

HAWAII ADMINISTRATIVE RULES

TITLE 12

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

SUBTITLE 8

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH

PART 1

GENERAL, LEGAL, AND ADMINISTRATIVE PROVISIONS
FOR OCCUPATIONAL SAFETY AND HEALTH

CHAPTER 57

DISCRIMINATION AGAINST EMPLOYEES EXERCISING RIGHTS
UNDER CHAPTER 396, HAWAII REVISED STATUTES

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Authority/historical note: based on 29 CFR 1977

SUBCHAPTER 1 - GENERAL

- §12-57-1 General requirements under section 396-8(e), HRS. (a)** No employer or person shall discharge or in any manner discriminate against any employee because the employee has:
- (1) Filed any complaint under or related to the law;
 - (2) Instituted or caused to be instituted any proceeding under or related to the law;
 - (3) Testified or intends to testify in any proceeding under or related to the law;
 - (4) Exercised on their own behalf or on the behalf of others any right afforded by the law;
 - (5) Failed or refused to operate or handle any machine, device, apparatus, or equipment which is in any unsafe condition; or
 - (6) Failed or refused to engage in unsafe practices in violation of the Law or of any standard, rule, regulation, citation or order issued under the authority of the law.

(b) Any employee who believes that they have been discriminated against in violation of section 396-8(e), HRS, may, within sixty days after such alleged violation occurs, file a complaint with the director. The complaint must describe the facts and circumstances of the allegations.

(c) The director shall cause an appropriate investigation to be made after a complaint is properly filed.

(d) If the director determines that a violation of section 396-8(e), HRS, has occurred, the director shall issue an order granting the appropriate relief to the complainant, which may include:

- (1) Rehiring of the employee, or
- (2) Reinstatement of the employee to the employee's former position with back pay and the restoration of seniority; or
- (3) Any other relief deemed appropriate by the director.

(e) The director may assess a civil penalty of not more than \$1,000 for each violation of section 396-8(e), HRS.

(f) The director shall notify the complainant and the employer of the determination. [Eff 7/6/98; am 3/29/99] (Auth: HRS §396-4) (Imp: HRS §396-8)

§12-57-2 Persons prohibited from discriminating. The prohibition against discrimination under section 396-8(e), HRS is not limited to actions taken by employers against their own employees. The law extends to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee. [Eff 7/6/98] (Auth: HRS §396-4)

(Imp: HRS §396-8)

§12-57-3 Unprotected activities distinguished. (a) The protected activity must constitute a substantial reason for the discharge or other adverse action, or

(b) The discharge or other adverse action would not have taken place "but for" engagement in the protected activity by the employee. [Eff 7/6/98] (Auth: HRS §396-4) (Imp: HRS §396-8)

SUBCHAPTER 2 - SPECIFIC PROTECTIONS

§12-57-4 Complaints under or related to section 396-8(e), HRS. A person or employer is prohibited from discharging or otherwise discriminating against any employee who:

(a) Makes a request for an inspection of the worksite;

(b) Makes a complaint in good faith to the employer relating to occupational safety and health matters; or

(c) Makes a complaint relating to conditions at the workplace to another federal, state, or local agency which has the authority to regulate or investigate occupational safety and health conditions.

For purposes of this section, an employee need not directly institute the proceeding in order to obtain the protection provided by section 396-8(e), HRS. It is sufficient if the employee sets into motion activities of others which result in proceedings under or related to the law. [Eff 7/6/98] (Auth: HRS §396-4) (Imp: HRS §396-8)

§12-57-5 Proceedings under or related to section 396-8(e), HRS. (a) A person or employer is prohibited from discharging or otherwise discriminating against any employee who institutes or caused to be instituted:

(1) Inspections and investigations of worksites;

(2) An employee contest of an abatement date;

(3) Proceedings for promulgation of an occupational safety and health standard;

(4) An application for modification or revocation of a variance;

(5) An administrative or judicial challenge to a standard; or

(6) An appeal of an appeals board order.

(b) For purposes of subsection (a), an employee need not directly institute the proceeding. It is sufficient if the employee sets into motion activities of others which result in proceedings under or related to the law. [Eff 7/6/98] (Auth: HRS §396-4) (Imp: HRS §396-8)

§12-57-6 Testimony. (a) A person or employer is prohibited from discharging or otherwise discriminating against any employee who gives or intends to give:

- (1) Any statement or testimony in any proceeding instituted or caused to be instituted by the employee under section 396-8(e), HRS;
 - (2) Any statement or testimony in the course of any judicial, quasi-judicial, or administrative enforcement proceeding under section 396-8(e), HRS.
- (b) Administrative enforcement proceedings include:
- (1) Inspections,
 - (2) Investigations,
 - (3) Administrative rulemaking, or
 - (4) Any adjudicative function under section 396-8(e), HRS. [Eff 7/6/98] (Auth: HRS §396-4) (Imp: HRS §396-8)

§12-57-7 Exercise of any right afforded by section 396-8(e), HRS. (a) A person or employer is prohibited from discharging or otherwise discriminating against any employee who:

- (1) Participates as a party in any judicial, quasi-judicial, or administrative enforcement proceeding under section 396-8(e), HRS;
 - (2) Requests information from HIOSH;
 - (3) Is interviewed by agents of the director in the course of inspections or investigations; or
 - (4) Asserts any right afforded by section 396-8(e), HRS.
- (b) Job refusal.
- (1) There is no right afforded by the law which would entitle employees to walk off the job because of potentially unsafe conditions at the workplace. Hazardous conditions which may be violative of the law will ordinarily be corrected by the employer once brought to the employer's attention. If corrections are not accomplished, or if there is a dispute about the existence of a hazard, the employee will normally have an opportunity to request an inspection of the workplace pursuant to section 396-8(b), HRS, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 396-8(e), HRS, by taking action to discipline an employee for walking off the job because of alleged safety or health hazards.
 - (2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting themselves to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to be exposed to the dangerous condition, that employee would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, under such circumstances, the employee, where possible, must also have sought from the employer, and had been unable to obtain, a correction of the dangerous condition. [Eff 7/6/98] (Auth: HRS §396-4) (Imp: HRS §396-8)

SUBCHAPTER 3 - PROCEDURES

§12-57-8 Filing of complaint for discrimination. (a) Who may file. A discrimination complaint under section 396-8(e), HRS, may be filed by the employee or by a representative authorized to do so on the employee's behalf.

(b) No particular form of complaint is required, but it must be an original signed by the complainant and it must describe the facts and circumstances of the allegations.

(c) Complaints shall be filed with the director.

(d) Time for filing.

- (1) Complaints not filed within 60 days after an alleged violation will be presumed to be untimely.
- (2) Circumstances which would justify tolling of the 60-day period include:
 - (A) where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action,
 - (B) where the adverse action is in the nature of a continuing violation,
 - (C) other strongly extenuating circumstances or recognized equitable principles.
- (3) The pendency of a grievance-arbitration proceeding or a filing with another agency, among others, are circumstances which do not justify tolling the 60-day period.

(e) Private sector employees may concurrently file a section 11(c) discrimination complaint with Federal OSHA within thirty (30) days of an alleged violation. [Eff 7/6/98] (Auth: HRS §396-4) (Imp: HRS §396-8)

§12-57-9 Notification of director's determination. Within ninety (90) days of the receipt of a complaint filed under section 396-8(e), HRS, the director will notify the complainant and the employer of the final determination and any subsequent action the department will take to resolve the complaint. The ninety (90) day period may be extended by the director for good cause. [Eff 7/6/98] (Auth: HRS §396-4) (Imp: HRS §396-8)

§12-57-10 Withdrawal of complaint. Enforcement of the provisions of section 396-8(e), HRS, is not only a matter of protecting rights of individual employees, but also of public interest. Attempts by an employee to withdraw a previously filed complaint will not necessarily result in the termination of the director's investigation. The director's jurisdiction shall not be foreclosed as a matter of law by the unilateral action of the employee. However, a voluntary and uncoerced request from a complainant to withdraw the complaint will be given careful consideration as a matter of policy and sound enforcement procedure. [Eff 7/6/98] (Auth: HRS §396-4) (Imp: HRS §396-8)

§12-57-11 Arbitration or other agency proceedings. (a) General.

- (1) An employee who files a complaint under section 396-8(e), HRS, may concurrently pursue remedies under grievance arbitration proceedings provided by collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board. Nothing in section 396-8(e), HRS, shall preclude an employee or representative of an employee from simultaneously pursuing a cause of action for injunctive relief or any other remedy provided by law. The director's jurisdiction to investigate complaints under section 396-8(e), HRS, and to determine whether discrimination has occurred is independent of the jurisdiction of other agencies or bodies.
- (2) The director recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements.
- (3) Where a complainant is in fact pursuing remedies other than those provided by section 396-8(e), HRS, postponement of the director's determination and deferral to the results of such proceedings may be in order.

(b) Postponement of determination. Postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under section 396-8(e), HRS, and those proceedings are not likely to violate the rights guaranteed by section 396-8(e), HRS. The factual issues in such proceedings must be substantially the same as those raised by the section 396-8(e), HRS, complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination.

(c) Deferral to outcome of other proceedings. A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-to-case basis after careful scrutiny of all available information. Before deferring to the results of another proceeding it must be

clear that the proceeding dealt adequately with all factual issues, that the proceeding was fair, regular, and free of procedural infirmities, and that the outcome of the proceeding was not repugnant to the purpose and policy of section 396-8(e), HRS. In this regard, if such other action initiated by a complainant is dismissed without an adjudicatory hearing, such dismissal will not ordinarily be regarded as determinative of the section 396-8(e), HRS, complaint. [Eff 7/6/98] (Auth: HRS §396-4)
(Imp: HRS §396-8)

SUBCHAPTER 4 - SPECIFIC SUBJECTS

§12-57-12 Employee refusal to comply with safety rules. Employees who refuse to comply with occupational safety and health standards or valid safety rules implemented by the employer in furtherance of section 396-8(e), HRS are not exercising any rights afforded by section 396-8(e), HRS. Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations will not be regarded as discriminatory action prohibited by section 396-8(e), HRS. [Eff 7/6/98]
(Auth: HRS §396-4) (Imp: HRS §396-8)