



Hawaii Employers Council

HCRC Hearing on Harassment Liability Scheduled For June 15, 2007

The Hawaii Civil Rights Commission (“HCRC”) will be holding a hearing on **Friday, June 15, 2007**, from 3 to 7:00 p.m., at 830 Punchbowl Street, Rm. 310, to solicit public testimony regarding proposed new administrative rules on employer liability for sex and ancestry harassment by supervisors. The notice of hearing and proposed rules can be found at this link: http://hawaii.gov/labor/hcrc/proposed_rules.shtml

The current Hawaii administrative rules on sexual and ancestry harassment hold employers strictly liable for all harassment committed by supervisors. However, the proposed rule amendments would allow employers to raise an affirmative defense to liability which has already been recognized by the U.S. Supreme Court in Fragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries Inc. v. Ellerth, 524 U.S. 742 (1998).

The federal courts hold that where unlawful supervisor harassment does not result in a “tangible employment action” (such as a demotion, failure to promote, termination, failure to provide a benefit, etc.), an employer can avoid liability by proving, as an affirmative defense, that (1) it exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the complaining employee unreasonably failed to avail him/herself of preventive and corrective opportunities provided by the employer. The federal courts and the vast majority of state courts have already recognized this affirmative defense. The proposed rule change will conform Hawaii harassment law to the majority of jurisdictions.

In March of 2006, the Hawaii Employers Council filed a petition with the HCRC to eliminate the current regulations holding employers strictly liable for supervisor harassment. Although the Commissioners eventually voted against HEC’s petition, the Commissioners recognized the inherent unfairness to employers under the current rule of strict liability. While a majority of the Commissioners agreed in principle with HEC’s proposed rule change, they apparently desired administrative rules which more clearly delineated the requirements of the affirmative defense. As a result, the Commission has drafted new proposed rules which include various factors which the Commission will consider in determining whether an employer took reasonable preventive and corrective measures against harassment, and whether an employee’s failure to complain of harassment is unreasonable. For example, the rules provide that in determining whether an employer reasonably acted to prevent and correct harassment, it will consider whether the employer has defined and prohibited sexual and ancestry harassment in written policies distributed to employees, ensured that employees are informed of reasonable complaint procedures for reporting harassment, and whether it has trained employees and supervisors on preventing unlawful harassment.

HEC encourages you to testify in support of the proposed rule amendments. At the September 2006 hearing on HEC's petition, a substantial number of plaintiff's attorneys testified in person against the rule amendments, arguing that strict liability was necessary to protect employees from injury. It is anticipated that they will again testify against these new proposed rules, and it is therefore important that employers voice their support for the elimination of strict liability.

Written testimony in support of the rule amendments should be addressed to:

Hawaii Civil Rights Commission
Attention: Proposed Rule Changes
830 Punchbowl St., Rm. 411
Honolulu, HI 96817

A list of "bullet points" for your letter is available here: [Suggestions for Supporting Testimony](#). Please contact HEC's General Counsel, Clayton Kamida, at 440-8874 or ckamida@hecouncil.org if you have any questions.

Draft proposed rules:

http://hawaii.gov/labor/hcrc/pdf/hcrc_legal_notice_12-46_6-15-07.pdf

Official notice of June 15, 2007 hearing:

http://hawaii.gov/labor/hcrc/pdf/hcrc_proposed_rule_12-46_6-15-07.pdf