

ACT 241

S.B. NO. 78

A Bill for an Act Relating to Employment Practices.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 378, Hawaii Revised Statutes, is amended by adding a new part II to be appropriately designated and to read as follows:

"PART II. LIE DETECTOR TESTS

§378- Definitions. As used in this part:

"Department" means the department of labor and industrial relations.

"Director" means the director of labor and industrial relations.

"Employee" means any individual in the employment of an employer.

"Employer" includes any individual, partnership, association, corporation, business trust, legal representative, receiver, trustee, or successor of any of the same, or any organized group of persons, acting directly or indirectly in the interest of any employer in relation to an employee.

"Lie detector test" means a test to detect deception or to verify the truth of statements through the use of any psychophysiological measuring device, such as, but not limited to, polygraph tests and voice stress analyzers.

"Person" means one or more individuals, and includes, but is not limited to, a partnership, association, or corporation, legal representative, trustee, in bankruptcy, receiver, or the State or any of its political subdivisions.

"Prospective employee" means any individual who has applied for or otherwise actively expressed interest in employment with an employer.

§378- Unlawful practices. It shall be unlawful for any employer to:

- (1) Require a prospective employee or employee to submit to a lie detector test as a condition of employment or continued employment;
- (2) Terminate or otherwise discriminate against any employee or prospective employee for refusing to submit to a lie detector test;
- (3) Ask an employee or prospective employee whether the employee or prospective employee is willing to submit to a lie detector test unless the employee or prospective employee is informed orally and in writing that the test is voluntary and the refusal to submit to the test will not result in termination of the employee or will not jeopardize the prospective employee's chance of a job;
- (4) Subject a prospective employee to a lie detector test which includes inquiries deemed unlawful under section 378-2;
- (5) Utilize any device that intrudes into any part or cavity of the body for the purpose of truth verification; or
- (6) Discharge or otherwise discriminate against any employee or prospective employee because such person has filed a complaint, testified, or assisted in any proceeding respecting the unlawful practices prohibited under this part.

§378- Exception. Nothing in this part shall be deemed to:

- (1) Repeal or affect any law or ordinance or government rule or regulation having the force and effect of law;
- (2) Apply to lie detector tests administered by any law enforcement agency;
- (3) Apply to the United States and any subdivision thereof;
- (4) Conflict with or affect the application of security regulations in employment established by the United States or the State; or
- (5) Apply to psychological tests administered by a law enforcement agency to determine the suitability of a candidate for employment with the law enforcement agency.

§378- Enforcement jurisdiction; complaint against unlawful practice. (a)

The department shall have jurisdiction over practices made unlawful by this part. Any prospective employee or employee claiming to be aggrieved by an unlawful practice may file with the department a verified complaint in writing which shall state the name and address of the prospective employer or employer alleged to have committed the unlawful practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the department. The attorney general, or the department upon its own initiative, in like manner, may make and file such a complaint.

(b) A complaint may be filed on behalf of a class by the attorney general or the department, and a complaint so filed may be investigated, conciliated, and litigated on a class action basis.

(c) No complaint shall be filed after the expiration of thirty days after the date upon which the alleged unlawful practice occurred or is discovered to have occurred, whichever is later.

§378- Power of department to prevent unlawful practice. (a) After the filing of any complaint, or whenever it appears to the department that an unlawful practice may have been committed, the department shall conduct an investigation in connection therewith. At any time after the filing of a complaint, but prior to the issuance of a determination as to whether there is or is not cause to believe that this part has been violated, the parties may agree to resolve the complaint through a settlement.

(b) If the department determines after such investigation that there is cause to believe that this part has been violated, the department shall demand that the respondent cease such unlawful practice. In addition to the penalty specified in section 378- the department may order appropriate affirmative action, including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without back pay, as, in the judgment of the department, will effectuate the purpose of this part.

(c) The department may commence a civil action in circuit court seeking appropriate relief. In a civil action brought pursuant to this subsection:

- (1) The director may join various complainants in one cause of action;
- (2) The director shall not be required to pay the filing fee or other costs or fees of any nature or to file a bond or other security of any nature in connection with such action or with proceedings supplementary thereto, or as a condition precedent to the availability to the director of any process in aid of such action or proceedings;
- (3) In no event shall any action be brought more than three years after the complaint was filed with the department.

(d) In any action brought pursuant to this part, if the court finds that a respondent has engaged in or is engaging in an unlawful practice as defined in this part, the court may enjoin the respondent from engaging in such unlawful practice and order such affirmative action as may be appropriate, including, but not limited to fines, reinstatement, hiring, or upgrading of employees and prospective employees, with or without back pay, or any other equitable relief as the court deems appropriate.

(e) In any action brought pursuant to this part, if any judgment obtained by the director against the respondent remains unsatisfied for a period of thirty days after such judgment is entered, the director may request the circuit court to compel the respondent to comply with the judgment, including, but not limited to, an order directing the respondent to cease doing business until the respondent has complied with the judgment.

(f) Whenever it appears to the director that an employer is engaged in any act or practice which constitutes or may constitute, now or later, a violation of this part, or any related rule, the director may bring an action in the circuit court of the circuit in which it is charged that the act or practice complained of occurred or is about to occur to enjoin the act or practice and to enforce compliance with this part or with the rule, and upon a proper showing, a permanent or temporary injunction or decree or restraining order shall be granted without bond.

(g) In any action brought under this part, the court may in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs of action, and reasonable attorney's fees, to be paid by the defendant.

§378- Investigation; oaths; affidavits; subpoena; witnesses; immunities.

(a) In connection with an investigation of a complaint filed under this part, or whenever it appears to the department that an unlawful practice may have been or is being committed, the director or an authorized representative shall have access to the premises of the parties or persons reasonably connected thereto, records, documents, and other material relevant to the complaint and shall have the right to examine, photograph, and copy such material, and may question such employees and make such investigation to determine whether any person has violated this part or any rule or regulation issued under this part or which may aid in the enforcement of this part.

(b) The director or an authorized representative may administer oaths and may issue subpoenas or subpoena duces tecum to compel the attendance and testimony of witnesses or the production of books, payrolls, records, correspondence, documents, or any other material relating to any matter under investigation.

(c) If a person fails to comply with a subpoena issued under this section, any circuit court, upon application of the director or the director's authorized representative, may issue an order requiring compliance.

§378- Rules. The director shall make such rules under chapter 91, not inconsistent with this part as in the judgment of the director are appropriate to carry out this part and for the efficient administration thereof.

§378- Penalties. (a) Civil. Any employer found in violation of this part shall be subject to a fine of not less than \$100 nor more than \$1,000 to be collected by the director and such fine shall not be suspended. Each violation shall constitute a separate offense. Amounts so collected by the director shall be paid into the general fund.

(b) Criminal. Whoever intentionally resists, prevents, impedes, or interferes with the department or any of its agents or representatives in the performance of duties pursuant to this part, or who in any manner intentionally violates the law, shall be fined not more than \$1,000, or imprisoned not more than one year, or both.

(c) All criminal actions for violations of this part or any rule issued pursuant thereto, shall be prosecuted by the attorney general or public prosecutor."

SECTION 2. Chapter 378, part II, Hawaii Revised Statutes, is repealed.

SECTION 3. This Act shall take effect on July 1, 1985.

(Approved June 5, 1985.)