HAWAII
STATE
COMMISSION
ON THE
STATUS
OF
WOMEN

Chair
LESLIE WILKINS

COMMISSIONERS:

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February 26, 2015

Testimony in Opposition, HB 684, HD1, Relating to Employment

To: Representative Karl Rhoads, Chair
Representative Joy A. San Buenaventura, Vice Chair
Members of the House Committee on Judiciary

From: Cathy Betts, Executive Director
Hawaii State Commission on the Status of Women

Re: Testimony in Opposition, HB 684, HD1, Relating to Employment

On behalf of the Hawaii State Commission on the Status of Women, I would like to provide comments on the current draft of HB 684, HD 1, and reiterate my opposition to the original language found in HB 684.

The language in HB 684, HD1, requires employers to set forth policies and procedures to protect employees from discrimination and harassment. The language further requires employers to provide newly enacted procedures and policies to be submitted, reviewed, and approved by the Department of Labor and Industrial Relations. While the Commission does not oppose the language found in HD1, the Commission opposes HD1 if combined with any of the language found in the original HB 684, thereby laying a foundation for a state adoption of the *Faragher/Ellerth* affirmative defense.

Any of the language found in HB 684 relating to an employer's affirmative defense would drastically change Hawaii's fair employment law by employing the standard as set forth in *Faragher v. City of Boca Raton*[1] and *Burlington Industries Inc. v. Ellerth*.[2] First, it would change our current law by requiring 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). That means simply showing sexual harassment or harassment based on one's status as a victim would not be enough for relief. A victim would need to prove that a tangible employment action occurred, and then an employer would be afforded an affirmative defense.

In cases where no tangible employment action is found, this bill would provide for an affirmative defense against claims of sexual (and other prohibited) harassment by a supervisor, where the employer can establish that it adopted and implemented an anti-harassment policy and that the victim/employee failed to take part in the employer's "preventative or corrective opportunities" or "*unreasonably failed to avoid harm*." In fact, this standard has been coined "a dubious summary judgment safe harbor for employers", which allows employers to not be held accountable or responsible for harassment of employees in the workplace. All over the nation, the use of this affirmative defense has overwhelmingly resulted in summary judgments for employers (no matter how reprehensible the underlying sexual harassment or discrimination was), and hence, no liability for employers.

[1] 524 U.S. 775 (1998)
[2] 524 U.S. 742 (1998)

In many harassment cases, harassment is gradual. This means a victim may wait to report harassment after it becomes more severe. In most jurisdictions, this delay often means a total bar in recovery for the victim/employee and no liability for the employer. Our own Hawaii 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 Hawaii law. Across the nation, using the *Faragher/Ellerth* affirmative defense has been notoriously bad for victims of discrimination in federal law, making it more difficult to prove sexual harassment in the workplace and placing the onus on victims to show that they "failed to avoid harm".

Many lower courts dismiss employee claims of sexual harassment almost entirely because an employer has an anti harassment policy, without regard to its effectiveness. So long as an employer proves the first prong of *Faragher/Ellerth*, courts will likely bar the suit from going forward and grant summary judgment. For example, in one case, an employee/victim was raped by a supervisor. The court held that the employer was not liable for any damages and granted summary judgment to the employer because it had instituted an anti harassment policy. The underlying rape, despite being egregious, did not matter simply because the employer had a policy in place. The employee/victim recovered no damages because of her delay in reporting. [3]

Additionally, many courts dismiss cases of sexual harassment because a victim delays reporting ("the dilatory plaintiff"), thereby barring the victim from damages and granting summary judgment to the employer. [4]

While the Commission appreciates the good intent of the language found in HD1 and supports that language standing alone, opening the door to allowing the *Faragher/Ellerth* standard into our statutes is potentially disastrous for victims of discrimination and harassment in the work place. Our fair employment law is strong; any language from the original HB 684 would greatly weaken it.

Thank you for this opportunity to provide comments.

[3] See *Watkins v. Professional Security Bureau* (4th Circuit, 1999)(unpublished opinion).

[4] See *Leopold v. Baccarat*, 239 F.3d 243 (2d Cir. 2001)(Supervisor sexually harassed two female employees. Employees failed to report for fear of being fired. One employee later reported a hostile work environment. Court found that employee acted unreasonably by failing to report due to her fear of being fired. In doing so, she didn't avail herself of any corrective remedies within the workplace).

WOMEN'S CAUCUS
DEMOCRATIC PARTY OF HAWAI'I

February 27, 2015

To: Representative Karl Rhoads, Chair
Representative Joy San Buenaventura, Vice Chair and
Members of the Committee on Judiciary

From: Jeanne Y. Ohta, Co-Chair

RE: HB 684 HD1 Relating to Employment
Hearing: Friday, February 27, 2015, 3:00 p.m., Room 325

Position: OPPOSED

The Hawai'i State Democratic Women's Caucus writes in OPPOSITION to HB 684 HD1 which would require that employers implement workplace procedures to prevent unlawful discrimination and harassment in the workplace and leaves open the possibility that these requirements will be used as an affirmative defense.

We oppose the affirmative defense language from the original bill and ask that the committee not add such language to this measure. If added, the employer must only show that it has adopted and implemented an anti-harassment policy or that it implemented procedures required in HD1 and that the employee unreasonably failed to avoid harm, or unreasonable failed to take advantage of the employer's preventative or corrective opportunities. This lower Federal standard leaves employees unprotected from discrimination and harassment.

It is the employer's responsibility to provide a safe and discrimination-free and harassment-free workplace. Hawai'i has been fortunate to have laws that protect employees. We are dismayed by any proposal which establishes the lower Federal standard. Federal law should not be the standard that is used in Hawai'i.

Unless employers are held liable to the degree that Hawaii's law currently requires, they would not feel compelled to provide a work environment that is harassment-free. Most employers do not understand the effects of harassment and how it interferes with job performance, promotion, and therefore, earnings.

The affirmative defense undermines the ability of the victims to seek remedy from their employers. It places the responsibility of coming forward on the victim even when the harasser is usually in a position of greater power than the victim and has the upper-hand in the organization. It is because of this power that harassment must be viewed as the responsibility of the employer. It is difficult for employees to come forward with complaints when the supervisor is responsible for the discrimination and harassment.

The Hawai‘i Civil Rights Commission reports that in fiscal year 2013, “523 employment complaints were filed. Of the 523 employment complaints filed, the bases most cited were sex, in 146 cases (27.9%); retaliation, in 115 cases (22.0%); and disability, in 92 cases (17.6%). Of the sex discrimination complaints, 33 (22.6% of all sex cases) alleged sexual harassment and 23 (15.8% of all sex cases) were based on pregnancy.

Race was the fourth most cited basis with 57 cases, representing 10.9% of all employment cases, followed by age in 47 cases (9.0%), ancestry/national origin in 32 cases (6.1%), arrest and court record in 16 cases (3.1%), religion in 8 cases (1.5%), and sexual orientation in 4 cases (0.8%). The bases of color and domestic or sexual violence victim status were cited in 2 cases each (0.4%), and marital status and breastfeeding were cited in 1 case each (0.2%).”

The report only includes cases filed at the HCRC; there undoubtedly are others; many of whom cannot find attorneys to represent them against their employers. Therefore, government officials must keep Hawaii’s employees safe in their work environments and not concede to efforts to weaken Hawaii’s laws simply because federal standards are lower or easier to enforce.

The 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.

We respectfully request that this bill be HELD. Thank you for the opportunity to provide testimony.

February 26, 2015

Chair Rhoads and Judiciary Committee

Re: HB 684 HD 1 Relating to Employment
Hearing on Feb. 27, 2015

Dear Rep. Rhoads Committee Members:

Americans for Democratic Action is an organization devoted to the promotion of progressive public policies.

We oppose HB 684 as it would repeal our current state standard for sexual harassment. The section of the bill allowing an employer to raise an affirmative defense limits the protections for victims of sexual harassment. It would import the federal *Faragher/Ellerth* standard into state fair employment law. It seems to deny relief and recovery for victims of harassment and allows employers to avoid some responsibility for harassment.

Thank you for your consideration.

Sincerely,

John Bickel
President

Chamber of Commerce HAWAII
The Voice of Business

LATE

nony to the House Committee on Judiciary
riday, February 27, 2015 at 3:00 P.M.
Conference Room 325, State Capitol

RE: HOUSE BILL 684 HD1 RELATING TO EMPLOYMENT

Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee:

The Chamber of Commerce of Hawaii ("The Chamber") **opposes** HB 684 HD1 as written, which requires employers to do annual mandatory training.

The Chamber is the largest business organization in Hawaii, representing about 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

HB 684 HD1 as amended took the original bill to add fairness in the workplace and made it into another mandate. While we support training in the workplace, this mandate will add cost and burden to employers.

The original HB 684 helps to address some of the changes set out by the Hawaii State Supreme Court case of Lales v. JN Automotive Group. We are not trying to address the specifics of that case, but rather the effect the ruling had on the workplace. We believe that employers who train and educate their employees on harassment policies, and who enforce those policies based on law should be allowed a defense of their actions and not be automatically liable. We believe that this is fair and just for both the employer and their employees. This bill seeks to ensure that employees are protected from a hostile work environment, and that employers are protected if they educate, train and enforce harassment policies.

Without this bill, employers, like yourselves, are now liable, and have no defense in situations where the employee did not inform the employer of harassment or a hostile work environment. It is unfair that an employer is held liable for an action which they were not made aware of, and did not have the opportunity to correct the transgression and work to ensure it does not happen in the future.

Also, please keep in mind that this bill does not in any way remove protections in the workplace for actions that may not be tangible. As an example, if an employee is improperly touched in the workplace, the employer is still liable for addressing the issue even though it may

not be an adverse tangible employment action. It is still an action covered under a hostile work environment and an employer would still need to take action. Furthermore, this bill does not change the standard of action or reprimand as set by Arquero v. Hilton Hawaiian Village, which essentially requires employers to resolve a hostile work environment with a corrective action that will reasonably prevent the conduct from happening again.

We ask the committee to **amend the bill** as follows which we think will address some of the misconceptions of the bill.

- Remove the existing language in section 1 of the bill and replace it with the language below.
- Amend 378-3 by adding a new section.
  Impose liability for a supervisor's unlawful harassment that does not culminate in a tangible employment action or sexual harassment; provided that the employer proves by a preponderance of the evidence that:
  (1) The employer:
  a. Exercised reasonable care to prevent or correct the supervisor's actions that violate this section, including but not limited to the adoption and implementation of an anti-harassment policy; and
  b. Took disciplinary action reasonably calculated to end the harassment and prevent further unlawful harassment; or
  (2) The employee unreasonably failed to take advantage of the employer's preventative or corrective opportunities.

We believe that this bill is fair for both employees and employers and creates a better work environment.

Thank you for the opportunity to testify.

TESTIMONY IN SUPPORT OF HB684 HD1
RELATING TO EMPLOYMENT

TO THE HOUSE COMMITTEE ON JUDICIARY

Hawaii State Capitol, Conference Room 325
February 27, 2015
3:00PM

Aloha Chair Rhoads, Vice Chair Buenaventura, and Members of the Committee,

The Maui Chamber of Commerce **supports** HB 684 HD1, which allows an employee who has suffered a tangible adverse employment action resulting from a supervisor's discriminatory actions to sue the employee's employer and allows an employer to raise an affirmative defense.

Our organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern. HB 684 helps to address some of the changes set out by the Hawaii State Supreme Court case of Lales v. JN Automotive Group. We are not trying to address the specifics of that case, but rather the effect the ruling had on the workplace. We believe that employers who train and educate their employees on harassment policies, and who enforce those policies based on law should be allowed a defense of their actions and not be automatically liable. We believe that this is fair and just for both the employer and their employees. This bill seeks to ensure that employees are protected from a hostile work environment (subsection (a) and (b)), and that employers are protected if they educate, train and enforce harassment policies (subsection (c)).

Without this bill, employers, like yourselves, are now liable, and have no defense in situations where the employee did not inform the employer of harassment or a hostile work environment. It is unfair that an employer is held liable for an action which they were not made aware of, and did not have the opportunity to correct the transgression and work to ensure it does not happen in the future.

Also, please keep in mind that this bill does not in any way remove protections in the workplace for actions that may not be tangible. As an example, if an employee is improperly touched in the workplace, the employer is still liable for addressing the issue even though it may not be an adverse tangible employment action. It is still an action covered under a hostile work environment and an employer would still need to take action. Furthermore, this bill does not change the standard of action or reprimand as set by Arquero v. Hilton Hawaiian Village, which essentially requires employers to resolve a hostile work environment with a corrective action that will reasonably prevent the conduct from happening again.

We believe that this bill is fair for both employees and employers and creates a better work environment.

Thank you for the opportunity to testify.
Sincerely,

Pamela Tumpap
President

Testimony to the House Committee on Judiciary
Friday, February 27, 2015
3:00 P.M.
State Capitol - Conference Room 325

RE: HOUSE BILL 684; RELATING TO EMPLOYMENT

Aloha Chair Rhoads, Vice Chair San Buenaventura, and members of the committee:

We are Melissa Pannell and John Knorek, the Legislative Committee co-chairs for the Society for Human Resource Management – Hawaii Chapter ("SHRM Hawaii"). SHRM Hawaii represents nearly 1,000 human resource professionals in the State of Hawaii.

We are writing to support the **original version** of HB 684 and to respectfully request that its contents be restored. This measure was intended to address a critical gap in Hawai'i's employment law. At issue is whether employers should be allowed to assert an affirmative defense to an employee's claim of sexual harassment. We believe that employers who have been given an opportunity, but failed, to address a claim of sexual harassment should face the appropriate legal consequences. However, we believe that employers who are not informed of such a claim should be allowed to offer an affirmative defense before being held responsible. It is our understanding that other legal claims, such as those against the perpetrator of sexual harassment, would not be affected by this measure.

Human resource professionals are keenly attuned to the needs of employers and employees. We are the frontline professionals responsible for businesses' most valuable asset: human capital. We truly have our employers' and employees' interests at heart. We appreciate the opportunity to be a part of the dialogue concerning this measure. Thank you for the opportunity to testify.

TESTIMONY IN OPPOSITION TO H.B. No. 684, H.D. 1

To:	The Honorable Karl Rhoads, Chair, Joy Buenaventure, Vice Chair, and members of the House Committee on Judiciary
From:	Robin Wurtzel
Date:	February 26, 2015
Date of Hearing:	February 27, 2015, 3:00 p.m.
Re: H.B.	No. 684, H.D. 1

My name is Robin Wurtzel, and I am an enforcement attorney at the Hawai‘i Civil Rights Commission. I am writing as a private citizen, not in my employment capacity as an employee or attorney for the State.

I strongly oppose H.B. No. 684, H.D.1. The original intention of the bill was to adopt the federal standard, set forth in two Supreme Court cases *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998*)* and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) , to Hawai‘i law. This would have diminished current Hawai‘i statutory standards. While the current bill has been amended and only requires employers to implement procedures and training, I urge the Committee to hold the bill in order to avoid further discussion on the issue and possible weakening of our laws.

The original bill proposed that employers would only be liable for discriminatory “adverse tangible employment action” by a supervisor and narrowly defined such action, as well as creating a narrow definition of supervisor. The original bill would have negatively affected many employees. It is common for employees to be supervised by someone who controls their day-to-day work, but does not have the ability to hire or fire. Employers would not be liable for the action of that type of manager, under the original draft bill.

The original bill also allowed liability when it is followed by a tangible employment action**. This would mean that there is no discrimination if an employee is sexually harassed but there is no firing, demotion, suspension or failure to promote.**

I oppose importing the federal standard into Hawai‘i’s Chapter 378 because it would diminish state law, which has a higher and better standard than federal law.

The Hawai‘i Supreme Court recently addressed the issue of employer liability in the *Lales* case and held that there is no individual liability under HRS chapter 378, part I, for a supervisor harasser, and went on to state that employers have strict liability for acts of unlawful harassment by supervisors. This standard is explained well by the Supreme Court, and should not be undermined by the original draft of HB 684, such that employers are not liable for supervisor harassment.

In addition to the clear standard set forth in the statute, and in case law, Hawai‘i law has not previously sought to mimic federal law. For example, H.R.S. Chapter 378, Part I applies to small employers, prohibiting discrimination in the workplace. Title VII only applies to employers with 15 or more employees. Also, protected classes under Hawai‘i law are broader than under federal law, and the EEOC is currently establishing positions to cover previously uncovered classes, which are explicitly set forth in Chapter 378. Thus, they are attempting to catch up to the Hawai‘i standard. Adopting the federal standard would harm Hawai‘i.

While these issues are not before this Committee now, I oppose the original intent of the bill, and do not want to see the original language returned to the bill.

I oppose H.B. No. 684, H.D. 1, and urge the Committee to hold the bill in committee.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

LATE

OWING MEASURE:
, H.D. 1, RELATING TO EMPLOYMENT.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 27, 2015 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
James E. Halvorson, Deputy Attorney General or
Nelson Y. Nabeta, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General wishes to express to this Committee its concerns regarding House Draft 1 of this bill. The original version of the bill proposed revisions to chapter 378, Hawaii Revised Statutes, allowing diligent employers the possibility of an affirmative defense, in a harassment case, asserted under the statute. The effect of the original version of the bill was to provide encouragement to employers to establish effective policies and procedures that prevent harassment in the workplace or to promptly correct a situation giving rise to that kind of behavior. Further, there was encouragement for employers to enact training programs for their employees that will in turn assist employees, who may be subjected to harassment, to take advantage of the protections provided to stop further harm. That process of implementing effective policies and assisting employees in using the policies would create a better work environment and provide protection to employers if they are sued despite their efforts.

But the present version of the bill eliminated the hope of the affirmative defense for such employers who use their resources to make the workplace a safer place for all their employees. This lack of incentive for employers to be diligent in this area is recognized by the House Committee on Labor and Public Employment based on its finding in Standing Committee Report No. 329, which provides in pertinent part:

> Your Committee finds that employers should implement policies and procedures that prohibit and prevent unlawful discriminatory practices in the workplace. However, your Committee also finds that our Committee on Judiciary is the more appropriate body to examine incentives to employers to adopt appropriate procedures. Should your Committee on Judiciary deliberate on this measure, your Committee respectfully requests that it further examine the issue of incentives to employers, through penalties or otherwise, to implement these policies.

Instead of providing an incentive for the employers, this bill now adds another layer of state regulation upon all employers. Indeed, employers could make exemplary efforts to prevent unlawful discrimination, but still be sued and not be able to use their efforts as an affirmative defense. The regulation applies to all employers regardless of size, available resources or whether there was history of prior discriminatory complaints submitted against an employer. The Standing Committee Report did not state findings as to the estimated costs to the employers to comply with this new regulation or the effect of increasing the burden of "every employer" of this State to provide the required training and develop and implement the required policies and procedures that are contemplated by this version of the bill.

Moreover, this draft of the bill requires all employers to develop and implement a "confidential system of reporting that encourages reporting of violations". The contemplated "confidential system of reporting" is potentially inconsistent with the existing due process obligations of state agencies and possibly private sector employers before taking disciplinary action against a supervisor for misconduct.

HAWAIʻI CIVIL RIGHTS COMMISSION

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

LATE

February 27, 2015
Rm. 325, 9:00 a.m.

To: The Honorable Karl Rhoads, Chair
Members of the House Committee on Judiciary

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawaiʻi Civil Rights Commission

Re: H.B. No. 684, H.D.1

The Hawaiʻi Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawaiʻi's laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services. The HCRC carries out the Hawaiʻi constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

The HCRC strongly opposes H.B. No. 684 in its original form, and any suggestion that it be reinserted into an H.D.2.

The House Committee on Labor and Public Employment, in its H.B. No. 684, H.D.1, stripped out the worst substantive provisions of the original bill, amending the bill by inserting affirmative mandates for employers to establish policies, procedures, and training to prevent unlawful discrimination and harassment in the workplace. In its committee report, the Committee on Labor expressly requested the Committee on Judiciary further examine the issue of "incentives" to employers to implement these mandate, implicitly leaving the door open for further discussion of the original bill proposals. While the HCRC does not oppose preventative policies, procedures, and training, and acknowledges that many if not most large employers have all three in some form, having these often do not actually prevent unlawful harassment of employees by

employers' supervisors, and it would encourage and reward form over substance to allow employers to use these to establish an affirmative defense to shield themselves from responsibility for real harm inflicted by their supervisors, to the detriment of employee victims of harassment.

H.B. No. 684, in its original form, would diminish the rights of and protections afforded to workers who are subjected to sexual harassment and other harassment (based on race, ancestry, sexual orientation, religion, etc.) under our strong state civil rights laws prohibiting discrimination in the workplace. Although purported to "allow" certain employees who have suffered a discriminatory "adverse tangible employment action" by a supervisor or employer to sue their employers, the purpose and effect of this bill is to limit employer liability for discriminatory acts of supervisors and import a federal law affirmative defense to complaints of supervisor harassment into Hawai'i state law, substantially weakening state protections.

The bill diminishes state law protections for victims of workplace sexual harassment, racial harassment, ancestry harassment, religious harassment, sexual orientation harassment, and all other prohibited workplace harassment. Undermining strong state law protections and rights in this fashion will have a disproportionate negative impact on women, and will especially hurt vulnerable workers, immigrants, persons with limited English proficiency, and those lowest in status and power in the workplace.

H.B. No. 684 Proposes Adoption of Federal *Faragher/Ellerth* Standard that Hurts Victims of Sexual Harassment and Other Prohibited Harassment

H.B. No. 684 provides for employer liability only for discriminatory "adverse tangible employment action" against an employee by a supervisor. "Adverse tangible employment action" is defined as (but not limited to) firing, failure to promote, assigning of significantly different responsibilities, and significantly reducing benefits of an employee. Excluded from this definition is harassing conduct, such as unwelcome sexual advances, requests for sexual favors or other verbal, physical or visual forms of harassment, when such harassment does not culminate in an adverse tangible employment action, as defined.

The bill limits its definition of "supervisor" to those who are empowered to take such adverse tangible employment actions. This narrow definition of "supervisor" conspicuously omits those who supervise day to day work, limiting the scope employer liability for discriminatory acts of those who

supervise, but don't have the authority to fire, suspend, promote, etc.

This narrow federal law definition of "supervisor" was created by the U.S. Supreme Court in its 2013 *Vance* decision. *Vance v. Ball State University*, 2013 WL 3155228 (U.S.) The *Vance* Court's narrow definition of "supervisor" has never been recognized under Hawai'i state law by the HCRC or state courts, and should not be imported into the HRS.

Furthermore, the bill limits employer liability for sexual harassment, ancestry harassment, and other prohibited harassment by supervisors, by providing for an "affirmative defense" in cases where the alleged harassment was not accompanied by a tangible enforcement action, as defined. In such a case, an employer can assert this affirmative defense to avoid liability by showing: that it "exercised reasonable care" to prevent or correct the harassment, including but not limited to adoption of an anti-harassment policy: and the employee harassment victim "unreasonably" failed to take advantage of the employer's preventative or corrective opportunity or policy, or "unreasonably" failed to avoid harm.

H.B. No. 684 is an attempt to import a federal standard into Hawai'i state law, specifically the federal law affirmative defense to a Title VII hostile environment claim, created by the U.S. Supreme Court in the *Faragher* and *Ellerth* cases in 1998. In those companion cases decided on the same day, the Court held:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.
> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), 807-808. (citations omitted).

Hawai‘i State Law Establishes Strong Protections Against Employment Discrimination and Expressly Provides for Strict Vicarious Employer Liability for Acts of Sexual Harassment and Ancestry Harassment by Supervisors

The protections and scope of Hawai‘i fair employment law are much stronger and more expansive and *not* the same as federal law. Stronger enforcement of Hawai‘i's civil rights protections is premised, in part, upon a Hawai‘i Constitution civil rights clause that has no corollary in the federal constitution. Article I, section 5 of the Hawai‘i Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, *nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise therof because of race, religion, sex, or ancestry.*
>
> (emphasis added).

Hawai‘i's civil rights laws are not the same as federal civil rights laws. The scope and coverage provided by our state fair employment law is more expansive in numerous respects than that provided by federal law. For example, HRS Chapter 378, Part I covers employers of 1 or more employees, in contrast to the federal Title VII coverage of employers of 15 or more employees; and our state law provides broader coverage with protected bases that are not protected under federal law.

To the point, in 2014 the Hawai‘i Supreme Court clarified "… that ***the Faragher affirmative defense is not applicable under Hawaii's anti-discrimination laws*** because the administrative rules of the Hawai‘i Civil Rights Commission hold employers strictly liable for the discriminatory conduct of their agents and supervisory employees." *Lales v. Wholesale Motors Company, dba JN Automotive Group, et al.*, SCWC-28516 (2014), 3.

Citing a history of settled law and long established administrative rules providing for strict vicarious liability for employers for the discriminatory acts of supervisors, the *Lales* Court explained:

> … HAR § 12-46-175(d) does not contradict or conflict with HRS chapter 378, and the HCRC did not overstep its statutory authority in imposing strict liability on employers for the discriminatory actions of their supervisors. ***Therefore, the Faragher affirmative defense is not applicable to [a] state harassment claim.***

* * * * *

> In sum, HAR § 12-46-175(d) imposes strict liability on employers for the discriminatory conduct of their supervisory employees, ***and thus, the Faragher affirmative defense is not applicable to chapter 378.***
>
> *Id.*, 49, 56-57.

In reaching this holding, the Court cited to the HCRC adoption of the strict vicarious liability provision of HAR § 12-46-175(d) in 1990, imposing strict vicarious employer liability for supervisor ancestry harassment; in 1990 the HCRC also adopted HAR § 12-46-109(c), imposing strict employer liability for supervisor sexual harassment. The Court also noted that the HCRC's predecessor, the Department of Labor and Industrial Relations (DLIR) had promulgated a nearly identical rule imposing strict vicarious employer liability for supervisor harassment in 1986. The Court added that when the legislature created the HCRC in 1988, it did not choose to make any change to affect the existing rule or limit HCRC promulgation of rules, but included in the purpose language of the act that one of the purposes of creating the HCRC was to preserve all existing rights and remedies. *Id.*, 56.

The Hawai‘i Supreme Court's rejection of the *Faragher* affirmative defense is consistent with the enactment of Act 275 in 1992, in which the legislature amended HRS § 378-3 to add an exception allowing an employee to file a civil cause of action directly in court for sexual harassment for up to two years from the date of harm, without exhaustion of administrative remedies by filing first with the HCRC. In doing so, the legislature implicitly recognized that victims of sexual harassment may have reasons or face barriers that prevent them from coming forward to timely file an HCRC complaint. These reasons or barriers could include trauma and emotional distress, fear of retaliation, job loss, or not being believed, hope of direct resolution, status and power differences, and language and cultural barriers.

Consequences of Adopting *Faragher/Ellerth* Federal Standard – Denial of Remedies for Vulnerable Workers Who are Subjected to Illegal Harassment by Supervisors

Since the *Faragher/Ellerth* affirmative defense was created by the U.S. Supreme Court in 1998, it has wrought catastrophic impact on the ability of victims of workplace harassment at the hands of supervisors to seek relief, recovery, and remedy in the federal courts, and has been the subject of ongoing, intense

controversy in the courts, the bar, and among legal scholars.

Federal courts have struggled with application of the standard, what is "reasonable" care on the part of an employer and what is "unreasonable" failure to take advantage of an employer policy or failure to avoid harm. Too often, victims of harassment are found lacking and left with no recourse or remedy. Victims of egregious harassment and even sexual assault have to face defenses based on contributory negligence. Although framed as an affirmative defense, the result has been imposition of added legal burdens for these plaintiffs.

Fortunately, the Hawai‘i state law imposing strict vicarious employer liability for supervisor harassment has provided a bright line, avoiding messy issues that make difficult cases even more difficult. Civil rights law enforcement and the victims of harassment benefit from this clear line, and we beg the legislature not to take undo decades of settled law and Hawai‘i jurisprudence by importing this flawed federal standard.

A few examples of troubling issues that will arise if the legislature chooses to enact this legislation:

Workers will be put in the no-win position of coming forward to complain about conduct that is not severe or pervasive, so does not rise to the level of hostile environment harassment, at the risk of being perceived as bringing frivolous or non-meritorious complaints, or face the defense to a later sexual harassment complaint based on a single severe act that she unreasonably failed to complain or avoid harm.

In such cases, employers may argue the equivalent of a "one-bite" rule, that a victim of a sexual harassment by a supervisor failed to complain earlier about less severe acts, in an effort to avoid responsibility for supervisor harassment.

In workplaces and industries that employ large numbers of immigrants and persons of limited English proficiency, workers who do not understand employer policies and procedures or face cultural or language barriers that keep them from coming forward to make a timely complaint, may face an affirmative defense if and when they do seek a remedy for harm suffered as a result of supervisor harassment.

In workplaces and industries that employ large numbers of young workers, a vulnerable workforce,

many in their first jobs, there will be troubling questions about whether those young workers can be cut-off from pursuing remedies because of an "unreasonable" failure to complain about or avoid harm at the hands of adult supervisors.

The Hawai'i Supreme Court in the *Lales* case held that there is no individual liability under HRS chapter 378, part I, for a supervisor harasser, but that employers have strict vicarious liability for acts of unlawful harassment by supervisors. If employers are allowed to escape responsibility for supervisor harassment, no one will be responsible for the harm suffered by the victim of sexual, racial, ancestry-based, or other prohibited harassment, and the victims of sexual and other harassment will be left without any relief, recourse, or remedy.

The HCRC strongly opposes H.B. No. 684 in its original form, and urges the Committee not to revive and reinsert its language and substance in any H.D.2.

The Twenty-Eighth Legislature
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HOU TIVES
Com
Rep. Karl Rhoads, Chair
Rep. Joy A. San Buenaventura, Vice Chair
State Capitol, Conference Room 325
Friday, February 27, 2015; 3:00 p.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 684, HD1
RELATING TO EMPLOYMENT

The ILWU Local 142 supports H.B. 684, HD1, which requires employers to implement workplace procedures to prevent unlawful discrimination and harassment in the workplace.

We opposed the original version of H.B. 684 because of language that would allow an employer to escape from responsibility and liability for the discriminatory actions of its supervisor by allowing an affirmative defense if the employer "exercised reasonable care to prevent or correct the supervisor's actions" and the employee "unreasonably failed to take advantage of the employer's preventative or corrective opportunities or unreasonably failed to avoid harm."

The current language in HD1 removes those objectionable sections and instead requires the employer to implement policies and procedures to "prohibit and prevent unlawful discriminatory practices in the workplace." We believe this is a more positive approach to halting discrimination in the work environment.

We oppose any effort to restore the original language of H.B. 684. Relieving the employer of responsibility and liability for the actions of its supervisors, then requiring the victim of harassment or discrimination to bear the burden of proof does NOT, in our opinion, conform to the spirit of civil rights laws.

H.B. 684, HD1 will ensure that employers take responsibility for what occurs at their worksites, particularly the actions of their supervisors and managers, and provide education to all employees about their rights under the law. **The ILWU urges passage of H.B. 684, HD1**.

Thank you for the opportunity to share our views and concerns.

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LATE

Hearing: 2-27-15
3pm
Room 325
COMMITTEE ON JUDICIARY

Rep. Karl Rhoads, Chair and Rep. Joy A. San Buenaventura, Vice Chair

TESTIMONY IN STRONG OPPOSITION TO H.B. No. HB 684, HD1

Dear Chair Rhoads and Members of the Committee on Judiciary:

My name is Daphne E. Barbee. I am an attorney who practices Civil Rights law in Hawaii. I am also the attorney who represented Mr .Lales in the Lales v. Wholesale Motors Co.., 133 Haw. 332 (2014)case. Mr. Lales alleged he was harassed by his supervisor due to his French ancestry and accent. In Lales, the Hawaii Supreme Court reaffirmed that the Hawaii State civil rights laws on sex, race and ancestry harassment properly provided stronger protections for victims than the federal laws. Specifically, the Court did not agree that federal Faragher/Ellereth standard should be incorporated into HRS chapter 378, part I.

The Hawaii Supreme Court ruled in Lales at page 353:

"Lales argues that the Faragher affirmative defense is not applicable to the state harassment claim because HAR § 12-46-175(d) imposes strict liability on employers for actions of their supervisory employees. Defendants, however, argue that the HCRC overstepped its statutory authority in enacting HAR § 12-46-175(d), and thus, the Faragher affirmative defense should be adopted.

As explained below, HAR § 12-46-175(d) does not contradict or conflict with HRS chapter 378, and the HCRC did not overstep its statutory authority in imposing strict liability on employers for the discriminatory actions of their supervisors. Therefore, the Faragher affirmative defense is not applicable to the state harassment claim."

* * *

The current language of HAR § 12-46-175(d), which the HCRC adopted in 1990, is nearly identical to the language of HAR § 12-23-115(d),[fn20] which existed prior to the creation of the HCRC. When the legislature created the HCRC in 1988, it did not expressly preclude the HCRC from imposing strict

liability on employers for the actions of their supervisory employees, as was already authorized under the existing administrative rules of the Department of Labor and Industrial Relations. Given that one of the purposes of creating the HCRC was to "preserve all existing rights and remedies," and that the legislature did not expressly foreclose the HCRC from adopting the then existing anti-discrimination rights and remedies, the HCRC did not violate its statutory mandate in adopting HAR § 12-46-175(d). Id. Page 356.

Hawaii has strong civil rights law, beginning with the Hawaii State Constitution. The Hawaii State Constitution, Article 1 Section 5 provides:

> "No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the persons civil rights, or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

The scope and coverage provided by Hawaii Civil Rights law are more expansive in protecting employees than those provided by Federal law. See Ross v. Stouffer Hotel Company, Ltd., 76 Haw. 454 (1994) (Rejecting a more restrictive federal standard for determining when the statute of limitations begin for filing initial complaints of discrimination and adopting a more expansive definition of marital status), Furukawa v. Honolulu Zoological Society, 85 Haw. 7 (1998) (Rejecting federal court's interpretation that employees must be similarly situated in all respects and instead requires that they be similar in all relative respects because of the more restrictive federal standard which would not protect employees of smaller businesses), and Nelson v. University of Hawaii, 97 Haw. 376 (2001) adopting a distinct and different framework for analyzing hostile environment sex harassment claims under Hawaii law than Federal law. While Hawaii Court's may look to Federal Court's interpretation of Title VII, it is not binding on Hawaii's Court. See Furukawa v. Honolulu Zoological Society, 85 Haw. at 13 (1998). See also Arquero v. Hilton Hawaii Village, LLC, 104 Haw. 423, 431 (2002) ("In contrast to federal courts...we separate the severity and pervasiveness of conduct from the effect that conduct had on the employees work environment").

Whether or not an employee complained to the supervisor of the harassment does not preclude liability for harassment. In Steinberg v. Hoshijo 88 Haw. 10 (1998), an employee quit her job at a physician's office due to sexual harassment by her supervisor and left the state. She later filed a sex harassment charge with the HCRC. She did not notify the employer before quitting her job due to harassment. Had the Faragher/Ellereth defense been available, the result may have changed in her case.

Discrimination still exists in Hawaii and we need strong laws to protect against it. Do not turn back the hands of time by changing long standing civil rights laws in Hawaii. Please do not pass this bill which may allow incorporation of the less stringent federal laws on civil rights. Thank you.