



# **HAWAI'I CIVIL RIGHTS COMMISSION**

## **2007-2008 Annual Report**

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## **Mission Statement**

The mission of the Hawai'i Civil Rights Commission is to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education.

## **Overview**

### **Fair and Effective Enforcement**

The state of Hawai'i has a strong commitment to the protection of civil rights. Article I, Section 5 of the Hawai'i Constitution provides that "no person shall ... be denied the enjoyment of ... civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." The legislature gave meaning to this commitment by creating the Hawai'i Civil Rights Commission (HCRC), through enactment of Act 219 in 1988 and Acts 386 and 387 in 1989.

The HCRC was organized in 1990 and officially opened its doors in January 1991. For seventeen years the HCRC has enforced state laws prohibiting discrimination in employment (H.R.S. Chapter 378, Part I), housing (H.R.S. Chapter 515), public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. §368-1.5). The HCRC receives, investigates, conciliates, and adjudicates complaints of discrimination.

The HCRC has five (5) uncompensated volunteer Commissioners.\* They are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and commitment to preserve the civil rights of all individuals.

The HCRC is attached to the Department of Labor and Industrial Relations (DLIR) for administrative purposes. The HCRC has a staff of thirty-three (33) persons who are divided into separate enforcement and adjudication sections.

### **An Effective and Uniform Enforcement Scheme**

Prior to the establishment of the HCRC, jurisdiction over state anti-discrimination laws was split among several state departments. Enforcement was limited and sporadic. State litigation to enforce fair employment practices law was virtually non-existent. Nearly all aggrieved were left with litigation of individual lawsuits as their only recourse. Few employment discrimination cases brought under state law were adjudicated, and there was little case law. For complainants who could not afford private attorneys to seek remedies in court, there was no administrative process to adjudicate their claims.

The intent of the legislature in creating the HCRC was "...to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State's commitment to preserving the civil rights of all individuals."<sup>1</sup> The cornerstone of the HCRC statutory scheme was the establishment of a uniform procedure "...designed to provide a forum which is accessible to anyone who suffers an act of discrimination."<sup>2</sup>

### **A Fair Administrative Process**

The HCRC is committed to, and its procedural safeguards are structured, to ensure fairness to both complainants and respondents. The HCRC is a five-member Commission with jurisdiction to enforce state civil rights laws. The HCRC is divided into two separate and distinct sections: the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and the adjudication section which hears, issues orders and renders final determinations on complaints of discrimination filed with the HCRC.

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\* Throughout FY 2007-2008 the HCRC had four sitting Commissioners, with one vacant seat.

The Commissioners have delegated HCRC enforcement authority to the Executive Director. The Commissioners have authority to adjudicate and render final decisions based on the recommendations of their Hearings Examiner, and oversee the adjudication section through their Chief Counsel.

The Commissioners and Hearings Examiner are not involved in or privy to any actions taken by the Executive Director in the investigation and pre-hearing stages of the HCRC process. Likewise, the Executive Director and enforcement section are not permitted to communicate ex parte with the Commissioners or Hearings Examiner about any case.

The HCRC investigates complaints of discrimination as a neutral fact-gatherer. At the conclusion of an investigation, a determination is made whether or not there is reasonable cause to believe unlawful discrimination has occurred.

The law requires filing of a complaint with the HCRC before filing a discrimination lawsuit in state court. Otherwise, the circuit court will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement prevents overburdening the courts with non-judicial and non-meritorious cases, as well as those cases that can be closed or settled in the administrative process. The great majority of cases filed with the HCRC are resolved, reach disposition, and are closed without resort to the courts.

### **Civil Rights Law Enforcement: State & Federal Law**

Federal fair employment and fair housing laws are enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and U.S. Department of Housing and Urban Development (HUD), respectively. Pursuant to work share cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law ("dual-filed" complaints).

While Hawai'i and federal fair employment and fair housing laws are similar, they are not identical. Hawai'i has protected bases that are not covered under federal law, and there are substantial differences in the definition of "employer" and the statute of limitations for filing a charge of employment discrimination. In addition to these jurisdictional differences, Hawai'i law provides stronger protection against pregnancy discrimination, sexual harassment, and disability discrimination in employment.

The greater protections in Hawai'i law are attributable to a strong civil rights mandate contained in the Hawai'i State Constitution, HCRC statutes, HCRC rules, HCRC Commission decisions, and state court interpretations. In contrast, federal court interpretations of federal civil rights laws have resulted in fewer protections against discrimination, particularly in the areas of disability and sexual harassment. The issue of state versus federal standards is an important one, particularly in states like Hawai'i that have a historically strong commitment to equal opportunity and non-discrimination.

There is a trend of limiting jurisdiction and process under civil rights statutes: sovereign immunity barring individual claims against the states under several federal civil rights statutes; free speech and free exercise of religion claims raised in defense of discrimination complaints; and equal protection and other challenges to enforcement processes. In this context, strong enforcement of state civil rights laws is more important than ever before.

### **The HCRC Today**

During FY 2007-2008, HCRC Commissioners and staff continued to focus their efforts on improving enforcement and public education activities.

Investigation and charge processing. During FY 2007-2008, the HCRC continued to implement plans to improve efficiency without sacrificing effective law enforcement, by implementing goals designed to reduce the time to complete investigations. Efforts were focused on completing

investigation of 95% of all complaints within 24 months of filing, as an incremental or intermediate step towards a goal of completing all case investigations within 18 months of filing.

**Mediation.** The HCRC's voluntary mediation program completed its ninth year of operation, working with the Mediation Centers of Hawai'i, community mediation centers on Oahu, Hawai'i, Maui, and Kauai, and private mediators. 20 cases settled in mediation for monetary relief exceeding \$262,000.

**Public Education.** The HCRC continued to prevent and eliminate discrimination through public education. HCRC staff made numerous presentations on civil rights and discrimination to labor, business, and professional, civil rights, and other community organizations. Public education included fair housing training on Kauai, Maui, Hawai'i, and Oahu. In May 2008, the HCRC held its annual public training in Honolulu at the Hawai'i Convention Center. At that training, the HCRC screened a PBS Hawai'i program on the Pono Art and Video Contest, co-sponsored by the HCRC, PBS Hawai'i, and the State of Hawai'i Department of Education, and exhibited the artwork of contest winners.

**Litigation.** During FY 2007-2008, HCRC enforcement attorneys continued to conciliate and litigate cause cases, in which a determination was made that there is reasonable cause to believe that unlawful discrimination has occurred.

The HCRC Commissioners and staff continue their unwavering commitment to the HCRC mission - to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education. We renew our pledge to fair and effective enforcement, so that no person shall be denied his or her civil rights under Hawai'i law.

### **Objectives and Goals for 2008-2009**

During FY 2008-2009, the HCRC will continue its efforts to improve both effectiveness and efficiency in its civil rights law enforcement work, including timely investigation, as well as conciliation and litigation of cause cases. The HCRC will strive to maintain state civil rights law enforcement efforts despite projected state fiscal constraints.

**Case Inventory and Processing:** The HCRC has implemented measures to complete investigation of 95% of all complaints within 24 months of filing, and will work incrementally toward the goal of completing all investigations within 18 months.

**Voluntary Mediation Program:** The HCRC will continue to improve and expand its voluntary mediation program to encourage and offer mediation in more cases.

**Public Awareness:** The HCRC plans to continue its focus on public education activities during the upcoming year. The HCRC will continue its annual public training and will co-sponsor an expanded Pono Art, Video and Writing Contest for public and private school students statewide. The HCRC will work with federal, state, business, labor, and community partners to expand outreach and public education statewide, especially on the neighbor islands, joining with the U.S. Equal Employment Opportunity Commission to in joint outreach efforts on Maui, Kauai, and Oahu. The HCRC will continue to explore more public-private partnerships to develop user-friendly public education resources. The HCRC hopes to produce a training video introducing the HCRC and explaining the HCRC process and laws under its jurisdiction.

The accompanying report is submitted pursuant to H.R.S. §§ 368-4 and 515-9.

<sup>1</sup>1989 House Journal, Standing Committee Report 372.

<sup>2</sup>Id

<sup>3</sup> Aged case reduction is a priority for the HCRC, as well as for the U.S. Department of Housing and Urban Development (HUD) and the U.S. Equal Employment Opportunity Commission (EEOC), the federal agencies that contract with the HCRC to process complaints dual-filed under state and federal law.

## **Mediation Program**

The HCRC's voluntary mediation program successfully completed its ninth year on June 30, 2008. Complainants, respondents and the HCRC, with the strong support of all the Commissioners, want prompt and fair resolutions to discrimination complaints. To help accomplish this goal, the HCRC developed its voluntary mediation program, a process in which neutral third parties (often a team of two co-mediators with at least one attorney-mediator) help the parties discuss, clarify and settle complaints.

The HCRC voluntary mediation program uses community mediators who are unbiased and do not rule on the merits of the complaint. The HCRC provides the mediators with the basic facts of each case needed to understand the dispute. The mediators then assist the parties in reaching agreements such as apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation saves time, money and resources and reduces stress by allowing the parties to explain their side of the case and to control the process of resolving their disputes in a non-adversarial manner.

The HCRC works with trained, senior mediators from the Mediation Centers of Hawai'i (MCH), an Aloha United Way statewide network of community non-profit mediation centers. MCH utilizes a facilitative approach to mediation. MCH mediators are trained in civil rights laws and settling disputes by HCRC and MCH staff on a regular basis. The HCRC mediation coordinator facilitates the process by explaining, encouraging, referring, and reviewing mediation and its benefits to the parties. There are mediation centers on Oahu (Mediation Center of the Pacific - MCP), Maui (Mediation Services of Maui -MSM), Hawai'i (Ku'ikahi Mediation Center in Hilo (KMC), the West Hawai'i Mediation Center in Kailua-Kona, and Kauai (Kauai Equal Opportunity Mediation Program). The centers charge nominal fees for the sessions, which can be waived or reduced if there is financial hardship.

Private mediation is also available if the parties choose. Private mediations generally utilize an evaluative approach, in which the law and possible damages are emphasized. Private mediation is an important part of the HCRC mediation program. Parties are free to select commercial private mediators who charge market rates or private mediators from the reduced-fee program of MCP, called the Access ADR program.

Mediation can occur at any stage of the intake, investigation, and enforcement or hearing process. Mediation is first offered when the complaint is accepted, because disputes are often easier to resolve while the facts are fresh and before potential damages accumulate and the positions of the parties become rigid. However, parties may voluntarily choose mediation at any time during the HCRC investigative, enforcement or hearing process.

During FY 2007-2008, 40 cases were referred into mediation (including cases carried over from the previous fiscal year). 33 mediations were completed (dispositions) and 7 cases were carried over to the next fiscal year. Of the 33 dispositions, 20 resulted in mediated settlements (60.6%), with 13 (39.4%) cases resulting in no agreement. The total disclosed monetary value of mediated agreements was \$262,400, with a wide variety of affirmative relief as well. (In 4 cases, the monetary consideration was subject to a confidentiality clause and not disclosed). MCP had 13 settlements; Access ADR had 1 settlement; Ku'ikahi Mediation Center had 2 settlements; West Hawai'i Mediation Center 1 settlement; and there were 3 settlements with private mediators.

Of the 40 referrals, 21 (52.5%) were made to MCP; 4 (10%) were to Ku'ikahi Mediation Center; 4 (10%) were to private mediators; 2 (5%) were to the Access ADR program of MCP; 1 each (2.5%) were to Mediation Services of Maui and West Hawai'i Mediation Center; and 7 cases (17.5%) were carried over to FY 2009. 38 referrals were based on employment charges, 1 was on housing and 1 was a public accommodations complaint.

The primary bases of discrimination of the 20 settlements were as follows: age (6); disability (5); race and ancestry (4); sex (3); retaliation (1) and sexual orientation (1). Most of the completed mediations also included charges on other protected bases. 15 mediated settlements were of dual-filed cases (also filed with the EEOC or HUD).

Although monetary settlements were achieved in most agreements, all mediated agreements involved some form of non-monetary affirmative relief. Examples of non-monetary relief include:

- 1) frank discussion of disputes, which often lay the groundwork for eventual settlement or restoration of the prior employment relationship;
- 2) reinstatement and/or restoration of employee benefits;
- 3) formal and informal apologies (by either or both sides);
- 4) increasing hours for part-time employees;
- 5) providing neutral or positive references for former employees;
- 6) removal of inappropriate negative comments in employee records;
- 7) provision of reasonable accommodations;
- 8) changing shifts when practicable;
- 9) policy revisions and postings; and
- 10) clarification of communications between employer and employee, leading to more productive working environments up to outright settlements.

## **Public Education & Outreach**

In addition to enforcing anti-discrimination laws, the HCRC is committed to preventing and eliminating discrimination through public education. The HCRC Commissioners and staff maintained or assisted in a number of civil rights public education efforts, working with civil rights, business, labor, professional, and non-profit organizations, on new and continuing initiatives.

On May 14, 2008, the HCRC conducted its annual training at the Hawai'i Convention Center for about 200 attendees. This year's intermediate/advanced training was titled, "Equal Employment Opportunity in Hawai'i: Hot Topics". The guest moderator was Bob LeClair, formerly of "You and the Law in Hawai'i". Interactive panels with experts were held on mediating sexual harassment cases and hot topics in civil rights: trends, cases and issues. The winning videos from the HCRC Pono Art and Video Contest were also shown at the annual training.

The HCRC continues to be an active participant in the fair housing public education campaign committee, which is comprised of representatives from the housing departments of the state, each county, the HUD Honolulu Field Office, and the Legal Aid Society of Hawai'i's Fair Housing Enforcement Program. The committee holds an annual joint private-public awareness fair housing campaign involving public service announcements on television, radio and print media, an annual Governor's Fair Housing Proclamation, and public education seminars on the Islands of Oahu, Maui, Kaua'i, and Hawai'i.

The HCRC also worked with the U.S. Department of Housing and Urban Development, the state, the counties, community fair housing organizations, non-profit and for-profit organizations, and businesses to co-sponsor fair housing trainings on all islands. Trainees included the Board of Realtors, National Association of Residential Property Managers, Condominium Council of Maui, and various community associations.

In addition, the HCRC conducted state-wide fair housing educational outreach workshops/trainings during April and May 2008 to increase compliance and prevent unlawful

discrimination. The workshops/trainings were held on Oahu, Kailua-Kona, Hilo, Lihue, and Kahului. An estimated 700+ people took advantage of these informative and free workshops/trainings.

The HCRC was a part of the national "Fair Housing Education in America Day" which taught school age children about the Fair Housing Act, how it became law and how it applies to everyone. On April 16, 2008, sixty 5<sup>th</sup> graders from Kahala Elementary School successfully completed the program and were charged with the responsibility to share fair housing information with others because "Fair Housing: It's Not an Option, It's the Law". On April 23, 2008, about twenty-five 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> grade Cub Scouts and their ohana also completed the national program. All participants received a Hawai'i Civil Rights Commission Fair Housing Education in America Certificate of Completion signed by the Executive Director.

The HCRC participated in the all-day Community Homebuyer Fair held on Saturday, June 21, 2008 at Kapolei Hale, the City and County of Honolulu's office building in central Oahu. The fair was a one-stop shop for minority first time homebuyers. Over 30 exhibitors provided information and handouts on housing laws to prospective homebuyers. Resources were provided in English, Spanish, Ilocano, Chinese, Marshallese, Samoan, and Vietnamese. An estimated 375 attended the fair. HCRC worked with the following organizations in the development, planning and implementation of the Community Homebuyers Fair:

- Hawai'i HomeOwnership Center
- City and County of Honolulu - Dept of Community Services, Section 8 and Rehabilitation Loan Branch
- Office of Hawaiian Affairs
- Honolulu Board of Realtors
- Hawaiian Community Assets
- Alu Like, Inc.
- Department of Hawaiian Homelands
- Consumer Credit Counseling Services of Hawai'i-CCCS of Hawai'i
- Hawai'i Public Housing Authority
- Hawai'i Association of Mortgage Brokers
- Hawai'i Credit Union League
- Habitat for Humanity
- Legal Aid Society of Hawai'i
- U.S. Department of Agriculture Rural Development (USDA)
- U.S. Department of Housing and Urban Development
- Mortgage Bankers Association of Hawai'i
- Self-Help Housing Corporation of Hawai'i

The HCRC also did outreach and/or made presentations at the following during FY 2007-2008:

- County of Maui, Workforce Development Division, WorkSource Maui seminars
- Hawai'i Government Employees Association Biennial Convention
- Hawai'i State Foundation on Culture and the Arts
- U.S. Equal Employment Opportunity Commission joint outreach
- U.S. Civil Rights Commission, Hawai'i Advisory Committee
- Community Forum on Sexual Harassment, Community Alliance Against Sexual Harassment
- PBS-Hawai'i Pledge Drive and DVD production
- William S. Richardson School of Law Luncheon Program: "New Approaches to Justice"
- Center for Alternative Dispute Resolution, State Judiciary
- Japanese Chamber of Commerce co-presentation with the EEOC on housing discrimination
- Honolulu Pride Festival
- Annual Martin Luther King, Jr. Holiday Parade & Festival
- Hawai'i Friends of Civil Rights
- statewide Fair Housing Month events



- Legal Aid Society of Hawai'i
- Annual training of statewide mediators

The locally-produced DVD, "Pregnancy Discrimination in the Workplace", which premiered at the 2007 HCRC annual training, has been made available for purchase for \$20.

The HCRC website at [www.hawaii.gov/labor/hcrc](http://www.hawaii.gov/labor/hcrc) received over 37,000 page views during the period from January 1 – June 30, 2008 (the page view system replaced the "hits" counting system in January 2008). The website is part of a consolidated website which includes all divisions of the Department of Labor and Industrial Relations. The HCRC is grateful for the assistance of DLIR webmaster Casey Cho in posting information on its website and helping make the website more user-friendly. Analysis of the webmaster's detailed monthly index indicates that the site continued to receive a broad range of interest from the public, especially the web pages on administrative rules and case decisions.

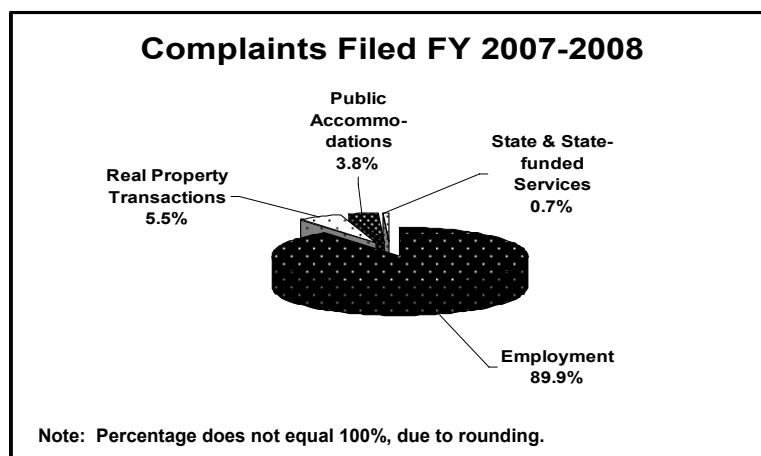
### Caseload Statistics

During FY 2007-2008, the HCRC continued its program of improving efficiency without sacrificing effective law enforcement. Notable achievements for FY 2007-2008 include: 1) an increase in the number of intakes completed; 2) an increase in the number of complaints filed; 3) shortened average processing times; and 4) a continued decrease in the overall age of cases.

### Intake

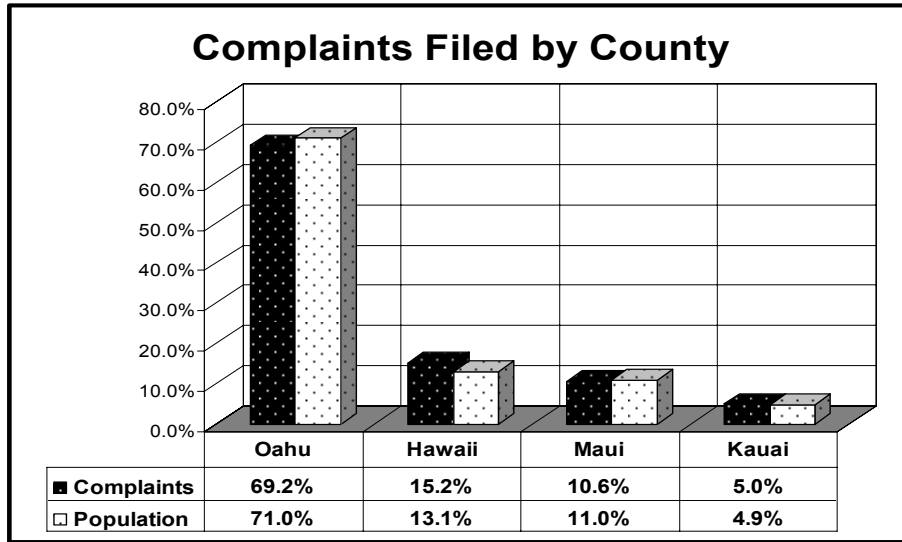
During FY 2007-2008, the HCRC received over 11,000 telephone and walk-in inquiries (11,224). HCRC investigators completed 761 intakes and 686 discrimination complaints were filed with the HCRC, an average of 57 cases a month.

Of the 686 complaints that were filed with the HCRC, 357 complaints originated with HCRC investigators (averaging 30 per month), and another 329 cases originated with the federal Equal Employment Opportunity Commission ("EEOC") or Department of Housing and Urban Development ("HUD"). These 329 cases were dual-filed under state law with the HCRC. The 686 cases included 617 employment cases, 26 public accommodations cases, 38 housing cases, and 5 cases involving state and state-funded services. The other inquiries and intake interviews did not lead to filed charges due primarily to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected basis or bases; or c) a complainant's decision not to pursue the complaint.



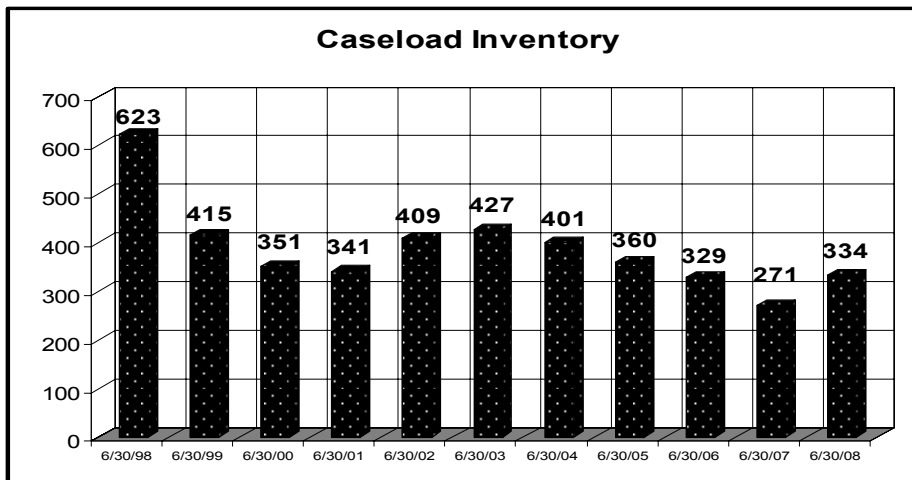
The 686 charges accepted by the HCRC consisted of 475 Oahu complaints, 104 Hawai'i County complaints, 73 Maui County complaints, and 34 Kauai County complaints. The number of

complaints filed from each county was consistent with its proportion of resident population in the state.



#### Closures<sup>4</sup>

HCRC investigators and attorneys closed 291 cases during FY 2007-2008 (down from 349 cases in FY 2006-2007), for an average closure rate of 24.25 cases per month (down from 29.08 cases per month in FY 2006-2007). In addition to the 291 closures during the fiscal year, HCRC investigations resulted in cause determinations in 23 cases. As of June 30, 2008, there were 334 cases pending with HCRC investigators.



#### <sup>4</sup> ANALYSIS AND EXPLANATION OF CLOSURE DATA

This closure data does not reflect the number of completed investigations that result in cause determinations. Generally, the reason for this distinction is that cases are not closed upon issuance of a notice of cause, but are then conciliated, and, if conciliation fails, are docketed for hearing.

Historically, there is a relationship between the number of cause cases and predetermination settlements/resolutions between parties—the larger the number of notices of cause, the smaller the number of settlements/resolutions, and vice versa. Typically, cause determinations and settlements/resolutions constitute between 15-25% of the total of those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties.

During FY 2007-2008, HCRC investigations resulted in 23 cause determinations, and 53 cases were closed on the basis of pre-determination settlement or resolution between parties. 166 cases were closed on the basis of no-cause determinations upon completion of investigation. The ratio of cause determination and predetermination settlement/resolution (76) to those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties (242) for this fiscal year is 31%.

The average period for case closure by investigators was 333 days, as compared to 371 days for FY 2006-2007 and 381 days for FY 2005-2006. A review of this fiscal year shows the following reasons for closures:

	No. of Cases	% of Subtotal	% of Total Closures
<b>Merit Closures</b>			
Resolved by Parties	39	16.67%	13.40%
Pre-Determination Settlements	14	5.98%	4.81%
Cases Settled or Otherwise Resolved After a Cause Determination	15	6.41%	5.15%
No Cause Determinations	<u>166</u>	<u>70.94%</u>	<u>57.04%</u>
<b>Subtotal</b>	<b>234</b>	<b>100.00%</b>	<b>80.41%</b>
<b>Non-merit Closures</b>			
Complainant Elected Court Action	29	50.89%	9.97%
No Jurisdiction	1	1.75%	0.34%
Complaint Withdrawn	5	8.77%	1.72%
Complainant Not Available	7	12.28%	2.41%
Complainant Failed to Cooperate	14	24.56%	4.81%
Other Agency Investigated	0	0.00%	0.00%
Administratively Closed	0	0.00%	0.00%
No Significant Relief Available	<u>1</u>	<u>1.75%</u>	<u>0.34%</u>
<b>Subtotal</b>	<b>57</b>	<b>100.00%</b>	<b>19.59%</b>
<b>Total Number of Closures</b>	<b>291</b>		<b>100.00%</b>

### Employment Cases

H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, assignment of income for child support obligations, National Guard participation, or breast feeding/expressing milk. Examples of such practices are outlined in H.R.S. § 378-2.

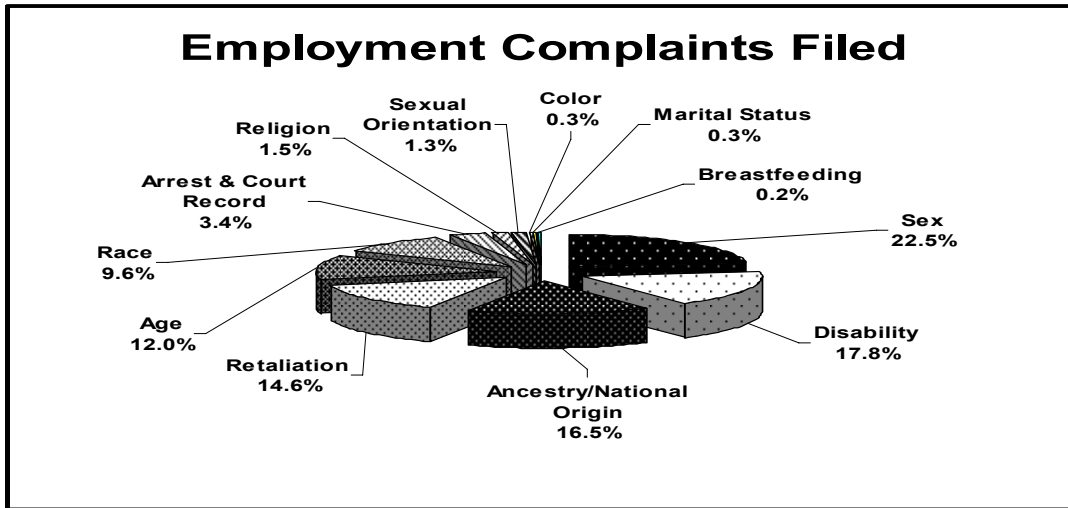
The HCRC has a work-share agreement with the EEOC. A case is filed with both agencies where there is concurrent jurisdiction, but only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 617 employment cases were accepted by the HCRC. HCRC was the intake agency for 291 of these cases, and HCRC dual-filed another 326 cases originating with EEOC.

Of the HCRC-originated cases, 73% were also filed with EEOC. Of the 617 employment complaints filed, the bases most cited were sex, in 139 (22.5%) cases, and disability, in 110 (17.8%) cases. Of those sex discrimination complaints, 55 (39.6% of all sex cases) alleged sexual harassment and 33 (23.7% of all sex cases) were based on pregnancy.

Ancestry/national origin was the third most common basis with 102 cases, representing 16.5% of all employment cases, followed by retaliation discrimination with 90 cases (14.6%), and age discrimination with 74 cases (12.0%). There were 59 cases based on race discrimination (9.6%); 21

cases based on arrest & court record (3.4%); 9 cases based on religion (1.5%); 8 cases based on sexual orientation (1.3%); 2 cases based on marital status (0.3%); 2 cases based on color (0.3%); and 1 case based on breastfeeding/expressing milk (0.2%). There were no cases based on child support obligations or National Guard participation.

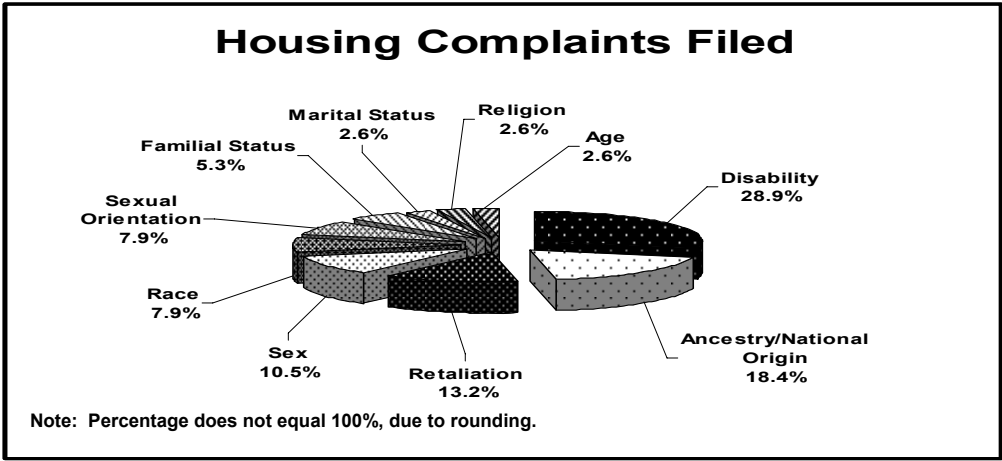
The case closure period averaged 363 days for the 238 employment cases that were closed (or caused) by HCRC investigators during FY 2007-2008.



### Housing Cases

H.R.S. Chapter 515 is Hawai'i's fair housing law. It prohibits discriminatory housing practices based on race, sex, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection. Examples of such unlawful practices are listed in H.R.S § 515-3 and include actions such as refusing to rent, sell, or grant loans to an individual because of one or more of the above protected bases.

The HCRC has a work-share agreement with the U.S. Department of Housing & Urban Development (HUD). HUD refers most of the complaints it receives regarding unlawful discrimination in Hawai'i to the HCRC for investigation. During FY 2007-2008, the HCRC accepted 38 cases of housing discrimination. There were 11 cases based on disability status (28.9%); followed by 7 cases based on ancestry/national origin (18.4%); 5 cases alleging retaliation (13.2%); 4 cases based on sex (10.5%); 3 cases based on race (7.9%); 3 cases based on sexual orientation (7.9%); 2 cases based on familial status (5.3%); 1 case based on marital status (2.6%); 1 case based on religion (2.6%); and 1 case based on age (2.6%). There were no cases based on color. Housing case closures averaged 126 days for the 40 cases closed (or caused) during FY 2007-2008.

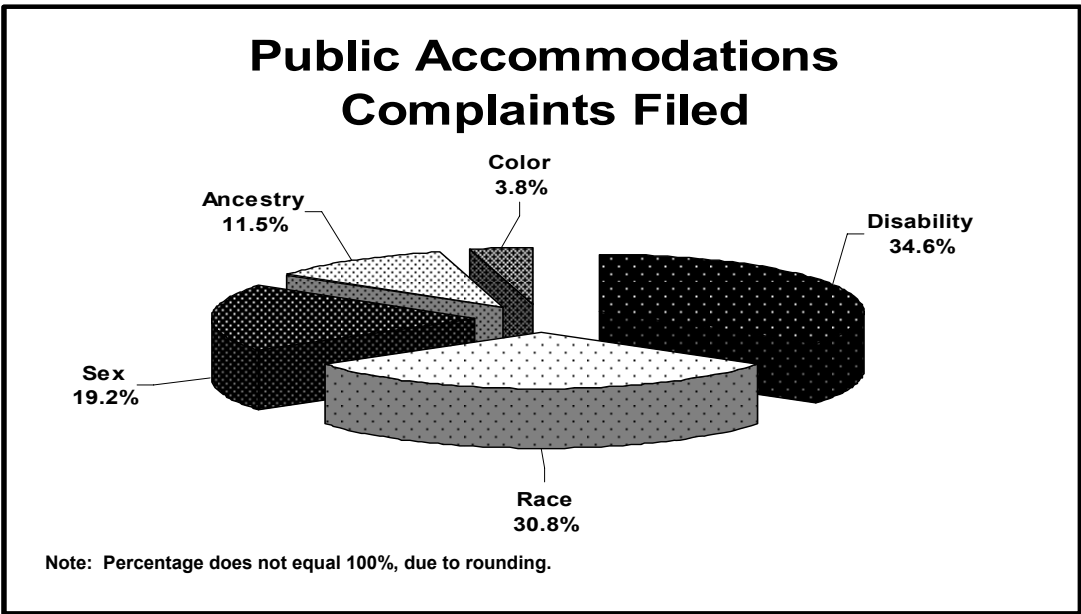


**Public Accommodations Cases**

H.R.S. Chapter 489 prohibits unfair discriminatory practices that deny, or attempt to deny a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation on the basis of race, sex, sexual orientation, color, religion, ancestry, or disability. Public accommodations include retail stores, restaurants, theaters, sports arenas, public transportation, healthcare providers, hotels, and banks.

During the fiscal year, 26 new cases of public accommodations discrimination were accepted. There were 9 cases based on disability discrimination (34.6%); 8 cases alleging race discrimination (30.8%); 5 cases based on sex discrimination (19.2%); 3 cases based on ancestry (11.6%); and 1 case based on color (3.8%). There were no cases based on retaliation, religion, or sexual orientation.

Public accommodations case closures averaged 377 days for the 17 cases closed (or caused) during FY 2007-2008.



**Access to State and State-Funded Services Cases**

H.R.S § 368-1.5 prohibits state agencies, or any program or activity receiving state financial assistance, from excluding from participation, denying benefits or otherwise discriminating against persons with disabilities (the only protected class under this statute).

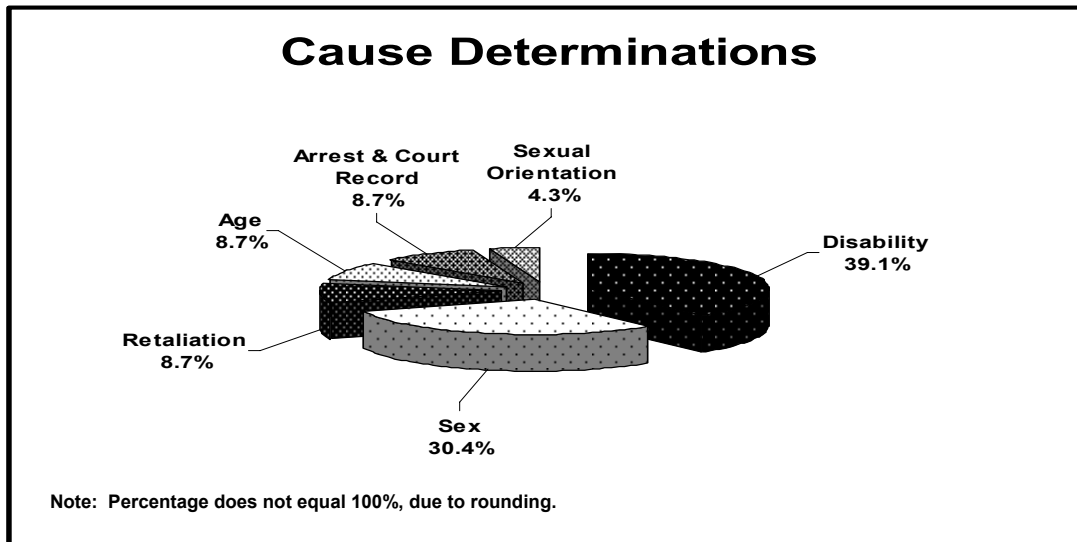
During the fiscal year, there were 5 cases filed under § 368-1.5. 4 cases were closed during FY 2007-2008. Access to state and state-funded services case closures averaged 370 days for the 4 cases closed (or caused) during FY 2007-2008.

### Cause Cases

When the investigation results in a recommendation that there is reasonable cause to believe that discrimination has occurred, the case is assigned to an HCRC enforcement attorney for legal action. In FY 2007-2008, 23 recommendations for cause determinations were brought forward for legal action. Of these cases, 18 (78.3%) were employment cases, 4 (17.4%) were housing cases, and 1 (4.3%) was a public accommodations cases. There were no access to state and state-funded services cases.

Of the 23 investigations where the result was a cause recommendation, 9 involved discrimination due to disability (39.1%), 7 involved discrimination on the basis of sex (30.4%), 2 involved retaliation (8.7%), 2 involved age (8.7%), 2 involved discrimination due to arrest and court record (8.7%), and 1 involved sexual orientation (4.3%). There were no cases involving ancestry/national origin, marital status, familial status, race, color, or religion.

During FY 2007-2008, enforcement attorneys closed 15 cases, and 11 of these cases (73.3%) were negotiated settlements.



### Case Settlements

The HCRC promotes and encourages settlement during all stages of the complaint process. Through pre-determination settlements, mediation, and conciliation, the HCRC obtains relief and resolves complaints while avoiding unnecessary litigation. These settlements provide closure for the parties and conserve HCRC investigation and litigation resources for complex or precedent setting cases.

During FY 2007-2008 the HCRC continued to successfully obtain monetary relief through settlement of complaints. In the 11 settlements obtained by HCRC attorneys in cases with a finding of reasonable cause, the monetary relief totaled \$303,500.00. In the 53 cases settled prior to an investigative finding, monetary relief exceeded \$136,000.00. This figure includes both

pre-determination settlements obtained through HCRC investigators (\$73,600.00) and investigative settlements obtained through the HCRC mediation program (\$62,500.00).

In addition to monetary relief, significant affirmative relief was also obtained. The HCRC seeks affirmative relief for four basic reasons: to enforce civil rights laws, stop discriminatory conduct, prevent future harm to complainants, and assist respondents in avoiding future violations. HCRC settlements and conciliation agreements routinely include various types of affirmative relief, such as developing and implementing anti-discrimination policies, employee and supervisor training on anti-discrimination policies, posting policies, and publishing notices informing the public of HCRC's role in enforcing state anti-discrimination laws.

In some instances, non-monetary relief can be an important element of a settlement. For example, in FY 2007-2008, there were complainants who received letters of apology pursuant to the terms of a settlement. A simple apology sometimes goes a long way towards healing the rift between a complainant and respondent, and this form of relief is often not available as a court ordered remedy. Some cases are resolved when an employer, housing provider, or public accommodation corrects an unlawful discriminatory policy or practice after notice of the violation. During FY 2007-2008, a significant number of employers, housing providers, and public accommodations voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following are illustrative of the HCRC cases that were resolved through conciliation or mediation and describe the relief that was obtained during FY 2007-2008:

- In a case involving constructive discharge and harassment based on sex, sexual orientation, and ancestry, the complaint was settled for payment of \$35,000 and affirmative relief, including training of the employer's staff.
- In a case involving termination and refusal to grant a reasonable accommodation based on religion, the complaint was settled for payment of \$4,000, the complainant's reinstatement to work and restoration of seniority, and affirmative relief, including posting of the employer's non-discrimination policies and training.
- In a case involving termination based on age, the complaint was settled for payment of \$20,000 and an agreement to post a notice concerning the settlement.
- In a case involving termination based on retaliation, the complaint was settled for payment of \$5,000 and affirmative relief, including posting of the employer's non-discrimination policies.
- In a case involving housing discrimination based on sex (pregnancy), the complaint was settled for payment of \$4,000 and affirmative relief, including training, posting of non-discrimination policies, and publication of a newspaper advertisement to educate the public about the State's laws prohibiting housing discrimination.
- A case was resolved via a mediated settlement agreement for payment of \$200,000 and affirmative relief after the HCRC found reasonable cause to believe that the complainants were denied a reasonable accommodation and/or reasonable modification in housing based on disability, and the complaint was docketed for a contested case hearing.

### **HCRC Warning Letters**

In an effort to prevent future or recurring problems, the HCRC provides respondents with "warning letters" advising them of unlawful or potentially unlawful practices that the HCRC discovers during the course of its investigation of other claims against the respondent. In those instances in which the HCRC investigation does not result in a recommendation of reasonable cause on the claims filed, but the HCRC investigator finds evidence of other unlawful practices (such as a discriminatory written policy or employment application, or

conduct in the workplace that could rise to the level of unlawful harassment if repeated), the HCRC will advise the respondent of the potential violations and give the respondent information about how it can correct the possible violation of the law. Warning letters have resulted in policy and application form changes, as well as discrimination prevention training for employees and managers.

## **Case Decisions**

### **Contested Case Hearings**

During fiscal year 2007-2008 one complex case was pending and was settled through mediation.

### **Litigation and Court Rulings**

#### **Scotto / housing disability case**

On June 22, 2007, the Commission issued a final decision in William D. Hoshijo, Executive Director, on Behalf of the Complaint Filed by Del M. Scotto vs. Janene Caracaus, Docket No. 06-001-H-D. This case involved allegations of disability discrimination in housing.

The Commission concluded that Respondent Janene Caracaus discriminated against Complainant Del Scotto because of his disability when she evicted him after he informed her of his prostate cancer. The Commission also found that Respondent had a legitimate non-discriminatory reason for the eviction because of Complainant's non-legal use of medical marijuana on the premises. Although Complainant had a valid marijuana medical use certificate from California, he did not have a marijuana medical use certificate from Hawai'i, which is required under H.R.S. Chapter 329 and H.A.R. §23-202-6. Because there were both discriminatory and non-discriminatory reasons for the eviction, the Commission did not award damages but ordered equitable relief, requiring Respondent to not discriminate on the basis of disability in the future and to post a non discrimination policy on the premises. In an order denying reconsideration, the Commission clarified that its decision did not foreclose the award of monetary damages in future mixed motive cases.

Respondent appealed this decision to the First Circuit Court and Complainant's estate appealed to the Third Circuit Court. The appeals were consolidated and heard by the First Circuit Court in Civ. No. 07-1-1325. On July 2, 2008 the First Circuit Court concluded that Respondent had waived her right to jury trial because she did not timely ask for a right to sue. The court affirmed that Respondent violated H.R.S. § 515-3 by terminating Complainant's tenancy because of his disability. The court, however, rejected Respondent's assertion of a legitimate, non-discriminatory reason for the eviction and found the eviction to be willful, wanton and grossly negligent. The court awarded Complainant's estate \$7,000 in special damages, \$10,000 in general damages, \$10,000 in punitive damages and attorneys' fees.

Respondent has appealed this decision to the Intermediate Court of Appeals.

## **Legislation**

During FY 2007-2008 no civil rights legislation affecting the HCRC or the laws under its jurisdiction was enacted.

## **Appendix**

### **Overview**



The Hawai'i Civil Rights Commission (HCRC) was established under Act 219, L. 1988, and Acts 386 and 387, L. 1989.

The HCRC's enabling statute, H.R.S. Chapter 368, declares that discrimination because of race, color, religion, age, sex, sexual orientation, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy. Certain bases are not protected under all HCRC laws.

The HCRC exercises jurisdiction over Hawai'i's laws prohibiting discrimination in employment (H.R.S. Chapter 378, Part I), housing (H.R.S. Chapter 515), public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. § 368-1.5). Under its statutory mandate, the HCRC receives, investigates, conciliates, litigates, and adjudicates complaints of discrimination, providing a uniform procedure for the enforcement of the state's discrimination laws.

The HCRC has five (5) uncompensated volunteer Commissioners. They are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and commitment to preserve the civil rights of all individuals.

The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes. The HCRC has a staff of thirty-three (33) persons who are divided into separate enforcement and adjudication sections.

### **Administrative Procedure**

Before the HCRC accepts a complaint of discrimination, a complaining person must allege that:

- 1) She or he has been subjected to unlawful discrimination<sup>1</sup> because of a "protected basis,"<sup>2</sup> and,
- 2) The unlawful discrimination occurred within the previous 180 days.<sup>3</sup>

After a complaint is filed with HCRC, in appropriate cases the parties are offered an opportunity to voluntarily mediate the complaint through the HCRC Mediation Program. If the parties agree to mediate, the HCRC mediation coordinator refers the parties to a community mediation center, which schedules and holds mediation sessions. Parties may alternatively choose to hire a private mediator.

In cases not referred to mediation, or those in which mediation is unsuccessful, an HCRC investigator conducts an objective, fact-finding investigation. HCRC investigators are impartial and gather evidence to allow the Executive Director to make a determination in each case. The HCRC investigator collects, reviews, and analyzes documents, and contacts and interviews witnesses. Some witnesses questioned may be identified by the complainant or by the respondent, and some are independent witnesses, including experts, who are identified by the investigator, by other witnesses, or are discovered during the investigation. In many cases, the investigator also attempts to settle the complaint prior to an investigative determination (pre-determination settlement).

After an HCRC investigation is completed, H.R.S. 368-13(b)-(c) requires the Executive Director to determine whether reasonable cause exists to believe that discrimination has occurred. Where no reasonable cause is found, the Executive Director dismisses the complaint and issues a right to sue letter to the complainant. Where a determination of reasonable cause is recommended, the complaint is assigned to an HCRC enforcement attorney for legal review and final recommendation to the Executive Director.

Upon the issuance of a finding of reasonable cause to believe that unlawful discrimination has occurred, the HCRC enforcement attorney attempts to conciliate or settle the complaint.<sup>4</sup> If conciliation is unsuccessful, the complaint is docketed for a contested case hearing. An HCRC enforcement attorney presents the case in support of the complainant before an impartial hearings examiner. The respondent (represented by themselves or by counsel or representative of their choice) is also given the opportunity to present his/her case at the hearing. Generally, a complainant may intervene in the contested case process as a party and also be represented by counsel or other representative of their choice.

After the completion of the contested case hearing, the hearings examiner issues a proposed decision based on the evidence. The five-member Commission Board then reviews the proposed decision and

the hearing record. The parties may file written exceptions and support statements and present oral arguments to the Board. The Commission Board then accepts, rejects, or modifies the proposed decision, issues a final decision and order, and awards remedies, if appropriate. This decision is legally binding. If any party disagrees with the decision, she/he has 30 days to file an appeal to the State Circuit Court. Furthermore, a Respondent who appeals a decision of the Commission Board is entitled to a jury trial on any claims that form the basis for an award of common law damages.<sup>5</sup>

The HCRC enforcement and administrative process is more cost effective than litigation in court. It provides for the investigation of complaints and access to justice for those who lack the resources to pursue their claims in court. This is particularly important in employment discrimination cases, where employees have often lost their source of income through termination and have little or no control over the evidence needed to prove discrimination.

The HCRC enforcement and adjudication process also funnels cases away from the courts, saving judicial resources and associated costs. Complainants who file suit in court must first exhaust administrative remedies by filing a complaint with the HCRC. The primary reason for this requirement is to prevent the courts from being overburdened with non-judicial or non-meritorious complaints, or with complaints that can be closed or settled in the HCRC's administrative process. In fact, the great majority of complaints filed with the HCRC are resolved or disposed of without resort to the courts.<sup>6</sup>

Although only a small number of cases are brought to administrative hearing and result in final Commission decisions, these cases are important because they create a body of legal precedent. Case law precedents, in Hawai'i and across the United States, provide the basis for anti-discrimination principles, such as the doctrine of sexual harassment. Case law also establishes standards that define the rights and protections under civil rights laws, and give guidance to employers, landlords, and businesses on how to prevent and eliminate discrimination.

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<sup>1</sup> "Unlawful discrimination" may occur in any of the following ways:

- a. Disparate Treatment – this is the usual form of discrimination; it occurs when individuals are treated in an unequal manner because of a "protected basis." Examples of disparate (unequal) treatment include: firing an employee because of her race, her age, or because she is pregnant; refusing to serve a person because of his race or his disability; refusing to rent to a person because of her race; or refusing to rent to a family because it has young children.
- b. Reasonable Accommodation – this is the second most common way that discrimination appears; it occurs when an individual is denied a "reasonable accommodation" designed to allow an individual to have equal access or equal benefits. Examples of failure to accommodate include: refusing to allow a seeing impaired customer into a taxicab because he is accompanied by a seeing-eye dog; refusing to allow a pregnant cashier to sit on a stool so that she can work while pregnant; or refusing to make exceptions to a condominium association's "no pets" house rule to allow a disabled resident to keep a service animal.
- c. Disparate Impact -- the least common way that discrimination appears; however, when discrimination occurs in this form, it may impact the greatest number of people. Disparate impact occurs when a policy, practice, or test that has a "disparate impact" on persons with a particular "protected basis." Examples of disparate impact include: a pre-employment test that includes a number of questions that are not job related but have the effect of disqualifying a large number women, or men, or any other protected basis.

<sup>2</sup> "Protected basis" is the criteria that it is unlawful for a respondent to discriminate upon. Protected bases vary depending on the statute involved:

- a. State Funded Services (Chapter 368, H.R.S.) The only protected basis is disability.
- b. Employment (Chapter 378, Part I, H.R.S.) The protected bases that an employer, employment agency, or labor organization may not discriminate on are: race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record.
- c. Public Accommodations (Chapter 489, H.R.S.) The protected bases that a public accommodation may not discriminate on are: race, sex (which includes gender identity and expression), sexual orientation, color, religion, ancestry, or disability.
- d. Housing (Chapter 515, H.R.S.) The protected bases that an owner, a real estate broker or any person engaging in a real estate transaction, may not discriminate on are: race, sex (which includes gender identity and expression), sexual orientation, color, religion, marital status, familial status, ancestry, disability, age or HIV (human immunodeficiency virus) infection.

<sup>3</sup> Complaints filed with HCRC usually involve a discrete act – such as termination, eviction, demotion, etc. – or involve acts that are ongoing and constitute a continuing violation. An example of a "continuing violation" is sexual harassment that began more than 180 days before the complaint is filed, but continued or ended less than 179 days before the complaint is filed. When

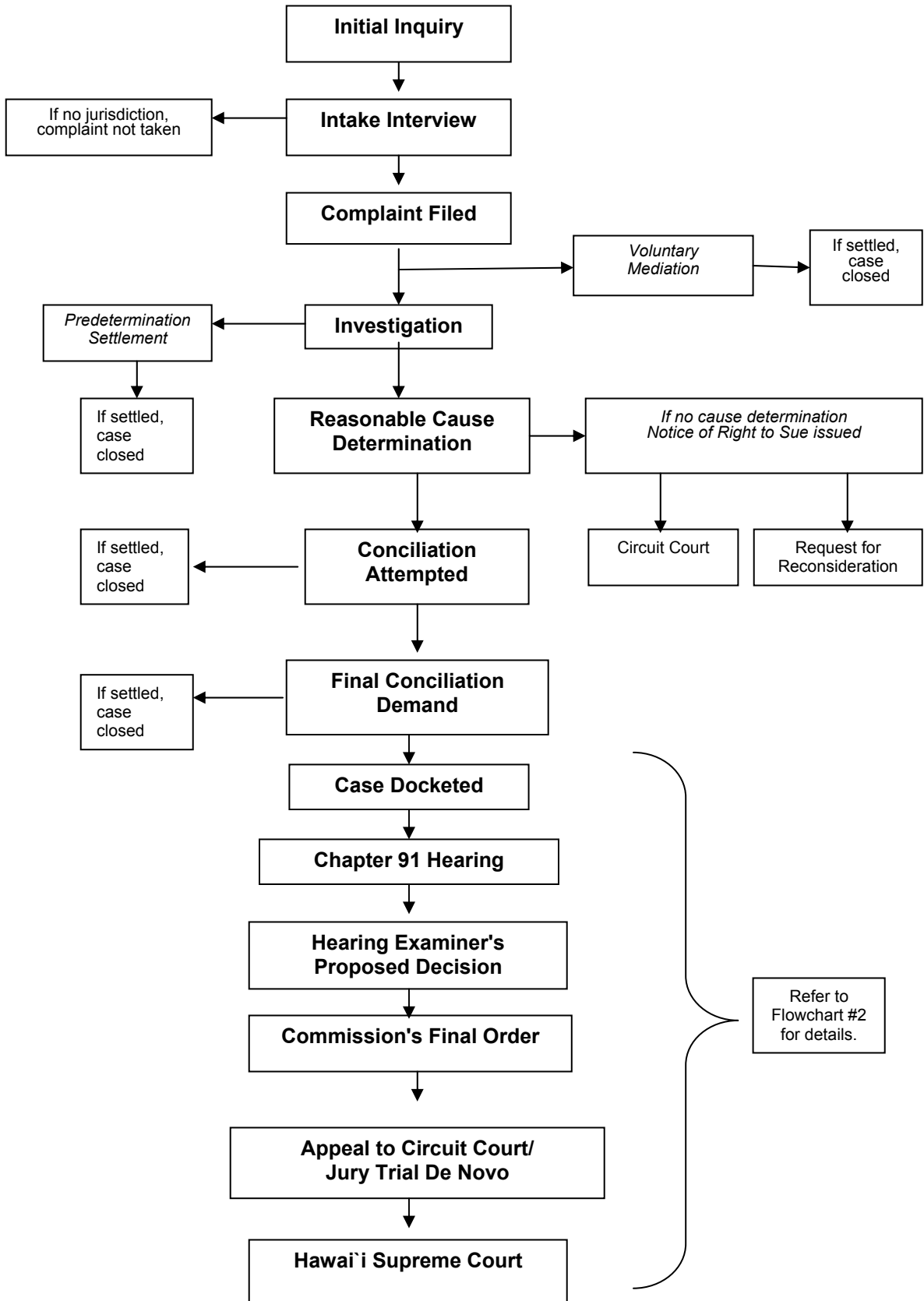
discrimination involves a discrete act, such as termination, the HCRC can only accept a complaint within 180 days of that complained action.

<sup>4</sup> During FY 2007-2008, of all complaints closed (291), 19.6% (57) were closed on the basis of the complainant electing court action or other administrative closure. The remaining cases (234) were closed on the basis of a completed investigation or a pre-determination settlement: in 70.9% (166) the Executive Director found no cause and dismissed the complaint; in 6.4% (15) the case was resolved through settlement or litigation by HCRC enforcement attorney after the issuance of a notice of cause; and 22.6% (53) were settled prior to a cause determination or were resolved by the parties.

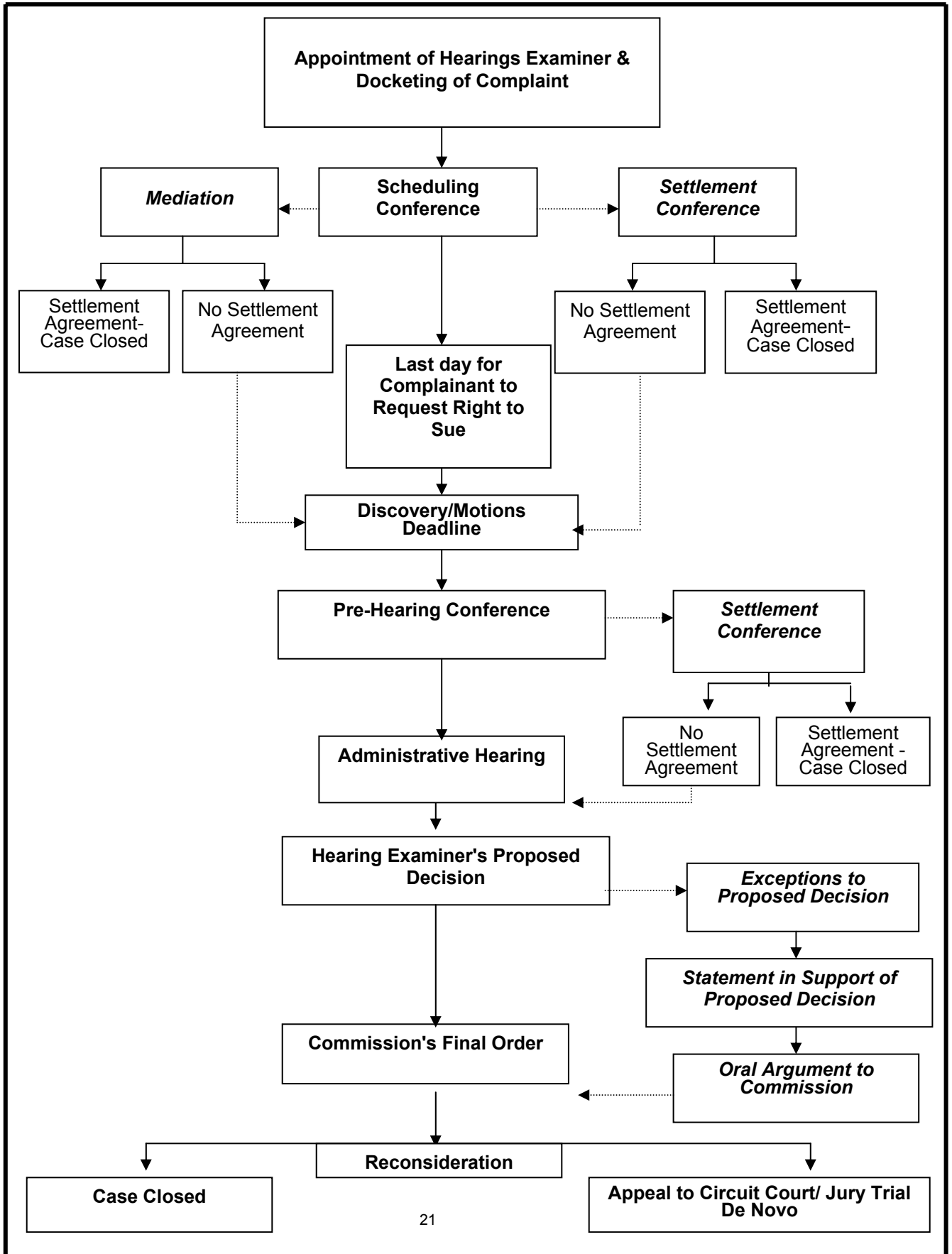
<sup>5</sup> The HCRC administrative procedure and circuit court appeal is illustrated in Flowchart # 1. In *SCI Management Corporation, et. al. v. Darrylynne Sims, et. al.*, No. 24485, June 18, 2003, the Hawai'i Supreme Court held that "a respondent who appeals a final order of the HCRC, pursuant to HRS § 368-16, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the HCRC."

<sup>6</sup> HCRC case dispositions are illustrated in Flowchart # 2.

### HCRC Procedural Flowchart #1



**HCRC Contested  
Case Flowchart #2**



## **HCRC Commissioners**

### **Coral Wong Pietsch**

**Chair (terms 2003-2007, 2007-2011)**

Coral Wong Pietsch is the Senior Civilian Attorney for the U.S. Army Pacific. In this position she oversees the personnel and labor law practice at Headquarters, U.S. Army Pacific Command, as well as the ethics program and the environmental law program. She is also responsible for providing advice and guidance on international law issues in the U.S. Army Pacific Command. Ms. Pietsch is a retired Brigadier General and was the first female general in the over 230-year history of the U.S. Army Judge Advocate General Corps, as well as the first Asian American female to reach the rank of Brigadier General in the Army. From 1986 to 1991, she served as Labor Counselor for the U.S. Army Support Command Hawai'i and was responsible for providing training to managers and supervisors on Title VII, the Rehabilitation Act, and sexual harassment.

### **Sara Banks**

**Commissioner (term 2004-2008)**

Raised on the island of O'ahu, Sara Banks is a graduate of Kailua High school. She has an undergraduate degree in broadcast communication from San Francisco State University. Ms. Banks remained in the Bay Area working in educational media before achieving a Masters of Fine Arts in Film at UCLA. After returning to Hawai'i, Ms. Banks lived on Kaua'i and managed a restaurant at the Kauai Hilton. She transferred to the Hilton Hawaiian Village and was in charge of the training department, overseeing the training for 1800 union employees and more than 300 managers. She then worked for three years as a volunteer coordinator for the Life Foundation, the AIDS service organization for O'ahu. She left the Life Foundation to become part owner of Wahine Builders, working both in the construction and personnel aspects of this company. Ms. Banks designed and implemented a pre-apprentice construction training program for incarcerated women.

Throughout her management and personnel career Ms. Banks has pursued her passion for film and video. Since the early seventies she has produced news magazine shows for public access, documentaries, PSA's and training videos for Hawai'i's businesses. She currently works for the Center on Disability Studies under the College of Education at the University of Hawai'i, producing a series of videos for a state-wide sixth grade science curriculum which weaves hard science with Native Hawaiian values, culture and accomplishments.

### **Leslie A. Ueoka**

**Commissioner (terms 2005-2008, 2008-2012)**

Leslie A. Ueoka is Assistant General Counsel for Hawai'ian Telcom, formerly known as Verizon Hawai'i and GTE Hawaiian Tel. In 1994, Mr. Ueoka was named GTE Attorney of the Year. Prior to that, he was in private practice.

Mr. Ueoka also serves on the Oahu Metro Board of the American Heart Association and has been involved with various association committees, including the Heart Walk and Heart Ball committees. In 2007, Mr. Ueoka was awarded the association's Impact Award, the highest award given annually to an individual, group, corporation or foundation that serves admirably, exhibits an earnest devotion to, and has made a remarkable impact on the mission of the association. Mr. Ueoka also serves as a trustee and the director of development for the 442<sup>nd</sup> Regimental Combat Team Foundation and is a member of the Sons and Daughters Chapter of the 442<sup>nd</sup> Veterans Club. In addition, he is a director of Gregory House Programs and Hawai'i Opera Theatre. Mr. Ueoka is a member of the Honolulu Symphony's Government Relations Committee, and has served as an assistant scoutmaster to Troop 325, Aloha Council, and Boy Scouts of America.

Mr. Ueoka was born in Honolulu, Hawai'i and graduated from Iolani School. He received his BA in English from Northwestern University, and his Juris Doctorate from Washington University.

**Mark G. Valencia**  
**Commissioner (term 2007-2009)**

Mark G. Valencia is a director in the law firm of Case Lombardi & Pettit. His practice includes both plaintiff and defense work in contract, insurance, tort, construction, land use, appellate, product liability, and employment cases. In addition, Mr. Valencia teaches law as an adjunct professor at Hawai'i Pacific University. He is also active in the community, volunteering with the Read Aloud America Program, serving as a longtime member of the Kuakini Medical Center Ethics Committee, and is an annual participant in the Professionals for Drug Free Kids Project.

Before joining Case Lombardi & Pettit in 2005, Mr. Valencia served as a policy analyst for Governor Linda Lingle, an attorney in private practice, a law clerk to former Hawai'i Intermediate Court of Appeals Judge Walter Kirimitsu, and as a Sergeant in the United States Army.

**HCRC Staff**

During FY 2007-2008 the HCRC staff consisted of 33 individuals in the following positions:

- Enforcement Staff:
  - Executive Director
  - Deputy Executive Director
  - Enforcement Attorneys (5)
  - Attorney Mediation Coordinator
  - Legal Assistant
  - Administrative Services Assistant
  - Investigator-Supervisors V-VI (3)
  - Investigator III-IV (11)
  - Secretary III
  - Legal Stenographer I
  - Office Assistants (III-IV) (4)
  
- Adjudication Staff:
  - Chief Counsel
  - Hearings Examiner
  - Secretary II