

SENATE BILL REPORT

SB 6435

As of January 25, 2018

Title: An act relating to establishing healthy workplaces.

Brief Description: Establishing healthy workplaces.

Sponsors: Senators Cleveland, Keiser, Kuderer and Saldaña.

Brief History:

Committee Activity: Labor & Commerce: 1/24/18.

Brief Summary of Bill

- Prohibits employers and employees from subjecting an employee to an abusive work environment.
- Provides vicarious liability for an employer and individual liability for an employee when an employee is subjected to an abusive work environment.

SENATE COMMITTEE ON LABOR & COMMERCE

Staff: Jarrett Sacks (786-7448)

Background: Federal Law. Under federal law, harassment is a form of employment discrimination. Harassment is unwelcome conduct based on race, color, religion, sex, national origin, age, or disability or genetic information. Harassment is unlawful when:

- enduring the offensive conduct is a condition of continued employment; or
- the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Both federal and state discrimination laws prohibit retaliating against an employee for opposing unlawful employment practices, or for participating in a discrimination investigation, proceeding, or lawsuit.

Under federal law, an employer is liable for harassment by a supervisor that results in an adverse employment action. Additionally, an employer is liable by a non-supervisory employee or non-employees if it knew or should have known about the harassment and failed

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to take appropriate corrective action. An employer may avoid liability if it reasonably tried to prevent and correct the harassing behavior and the employee unreasonably failed to take advantage of the preventative or corrective opportunities.

State Law. Under the Washington State Law Against Discrimination (WLAD), a person has the right to be free from discrimination related to a protected status, such as race, national origin, sex, veteran or military status, sexual orientation, and disability. The WLAD applies to employers that employ eight or more employees, but does not apply to any religious or sectarian organization not organized for private profit. The Human Rights Commission (HRC) enforces the WLAD.

Taking certain actions because of a protected status are considered unfair practices. The HRC investigates complaints alleging unfair practices. If there is reasonable cause to believe an unfair practice is, or has been, occurring, the HRC must act to eliminate the unfair practice through conference, conciliation, and persuasion. If no agreement is reached, HRC requests the appointment of an administrative law judge (ALJ). An ALJ is empowered to award damages, require the wrongful act cease and desist, and to order any other affirmative action to effectuate the purposes of the law.

Summary of Bill: Abusive Work Environment. It is unlawful for an employee to be subjected to an abusive work environment. An abusive work environment is a workplace where an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm to the employee. Abusive conduct of an employer or employee in the workplace is conduct done with malice that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Generally, a single act will not constitute abusive conduct, unless especially severe or egregious. Abusive conduct may include:

- repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets;
- verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or
- the gratuitous sabotage or undermining of a person's work performance.

Employers and employees are also prohibited from retaliating against an employee for opposing the unlawful conduct established in the bill, or for making a charge, testifying, or assisting in an investigation of unlawful conduct prohibited by the bill.

Malice. Malice is the desire to see another person suffer psychological, physical, or economic harm, without legitimate cause or justification. Malice may be inferred from the presence of factors, such as:

- outward expressions of hostility;
- harmful conduct inconsistent with an employer's legitimate business interests;
- a continuation of harmful, illegitimate conduct after the complainant requests that it cease or demonstrates outward signs of emotional or physical distress; or
- attempts to exploit the complainant's known psychological or physical vulnerability.

Liability and Affirmative Defenses. An employer is vicariously liable for one or more of its employees subjecting another employee to an abusive work environment. If the alleged

violation does not include an adverse employment action, it is an affirmative defense for an employer that:

- the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and
- the complainant employee unreasonably failed to take advantage of the appropriate preventative or corrective opportunities provided by the employer.

It is also an affirmative defense that the complaint was based on:

- an adverse employment action reasonably made for poor performance, misconduct, or economic necessity;
- a reasonable performance evaluation; or
- an employer's reasonable investigation about potentially illegal or unethical activity.

An employee may be held individually liable for subjecting another employee to an abusive work environment. It is an affirmative defense for an employee if they committed the violation at the direction of the employer under actual or implied threat of an adverse employment action.

Relief. The act is only enforceable through a civil cause of action commenced by an injured employee. For violations of the act, a court may issue an injunction to stop the unlawful conduct and may order other appropriate relief, including:

- reinstatement;
- removal of the offending party from the plaintiff's work environment;
- reimbursement for lost wages;
- front pay;
- medical expenses;
- compensation for pain and suffering and emotional distress;
- punitive damages; and
- reasonable costs and attorneys' fees.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Workplace bullying is an epidemic. Abusive conduct is three to four times more prevalent than sexual harassment and it has many of the same bad effects. The United States is the only western county to not address workplace bullying. No good employer should fear the bill because there are protections in the bill and affirmative defenses. Not acting to stop the conduct prolongs it and increases the influence of abusers. It forces workers to leave jobs and causes them financial hardship. The bill is good for business because bullying decreases productivity.

CON: The bill creates a vague standard that will create confusion for employers and increase litigation. The term vicarious liability is not defined in the bill but it seems to mean guilt by

association. The bill is unclear if the anti-retaliation provisions would prohibit firing a party for being abusive. The bill requires businesses to go to court to prove the affirmative defenses.

Persons Testifying: PRO: Senator Annette Cleveland, Prime Sponsor; Dr. Gary Namie, Director, Workplace Bullying Institute; Herb Krohn, State Legislative Director, SMART Transportation Division/United Transportation Union.

CON: Bruce Beckett, Washington Retail Association; Bob Battles, AWB.

Persons Signed In To Testify But Not Testifying: No one.