

CIVIL RIGHTS COMMISSION
STATE OF HAWAII

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In the Matter of) DR 93-009
_____)
Petitioners,)
- - - - -)
LINDA C. TSEU, as Executive)
Director of the Hawaii Civil)
Rights Commission; JANE DOE,)
Complainant,)
Respondents.)

FINAL ORDER ADOPTING IN PART THE
HEARINGS EXAMINER'S RECOMMENDED ORDER

I. INTRODUCTION

This Petition was filed on September 16, 1993, seeking a declaration that Chapter 378, Part I, Hawaii Revised Statutes, does not protect an individual from discrimination because of that individual's association with other persons who have arrest and court records. On November 9, 1993, the Commission assigned the Petition to the Hearings Examiner pursuant to H.A.R. § 12-46-63(b)(3). The chronology of events in the Introduction section of the Hearings Examiner's Findings of Fact, Conclusions of Law and Recommended Order ("Hearings Examiner's Order") are adopted by the Commission.

After the filing of the Hearing Examiner's Order on January 4, 1994, the Respondents filed written exceptions on January 19, 1994.

Petitioners filed a memorandum in opposition on January 25, 1994. The Commission held a hearing for the parties to present oral argument on March 2, 1994.

II. PRELIMINARY MATTERS

At oral argument, Petitioners submitted an exhibit consisting of written testimony provided by the Commission on February 4, 1994 to the Senate Committee on Labor and Employment on Senate Bill No. 2630.¹ Respondents did not object to the submission. The Commission hereby accepts the exhibit into the record as Petitioners' Exhibit A.

After oral argument on March 4, 1994, Petitioners submitted a post argument memorandum which had not been requested by the Commission. On March 8, 1994, Respondents filed a motion to strike the memorandum. The Commission hereby grants the motion to strike in this instance because the Commission did not request additional briefs from the parties.

III. FINDINGS OF FACT

The parties did not take exception to the Hearings Examiner's Findings of Fact. The Commission hereby adopts the Findings of Fact in the Hearings Examiner's Order. To summarize, Respondent Jane Doe worked for Petitioners and does not have an arrest and

¹Senate Bill No. 2630 proposed to amend H.R.S. § 378-2 to prohibit employment discrimination against non-disabled persons because of their association to a person with a disability. It would also amend H.R.S. § 489-5 to prohibit similar discrimination by a place of public accommodations.

court record. However, Respondent Doe's husband, who also worked for Petitioners, was arrested and pleaded guilty to a criminal charge. Respondent Doe filed a complaint with the Commission alleging that Petitioners had created an offensive work environment and terminated her employment because of her association with an person with an arrest and court record and because of her marital status.²

IV. CONCLUSIONS OF LAW

H.R.S. § 378-2 prohibits employers from discriminating against any individual because of arrest and court record³. H.R.S. § 378-2(A) provides:

[i]t shall be a discriminatory practice [b]ecause of ... arrest and court record [f]or any employer to refuse to hire or employ or bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment;

The Petition raises the issue of whether individuals, with no arrest and court record, who are associated by marriage, friendship, or otherwise with a person who has an arrest and court record, are protected from an employer's discriminatory acts.

²The investigation of the complaint is pending and no determination of reasonable cause has been made. Petitioners have denied the allegations of the complaint.

³In H.R.S. § 378-1, "arrest and court record" is defined to include[] any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to any law enforcement or military authority.

Petitioners argue that the protections against employment discrimination do not apply to those associated with persons with arrest and court records. Respondents disagree and argue that individuals who are associated with persons with arrest and court records are protected. The Hearings Examiner recommended that the Commission find no associational protections for arrest and court record discrimination. The Commission agrees with the Petitioners and the Hearings Examiner.

V. DISCUSSION

H.R.S. § 378-2 clearly protects individuals with arrest and court records from discrimination in employment. However, protections against discrimination because of association with a person with an arrest and court record are unclear.

In determining whether such protections exist, the Commission must interpret the statute. Respondents argue that the plain language of H.R.S. § 378-2 can be read to protect individuals who associate with members of any protected class because unlike Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(2)(a)(1)⁴, our statute makes no reference to "such individual's" race, sex, or other protected class, and the deletion of the word "his" before

⁴42 U.S.C. § 2000e(2)(a)(1) provides:

it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin.

the enumerated protected classes' in 1981 broadens the category of protected persons by eliminating any requirement that the discrimination result because of a person's own arrest and court record. Finally, Respondents argue that the legislative history indicates a strong public policy against any discrimination, and thus, the law should be extended to protect those who are discriminated against because of their association with persons with arrest and court records.

Petitioners argue that H.R.S. § 378-2 does not expressly prohibit associational discrimination and the legislative history does not indicate any intent to include associational discrimination within its protection. At oral argument,

⁵H.R.S. § 378-2 (1963) provided in relevant part:

It shall be unlawful employment practice or unlawful discrimination:

- (a) For an employer to refuse to hire or employ or to bar or discharge from employment, any individual because of his race, sex, age, religion, color, or ancestry, provided that an employer may refuse to hire an individual for good cause relating to the ability of the individual to perform the work in question;
- (b) For an employer to discriminate against any individual in compensation or in the terms, conditions or privileges of employment because of race, sex, age, religion, color, or ancestry

(Emphasis added). H.R.S. § 378-2 (1981) eliminated the word "his" and provided in relevant part:

It shall be an unlawful discriminatory practice:

- (1) For an employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment because of race, sex, age, religion, color, ancestry, physical handicap, marital status, or arrest and court record

Petitioners contended that the statutory amendment which deleted the word "his" but kept the words "any individual" was done for the purpose of making the provision gender neutral and not to add associational protections. Transcript of Oral Argument, p. 9-10.

The Commission believes the original language of H.R.S. § 378-2 and its legislative history indicate that the Legislature intended to limit protections to individuals who fall within any of the enumerated protected classes. Senate Stand. Comm. Rep. No. 399, 1963 Senate Journal at 810. The addition of arrest and court record as a protected class was intended by the Legislature to protect individuals who had arrest and court records. House Stand. Comm. Rep. No. 376, 1973 House Journal at 912. The 1981 amendment to H.R.S. § 378-2 which deleted "his" before the enumerated protected classes was intended to combine two subsections, not to expand the scope of the statute to add associational protections. See, Testimony of Joshua C. Agsalud, Director of Department of Labor and Industrial Relations on H.B. No. 741 (February 26 and March 24, 1981).

The Commission interprets H.R.S. § 378-2 to require that the individual's membership in one of the enumerated protected classes be part of the reason for the discrimination. Based upon this analysis, the Commission concludes that H.R.S. § 378-2 does not prohibit discrimination because of an individual's association to another person with an arrest and court record.

The Commission recognizes the unfairness and irony of denying protections to Jane Doe, a person who is not a criminal nor has a

record of any involvement with the criminal justice system, if, in fact, she was discriminated against in employment because of her husband's arrest and court record. Unfortunately, under Hawaii law and the federal cases⁶ which have found associational protections, the Commission does not believe that it has the power or authority to investigate a complaint alleging associational discrimination because of the arrest and court record of another person.

VI. FINAL DECISION AND ORDER

The Commission hereby adopts as its Final Decision and Order the Hearings Examiner's recommendations that:

1) There is no standing under H.R.S. § 378-2 for an individual, without an arrest and court record, who associates with another individual with an arrest and court record;

2) Respondent Doe cannot assert standing because of her own lack of an arrest and court record or derivative standing based upon her husband's arrest and court record; and

3) The Executive Director dismiss Respondent Doe's complaint based discrimination because of her association to an individual

⁶Federal courts have found associational protections under Title VII of the Civil Rights Act for race, sex, and national origin discrimination. See, e.g., Parr v. Woodmen of the World Life Insurance Co., 791 F.2d 888 (11th Cir. 1986); Reiter v. Center Consolidated School Dist. No. 26-JT, 618 F.Supp. 1458 (D. Colo. 1985); Nicol v. Imagematrix Inc., 773 F.Supp. 802 (D. Va. 1991). These cases found standing for plaintiffs, who associated with persons of a different race, sex, or national origin, based upon the plaintiff's own race, sex, and national origin. In other words, these cases did not find broad associational standing rights but found that plaintiff's own membership in a protected class was implicated by the alleged discriminatory conduct and that such conduct is proscribed by Title VII of the Civil Rights Act.

with an arrest and court record.

This does not affect Respondent Doe's standing to assert claims based upon her marital status or under any other theories.

The Commission declines to adopt the Hearings Examiner's recommendation that it conclude that there is associational standing for race, sex, sexual orientation, age, religion, color, ancestry, or marital status under H.R.S. § 378-2. The issue of standing for other protected classes was not involved in the petition and need not be decided at this time. By declining to adopt this part of the Hearings Examiner's recommendation, no inference should be drawn that there are no protections against discrimination because of association to another person if an individual's own membership in a protected class is implicated by the discriminatory practice.

DATED: Honolulu, Hawaii 3/30/94

Amevil Agbayani
Amevil Agbayani, Chair

Josephine Epstein
Josephine Epstein, Commissioner

Jackie Mahi Erickson
Jackie Mahi Erickson, Commissioner

Richard Port
Richard Port, Commissioner

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