



## *The Judiciary, State of Hawai‘i*

### **Testimony to the House Committee on Labor and Public Employment**

Representative Mark M. Nakashima, Chair  
Representative Jarrett Keohokalole, Vice Chair

Friday, January 29, 2016 10:00 a.m.  
State Capitol, Conference Room 309

#### **WRITTEN TESTIMONY ONLY**

By  
The Honorable Barbara P. Richardson  
Deputy Chief Judge  
District Court of the First Circuit

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**Bill No. and Title:** House Bill No. 1269, Relating to Public Safety.

**Purpose:** The purpose of this Act is to allow employers to obtain temporary restraining orders and injunctions to protect against harassment of employees or invitees at worksites.

**Judiciary's Position:**

The Judiciary takes no position on the intent of House Bill No. 1269, but notes that the current language of the Bill may (1) impose unintended costs and complications for employers; and (2) create uncertainty in the application of the law.

**Unintended Costs and Complications**

The State of Hawai‘i is the largest employer in the State. Is it intended that the State of Hawai‘i be able to file a petition on behalf of a state employee, including against another state employee?

Under current law, a corporation can only appear in court through an attorney. O‘ahu Plumbing & Sheet Metal v. Kona Constr., 60 Haw. 372, 374 (1979). If an employer is incorporated, then the filing of a petition and court appearances by the corporation-employer on behalf of an employee would have to

be through an attorney. The award of reasonable attorneys' fees to a prevailing party is discretionary, so even if the employer prevails in the proceeding, the employer may not recover all of its costs.

The necessity of counsel for a corporate employer petitioning on behalf of an employee may create a conflict of interest for the attorney. While the attorney would be hired by the employer to represent the employer, it is the employee who is threatened by acts of harassment. The interests of the employer may not always coincide with those of the employee.

Existing law would permit the employee-victim to file a petition for a temporary restraining order and an injunction against harassment without hiring an attorney. Many temporary restraining order cases proceed through resolution without the involvement of an attorney. Even if the petitioner hires an attorney, there is no question under present practice that the attorney's duty of loyalty is to the petitioner.

This Bill raises other issues, and the Judiciary questions how a petitioner-employer could prove its case if the employee who is the target of the alleged harassment is unwilling to participate in the proceedings.

#### Uncertainty in the Application of the Law

It is uncertain what the process for intervention by an employee organization would be. The Bill states "that an employee organization that represents employees of the employer shall be allowed to intervene in a proceeding under this section." In a case in which one employee is harassed by another employee, it is unclear if an employee organization would be allowed to intervene on behalf of a respondent-employee or both parties. There is no provision for notice to an employee organization for either petitioner-employee or respondent-employee. The court is required to allow the intervention, but the Bill does not provide guidance on how to resolve a conflict between the right to intervene and a right to a hearing within 15 days. In light of the absence of any service requirement on the employee organization, there is a possibility that the employee organization does not receive notice of the temporary restraining order at the same time as the respondent. A contested hearing could go beyond the 90 day limit of the temporary restraining order.

The requirement that a judge receive evidence of the employer's position with respect to a respondent-employee's continued employment is also problematic. The Bill provides: "If the defendant is a current employee of the petitioner, the judge **shall** receive evidence concerning the employer's decision to retain, terminate, or otherwise discipline the defendant." (Emphasis added.) This evidentiary mandate may create difficulties where, as is frequently the case, pending employee disciplinary matters are confidential. Hearings in district court are open to the public, and thus confidential employment decisions may become public, in violation of other state statutes or confidentiality agreements.

Finally, the Judiciary respectfully requests that the term "defendant" be replaced with "respondent." Because a person seeking an injunction is denominated a "petitioner," the enjoined party is referred to as a "respondent." There is no "defendant" in this type of civil proceeding.

Thank you for the opportunity to present testimony on this measure.