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1ST JUDICIAL DISTRICT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

RGIS INVENTORY SPECIALIST,

APPELLANT,

v.

THE HAWAII CIVIL RIGHTS
COMMISSION,

APPELLEE.

CIVIL NO. 02-1-1703-07
(Agency Appeal)

ORDER REVERSING THE HAWAII CIVIL
RIGHTS COMMISSION'S FINAL DECISION AND
ORDER GRANTING PETITION FOR
DECLARATORY RELIEF

Hrg. Date: December 9, 2002
Time: 2:30 p.m.
Before: Hon. Eden Elizabeth Hifo

**ORDER REVERSING THE HAWAII CIVIL RIGHTS COMMISSION'S FINAL
DECISION AND ORDER GRANTING PETITION FOR DECLARATORY RELIEF**

This matter having come before the Court on Appellant RGIS INVENTORY
SPECIALISTS' ("RGIS") administrative appeal of the Final Decision And Order Granting
Petition For Declaratory Relief issued by the Hawaii Civil Rights Commission on June 28,
2002, and Appellant RGIS being represented by Richard M. Rand and Clayton A. Kamida, and
Appellee the HAWAII CIVIL RIGHTS COMMISSION ("HCRC") being represented by John

Ishihara, and the Court having considered and reviewed the parties' briefs, the administrative record in this action, and the arguments of the parties at hearing, the Court finds as follows.

In this case, RGIS appeals a Final Decision And Order Granting Petition For Declaratory Relief by the HCRC dated June 28, 2002. In the proceeding below, the HCRC's Executive Director filed a petition for declaratory relief with the HCRC seeking a determination that the HCRC possessed jurisdiction to accept and investigate claims of discrimination "due to or based upon the claimant being transgendered or transsexual." R. at 5. The petition stated that "[i]t is the Executive Director [sic] contention that employment discrimination due to an individual being transgender or transsexual, or due to a person's apparent gender, constitutes "sex" discrimination under HRS Chapter 378." *Id.* In granting the petition, the Commission determined that "[i]f transgender individuals and transsexuals are subject to discrimination because they are transgender or transsexual, such discrimination may constitute sex discrimination." R. at 253.

RGIS asserts that the declaratory ruling in this case was *ultra vires*, and the HCRC lacked jurisdiction to issue the ruling in this matter, because the Hawai'i Administrative Procedure Act prohibits agencies from petitioning other agencies for a declaratory ruling. The Court agrees. Hawai'i Revised Statutes §91-8 provides that only "interested persons" may petition an agency for a declaratory ruling. In turn, H.R.S. §91-1(2) defines a "person" as including "individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies" [emphasis added]. An "agency" is defined by H.R.S. §91-1(1) as each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches." There is no dispute that the HCRC is an "agency" for purposes of Section 91-1. The Court finds that the

Executive Director's petition for a declaratory ruling is a prohibited petition by an "agency" for purposes of the Hawai'i Administrative Procedure Act.

Although the HCRC relies on Gibb v. Spiker, 68 Haw. 432, 718 P.2d 1076 (Haw. 1986), the Court finds Gibb distinguishable. The chief of police in Gibb was petitioning an agency different from the one which he represented. In addition, the court in Gibb did not determine whether the Honolulu Police Department was an "agency" for purposes of H.R.S. §91-1, and whether an agency official acting in his official capacity could be considered an "agency" under the Hawai'i Administrative Procedure Act. Allowing an Executive Director to petition his/her own agency for a declaratory ruling creates a substantial risk of rulemaking through declaratory orders. Because the declaratory rulings of administrative agencies are not subject to normal rulemaking requirements (*see* H.R.S. §91-1(4)), the Court finds that the provision in Haw. Admin R. §12-46-61 which authorizes the Executive Director to petition his own agency for a declaratory ruling conflicts with the Hawai'i Administrative Procedure Act.

The Court also finds that the HCRC's declaratory order in this case did not comply with the Commission's own rules at Haw. Admin. R. §12-46-61 and 12-46-63(4). Section 12-46-61 requires a person petitioning for a declaratory ruling to submit facts giving rise to the petition, and Section 12-46-63(4) provides that the Commission may refuse to consider the petition where based on speculative or hypothetical facts. In this case, the Executive Director's petition did not include copies of the complaints filed with the HCRC, nor did the petition allege the factual basis for the complaints, or identify the adverse employment action alleged by the complainants. *Id.* The Executive Director merely filed an affidavit from attorney April L. Wilson-South stating there "are filed with the enforcement section of the HCRC six employment discrimination claims alleging sex discrimination because complainant is transgender." The Executive Director

redacted information regarding the complaints from the documents submitted, and claimed that facts relating to the complaints should not be presented as part of the declaratory proceedings. R. at 280-281. Under such circumstances, the petition should have been denied based on the inadequacy of the administrative record.

Finally, the Court finds that ^{the unlawful discriminatory practice because of "sex" contained in} Hawai'i employment discrimination law, at H.R.S. Chapter 378, does not prohibit discrimination which is directed to person's status as transgender or transsexual. In interpreting Hawai'i's employment discrimination laws, Hawai'i courts will look for guidance to federal precedent interpreting analogous federal laws. Schefke v. Reliable Collection Agency, Ltd., 96 Haw. 408, 425, 32 P.3d 52, 59 (Haw. 2001). Hawai'i Revised Statute §378-2 prohibits discrimination in employment "[b]ecause of . . .sex." Title VII of the Civil Rights Act of 1964 likewise prohibits discrimination in employment because of "sex." 42 U.S.C. §2000e-2(a)(1):

The HCRC has failed to point to anything in the legislative history of Hawai'i's employment discrimination laws indicating that the term "sex," as used by the Hawai'i legislature, was intended to include the concept of "gender identity." The federal courts interpreting Title VII have determined that the meaning of the term "sex" as used in Title VII means a person's biological status as male or female, rather than a person's conception of his/her gender identity. In other words, Title VII's prohibition on discrimination because of sex means "it is unlawful to discriminate against women because they are women and against men because they are men." Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984). The Court finds federal precedent persuasive in interpreting the term "sex" under Hawai'i discrimination law.

The HCRC relies on Price-Waterhouse v. Hopkins, 490 U.S. 228 (1989), in arguing that because discrimination based on sexual stereotyping is prohibited by Title VII, discrimination against transsexual and transgendered individuals must also be prohibited. However, the United States Supreme Court's decision in Price-Waterhouse did not address discrimination directed towards gender identity. Rather, the case dealt with stereotypical attitudes against women *qua* women, not persons whose gender identity is different from their biological sex. The Court also notes that the federal court decisions after Price Waterhouse have continued to interpret the term "sex" as used in Title VII to mean biological or anatomical sex.

The Ninth Circuit's decision interpreting the federal Gender Motivated Violence Act ("GMVA") in Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) is likewise distinguishable. In that case, the Ninth Circuit noted that when Congress used the term "gender" in the GMVA, it acted intentionally to incorporate the broader concept of gender identity, and specifically intended to go beyond biological or anatomical characteristics. 204 F.3d at 1201 n. 12.

At the hearing on this appeal, Counsel for the HCRC argued that the Commission's order merely authorizes the investigation of claims of sex discrimination by transsexual and transgendered individuals, and that the order did not determine that Hawai'i law prohibits discrimination which is directed towards an individual's status as transsexual or transgendered. However, this claim is belied by the HCRC's Final Decision and Order, which expressly found that discrimination against persons because of their status as transgender or transsexual constituted sex discrimination. R. at 253.

In determining that Hawai'i's employment discrimination law ^{regarding "sex"} does not prohibit discrimination directed to an individual's status as transsexual or transgendered, this Court recognizes that discrimination against all persons because of their status as males or females is

prohibited by Haw. Rev. Stat. Chapter 378. The Court agrees with the HCRC that transgendered and transsexual individuals may file charges of discrimination and are entitled to protection from employment discrimination because of their biological sex, even though they are excluded from the protections of Hawai'i disability law. See Haw. Admin. R. §12-46-181. Thus, the HCRC is not precluded from investigating claims of sex discrimination filed by transsexual or transgendered individuals to the extent that the complaints allege discrimination based on *or any other unlawful discriminatory practice.* biological sex. However, transsexual and transgendered persons are not entitled to any greater *in connection with discriminatory practice based on "sex"* protections than males and females who identify with their biological sex, and are not protected *the "sex" provision of the* by Hawai'i employment discrimination law specifically because of their status as transsexuals or transgendered individuals.

For the foregoing reasons, the Court grants RGIS's appeal in this matter, and vacates the Final Decision And Order Granting Petition For Declaratory Relief issued by the HCRC on June 28, 2002.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, _____

JAN 27 2003

EDEN ELIZABETH INFO



JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

JOHN ISHIHARA
Attorney for Appellee
HAWAI'I CIVIL RIGHTS COMMISSION

RGIS Inventory Specialist v. Hawai'i Civil Rights Commission, Civil. No. 02-1-1703-07 (Agency Appeal), ORDER REVERSING THE HAWAI'I CIVIL RIGHTS COMMISSION'S FINAL DECISION AND ORDER GRANTING PETITION FOR DECLARATORY RELIEF