

LEGAL NOTICE
Notice of Proposed Rulemaking
Public Hearing

Notice is hereby given of proposed rulemaking and a public hearing by the Hawaii Civil Rights Commission (HCRC), to amend Title 12, Chapter 46, Hawaii Administrative Rules (HAR), pursuant to Section 368-3(9), Hawaii Revised Statutes (HRS), and the Hawaii Administrative Procedure Act, Chapter 91, HRS.

The purpose of this public hearing is to consider amendments that are intended to change Hawaii's rules on employer liability regarding sexual and ancestry harassment in the workplace by agents or supervisors to recognize an affirmative defense if there is no tangible employment action.

The proposed changes include:

HAR § 12-46-1 is amended to add a definition for "tangible employment action."

HAR § 12-46-109(b) is amended to add a reference to the affirmative defense for sexual harassment by agents or supervisors and clarify that the factors listed for the affirmative defense do not comprise an exhaustive list of the factors to be considered.

HAR § 12-46-109(c) (1) adds a new paragraph which provides that an employer is liable for sexual harassment by an agent or supervisor when there is a tangible employment action. It provides that the affirmative defense is not available in cases involving a tangible employment action.

HAR § 12-46-109(c)(2) adds a new paragraph which sets forth the two elements of the affirmative defense if an employer demonstrates that sexual harassment by an agent or supervisor did not involve a tangible employment action. It provides that an employer must demonstrate each of the two elements: 1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

HAR § 12-46-109(c)(3) adds a new paragraph which provides that the affirmative defense does not bar damages for which an agent or supervisor may be liable as an individual.

HAR § 12-46-109(c)(4) adds a new paragraph which sets forth the various factors that the commission will consider in determining whether an employer exercised reasonable care to prevent sexual harassment.

HAR § 12-46-109(c)(5) adds a new paragraph which sets forth the various factors that the commission will consider in determining whether an employer has reasonably corrected sexual

harassment.

HAR § 12-46-109(c)(6) adds a new paragraph which sets forth the various factors that the commission will consider in determining whether the employee unreasonably failed to take advantage of the employer's preventative and corrective opportunities or to avoid harm otherwise.

HAR § 12-46-175(c) is amended to provide that in determining whether alleged conduct constitutes ancestry harassment or a defense is established the commission will look at the record as a whole and the totality of the circumstances, including the nature of the conduct and the context. The determination will be based on the facts, on a case by case basis, and the factors listed for the affirmative defense do not comprise an exhaustive list of what must be considered.

HAR § 12-46-175(d)(1) adds a new paragraph which provides that an employer is liable for ancestry harassment by an agent or supervisor when there is a tangible employment action. It provides that the affirmative defense is not available in cases involving a tangible employment action.

HAR § 12-46-175(d)(2) adds a new paragraph which sets forth the two elements of the affirmative defense if an employer demonstrates that ancestry harassment by an agent or supervisor did not involve a tangible employment action. It provides that an employer must demonstrate each of the two elements: 1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

HAR § 12-46-175(d)(3) adds a new paragraph which provides that the affirmative defense does not bar damages for which an agent or supervisor may be liable as an individual.

HAR § 12-46-175(d)(4) adds a new paragraph which sets forth the various factors that the commission will consider in determining whether an employer exercised reasonable care to prevent ancestry harassment.

HAR § 12-46-175(d)(5) adds a new paragraph which sets forth the various factors that the commission will consider in determining whether an employer has reasonably corrected ancestry harassment.

HAR § 12-46-175(d)(6) adds a new paragraph which sets forth the various factors that the commission will consider in determining whether the employee unreasonably failed to take advantage of the employer's preventative and corrective opportunities or to avoid harm

otherwise.

A copy of the proposed rule changes will be available for public viewing from the first working day that the legal notice appears in the Honolulu Star Bulletin, The Honolulu Advertiser, Hawaii Tribune Herald, West Hawaii Today, The Maui News, and The Garden Island, through the day the public hearing is held, from Monday - Friday between the hours of 1:00 p.m. - 4:00 p.m., at the following locations: 830 Punchbowl Street, Room 411, Honolulu, Hawaii 96813; 2264 Aupuni Street, Wailuku, Hawaii 96793; 75 Aupuni Street, Hilo, Hawaii 96720; 81-990 Halekii Street, Room 2087, Kealahou, Hawaii 96750; and 3060 Eiwa Street, Lihue, Hawaii 96766. A copy of the proposed rule changes may be viewed at our website at <http://hawaii.gov/labor/hcrc>. Copies will also be mailed at no cost, upon written request to the Hawaii Civil Rights Commission, Attention: Proposed Rule Changes, 830 Punchbowl Street, Room 411, Honolulu, Hawaii 96813.

Interested persons may present, at the public hearing, any written or oral data, views, arguments, comments, and objections concerning the proposals at:

HONOLULU, OAHU

Date: June 15, 2007, 3:00 p.m. to 7:00 p.m.
830 Punchbowl Street, Room 310
Honolulu, Hawaii 96813

Interested persons unable to attend the public hearing, may submit written data, views, arguments, comments, and objections concerning the proposals to the Hawaii Civil Rights Commission, Attention: Proposed Rule Changes, 830 Punchbowl Street, Room 411, Honolulu, Hawaii 96813. All submissions for the record must be received at or prior to the scheduled public hearing. (If possible, please submit seven copies of any written data, views, arguments, comments, and objections.) Written data, views, arguments, comments, and objections may also be faxed to the HCRC at 586-8655.

If necessary, the public hearing may be continued to a time, date, and place announced at the scheduled hearing.

The public hearing is accessible for individuals with disabilities. Auxiliary aids and services are available upon request by calling HCRC offices no later than ten working days prior to the needed accommodation. Please call (808) 586-8636 for more information or to request an auxiliary aid or service.

It is the policy of the HCRC, as an attached agency of the Department of Labor and Industrial Relations, that no person shall on the basis of race, color, sex, marital status, religion, creed, ethnic origin, national origin, age, disability, ancestry, arrest/court record, sexual orientation, and National Guard participation be subjected to discrimination, excluded from participation in, or denied the benefits of the department's services, programs, activities, or employment.

Dated: May 15, 2007

LISA WONG
Acting Chair
Hawaii Civil Rights Commission