DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Amendments to Chapter 12-46
Hawaii Administrative Rules

April 5, 2007

1. Section 12-46-1, Hawaii Administrative Rules, is amended to add a new definition to read as follows:

""Tangible employment action" is a significant change in employment status and a means by which a supervisor brings the official power of the employer to bear on subordinates. It includes, but is not limited to, non-selection, discharge, demotion, promotion, non-promotion, compensation change, significant changes in fringe benefits, constructive discharge precipitated by an official act by an agent or supervisory employee, reassignment that significantly alters employment or promotional opportunities, or working conditions, and the granting of an employment benefit, including but not limited to continued employment, for an employee's submission to unwelcome sexual demands."
[Eff 12/31/90; am 5/1/92; am 11/4/93;] (Auth: HRS §368-3) (Imp. HRS §368-3)

2. Section 12-46-109, Hawaii Administrative Rules, subsections (b) and (c) are amended to read as follows:

"(b) In determining whether alleged conduct constitutes sexual harassment or a defense is established, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action or the existence of any defense shall be made from the facts, on a case by case basis. The factors listed for the affirmative defense do not comprise an exhaustive list of what must be considered, and the reasonableness or unreasonableness of any action depends upon the facts and context, including the size of the employer and the capabilities of the employee.

(c) An employer shall be responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts

complained of were authorized or even forbidden, and regardless of whether the employer or other covered entity knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acted in either a supervisory or agency capacity.

(1) An employer shall be liable for unlawful harassment by an agent or supervisory employee when the harassment involves a tangible employment action.
No affirmative defense is available in cases involving a tangible employment action.

(2) When an employer demonstrates that harassment by an agent or supervisory employee did not involve a tangible employment action, the employer may establish an affirmative defense. The affirmative defense is established when the employer demonstrates each of the two following elements:

(A) The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(B) The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(3) The affirmative defense does not bar damages for which an agent or supervisory employee may be liable as an individual.

(4) Factors that the commission will consider in determining whether an employer exercised reasonable care to prevent harassment, include, but are not limited to:

(A) Whether an employer adopted written policies and procedures on sexual harassment, which may include a statement that sexual harassment is illegal and will not be tolerated, a definition of sexual harassment under applicable laws, examples of sexually harassing conduct, a description of the employer's internal complaint procedure; the complaint process available through the commission and EEOC; a statement that retaliation against employees for participating in the employer's complaint procedure is illegal and will not be tolerated; and examples of unlawful retaliatory conduct;

(B) Whether an employer distributed such policies and procedures to adequately inform employees, which

may include providing copies to employees, explaining policies to employees whose primary or native language is not English, and posting information about the policies and procedures in one or more workplace areas accessible to employees;

(C) Whether an employer provided periodic and appropriate training to all employees regarding such policies and procedures; or

(D) Whether an employer provided appropriate training to all new agents and supervisory employees upon their assumption of a position as agent or supervisory employee, periodic and appropriate training to all supervisors and agents, and periodically evaluated all agents and supervisory employees regarding their efforts to enforce and comply with such policies and procedures.

(5) Factors that the commission will consider in determining whether an employer has reasonably corrected harassment include, but are not limited to:

(A) Whether an employer established a complaint procedure for sexual harassment, which may include multiple ways to report alleged harassment, and a requirement that all agents and supervisory employees report any allegation, complaint, or other circumstance of actual or potential sexual harassment to those charged with initiating investigations;

(B) Whether an employer conducted prompt and appropriate investigations of all complaints,

(C) Whether an employer took immediate steps to ensure that the alleged harassing behavior ends after receipt of a complaint or report and the employee is not subjected to retaliation;

(D) Whether an employer took immediate and appropriate corrective action when it is determined that sexual harassment has occurred; or

(E) Whether an employer maintained accurate records of all complaints and investigations of sexual harassment.

(6) Factors that the commission will consider in determining whether an employee unreasonably failed to take advantage of the employer's preventative and corrective opportunities or to avoid harm, include, but are not limited to:

(A) Whether an employee's delay or failure to complain was due to unreasonable doubts about the effectiveness of the employer's preventative and corrective opportunities;

(B) Whether an employee's efforts to stop the harassment by means other than the use of the employer's preventative and corrective opportunities made the delay or failure to complain unreasonable;

(C) Whether an employee's age, maturity, physical limitations, or cognitive abilities made the delay or failure to complain unreasonable;

(D) Where an employee's primary or native language is not English, whether the ability of the employee to recognize harassment and understand the obligation to complain made the delay or failure to complain unreasonable;

(E) Where an employee is a recent immigrant to the United States, whether the employee's understanding of his or her legal rights made the delay or failure to complain unreasonable; or

(F) Whether an employee tried to avoid harm otherwise by filing a complaint with the commission or EEOC, pursued a union grievance, or complained to the staffing agency through which the employee is employed."

[Eff 12/31/90;] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

3. Section 12-46-175, Hawaii Administrative Rules, subsections (c) and (d) are amended to read as follows:

"(c) The employer has an affirmative duty to maintain a working environment free of harassment on the basis of ancestry. In determining whether alleged conduct constitutes ancestry harassment or a defense is established, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the conduct and the context in which the alleged incidents occurred. The determination of the legality of a particular action or the existence of any defense shall be made from the facts, on a case by case basis. The factors listed for the affirmative defense do not comprise an exhaustive list of what must be considered, and the reasonableness or unreasonableness of any action depends upon

the facts and context, including the size of the employer and the capabilities of the employee.

(d) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of ancestry regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in a supervisory or agency capacity.

(1) An employer shall be liable for unlawful harassment by an agent or supervisory employee when the harassment involves a tangible employment action. No affirmative defense is available in cases involving a tangible employment action.

(2) When an employer demonstrates that harassment by an agent or supervisory employee did not involve a tangible employment action, the employer may establish an affirmative defense. The affirmative defense is established when the employer demonstrates each of the two following elements:

(A) The employer exercised reasonable care to prevent and correct promptly any harassing behavior, and

(B) The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(3) The affirmative defense does not bar damages for which an agent or supervisory employee may be liable as an individual.

(4) Factors that the commission will consider in determining whether an employer exercised reasonable care to prevent harassment, include, but are not limited to:

(A) Whether an employer adopted written policies and procedures on ancestry harassment, which may include a statement that ancestry harassment is illegal and will not be tolerated, a definition of ancestry harassment under applicable laws, examples of ancestry harassment, a description of the employer's internal complaint procedure; the complaint process available through the commission and EEOC; a statement that retaliation against employees for participating in the employer's complaint procedure is illegal and

will not be tolerated; and examples of unlawful retaliatory conduct;

(B) Whether an employer distributed such policies and procedures to adequately inform employees, which may include providing copies to employees, explaining policies to employees whose primary or native language is not English, and posting information about the policies and procedures in one or more workplace areas accessible to employees;

(C) Whether an employer provided periodic and appropriate training to all employees regarding such policies and procedures; or

(D) Whether an employer provided appropriate training to all new agents and supervisory employees upon their assumption of a position as agent or supervisory employee, periodic and appropriate training to all supervisors and agents, and periodically evaluated all agents and supervisory employees regarding their efforts to enforce and comply with such policies and procedures.

(5) Factors that the commission will consider in determining whether an employer has reasonably corrected harassment include, but are not limited to:

(A) Whether an employer established a complaint procedure for ancestry harassment, which may include multiple ways to report alleged harassment, and a requirement that all agents and supervisory employees report any allegation, complaint, or other circumstance of actual or potential ancestry harassment to those charged with initiating investigations;

(B) Whether an employer conducted prompt and appropriate investigations of all complaints,

(C) Whether an employer took immediate steps to ensure that the alleged harassing behavior ends after receipt of a complaint or report and the employee is not subjected to retaliation;

(D) Whether an employer took immediate and appropriate corrective action when it is determined that ancestry harassment has occurred, or

(E) Whether an employer maintained accurate records of all complaints and investigations of ancestry harassment.

(6) Factors that the commission will consider in determining whether an employee unreasonably failed to take advantage of the employer's preventative and corrective opportunities or to avoid harm, include, but are not limited to:

(A) Whether an employee's delay or failure to complain was due to unreasonable doubts about the effectiveness of the employer's preventative and corrective opportunities;

(B) Whether an employee's efforts to stop the harassment by means other than the use of the employer's preventative and corrective opportunities made the delay or failure to complain unreasonable;

(C) Whether an employee's age, maturity, physical limitations, or cognitive abilities made the delay or failure to complain unreasonable;

(D) Where an employee's primary or native language is not English, whether the ability of the employee to recognize harassment and understand the obligation to complain made the delay or failure to complain unreasonable;

(E) Where an employee is a recent immigrant to the United States, whether the employee's understanding of his or her legal rights made the delay or failure to complain unreasonable; or

(F) Whether an employee tried to avoid harm otherwise by filing a complaint with the commission or EEOC, pursued a union grievance, or complained to the staffing agency through which the employee is employed."

[Eff 12/31/90;] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

4. New material is underscored. Additions to update source notes to reflect these amendments are not underscored.

5. These amendments to Title 12 Chapter 46, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised

Statutes, which were adopted on ( )
and filed with the Office of the Lieutenant Governor.

_____
Director

Approved as to Form

Nolan T. Higa
_____
Deputy Attorney General