



# **HAWAI'I CIVIL RIGHTS COMMISSION**

## **2015-2016 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**

### **The State of Hawai'i's Constitutional Civil Rights Mandate**

Article I, Section 5 of the Hawai'i Constitution is the foundation of our state civil rights laws. It provides that: "No person shall ... be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." There is no counterpart to this civil rights mandate in the U.S. Constitution.

### **Looking Forward: Strengthening Civil Rights Law Enforcement**

In Fiscal Year (FY) 2016-2017 and going forward, the Hawai'i Civil Rights Commission (HCRC) will focus its efforts on strategic use of resources to strengthen civil rights law enforcement. To the extent possible, more enforcement resources will be dedicated to investigation, conciliation, and litigation of strong "cause" cases, where there is reasonable cause to believe that unlawful discrimination has occurred.

From 2008-2015, the HCRC focused on rebuilding capacity after losing 8 of 30 permanent positions and 3 of 11 permanent investigator positions due to the recession, budget cuts, and reduction in force (RIF). During this period, loss of staffing directly resulted in loss of capacity to timely and effectively investigate discrimination complaints. The investigation caseload grew from 271 cases at the end of FY 2007 to a high of 527 at the end of FY 2012. The size and age of the investigation caseload had a negative effect on timely and effective investigation and enforcement. Older cases are more difficult to investigate, conciliate, and litigate.

While the lost positions have not been restored, concerted efforts have been made to reduce the size of the investigation caseload, to be in a better position to dedicate more resources to strong cases that should be investigated, with issuance of notices of reasonable cause to believe unlawful discrimination has occurred, conciliated, and litigated.

In FY 2016, the HCRC re-focused efforts on strong enforcement, with a strategic emphasis on dedicating resources to priority cases, taking incremental steps toward strengthening civil rights law enforcement, allowing for better use of finite resources for effective and efficient investigation, conciliation, and litigation of discrimination complaints. With fewer investigators, the HCRC moved away from

specialization in the investigation process toward a more integrated process. Rather than having investigators' work defined by functional specialization, the HCRC moved toward reintegration of its investigator process, so all investigators are equipped and able to handle investigations from intake through disposition. This yielded improved efficiency and continuity in investigation, as well as more well-rounded and supported investigators.

This renewed emphasis on strengthened enforcement yielded a higher number of reasonable cause recommendations in FY 2016 (25) than in FY 2015 (15), and a higher number of conciliation settlement agreements in cause cases in FY 2016 (23) with monetary settlements totaling \$565,578, than the number of conciliation settlement agreements in FY 2015 (9) with monetary settlements totaling \$263,500. In addition to these conciliation settlements in cause cases, in FY 2016 the HCRC closed a higher number of cases based on settlements prior to an investigative finding (59) with monetary relief totaling \$324,615, compared to the number of cases closed in FY 2015 based on settlements prior to an investigative finding (24) with monetary relief totaling \$176,870. In addition to monetary relief, the HCRC seeks and obtains non-monetary affirmative relief in all settlements to which the HCRC is a party, to stop discriminatory conduct, prevent future harm, and avoid future violations of law.

Going forward, the HCRC will build on these efforts by increasing, marshalling, and dedicating staff time and resources on strong cause cases in order to strengthen civil rights law enforcement.

### **Fair and Effective Enforcement – History and Structure of the HCRC**

The HCRC was organized in 1990 and officially opened its doors in January 1991. For twenty-six 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 & Industrial Relations (DLIR) for administrative purposes.

### **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 prosecution of discrimination complaints was virtually non-existent. Nearly all aggrieved were left with litigation of individual lawsuits as their only recourse. For complainants who could not afford private attorneys to seek remedies in court, there was no administrative process to adjudicate their

claims. As a result, few employment discrimination cases were brought to court under state law, and there were few court interpretations of state law.

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 divided into two separate and distinct sections: a) the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and b) the adjudication section which conducts hearings, issues orders and renders final determinations on complaints of discrimination filed with the HCRC.

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, Chief Counsel, 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, Chief Counsel 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 in most (but not all) cases before filing a discrimination lawsuit in state court.<sup>3</sup> Otherwise, the state courts will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement reduces court caseloads by eliminating claims which are non-jurisdictional, or non-meritorious, or complaints that are closed or settled through the HCRC administrative process. As a result, the great majorities of cases filed

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

<sup>2</sup> Id.

<sup>3</sup> Pursuant to HRS § 378-3(10) an employee may file a direct civil action for sexual harassment. Similarly, pursuant to HRS § 515-9(b), an aggrieved person may file a direct civil action for fair housing complaints. While the statutes allow these direct civil actions in these cases, only a small number are filed; the great majority still file complaints with the HCRC.

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 and cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law (“dual-filed” complaints). Both EEOC and HUD contracts require maintenance of state effort and dedication of state resources for investigation of dual-filed complaints.

While Hawai‘i and federal fair employment and fair housing laws are similar, they are not identical. Hawai‘i has more protected bases than federal law, and there are substantial differences in the definition of “employer” and the statute of limitations for filing charges of employment and housing discrimination. In addition to these jurisdictional differences, Hawai‘i law provides stronger protections against pregnancy discrimination and sexual harassment in employment.

The greater protections in Hawai‘i law are attributable to the 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 historically resulted in narrower protections against discrimination. The issue of state versus federal standards is an important one, particularly in states like Hawai‘i that have a strong commitment to equal opportunity and non-discrimination.

### **Mediation Program**

The HCRC's voluntary mediation program completed its seventeenth full year on June 30, 2016. The program enjoyed a productive year, despite operating without a permanent Mediation Coordinator. In FY 2015, the HCRC was able to update and re-describe the position, and engage in recruitment and selection to fill this critical position. The new Program Specialist – Mediation Coordinator started work at the beginning of FY 2016. No longer dependent on part-time mediation program administration by enforcement staff covering in the absence of a mediation coordinator, the HCRC looks forward to revitalization and growth of the mediation program.

Complainants, respondents and the HCRC, with the strong support of 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 persons (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 trained 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 to reach voluntary agreements. These agreements may include apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation saves time, money and resources. It also eliminates the stress of litigation and allows the parties to explain their side of the case and to control the process of resolving the disputes in a non-adversarial manner.

The HCRC works with trained, senior mediators from the Mediation Centers of Hawaii (MCH), a statewide network of community non-profit mediation centers. MCH utilizes a facilitative approach to mediation. MCH mediators receive training on 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 O'ahu (Mediation Center of the Pacific), Maui (Mediation Services of Maui), east Hawai'i (Ku'ikahi Mediation Center in Hilo), the West Hawai'i Mediation Center in Kailua-Kona, and Kaua'i (Kaua'i Economic Opportunity, Inc. Mediation Program). The centers charge fees on a sliding scale 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 Access ADR program, a reduced fee program of the MCP.

Mediation can occur at any stage of the intake, investigation, conciliation, or hearing process. Mediation is first offered when the complaint is accepted. At this early stage disputes are often easier to resolve because the facts are fresh, damages may not have accumulated, and the positions of the parties may still be fluid. However, parties may voluntarily choose mediation at any time during the HCRC investigative, conciliation or hearing process.

Since the inception of the HCRC's mediation program, voluntary mediation has been an available option for all types of complaints, except for housing complaints. With the hiring of its new Program Specialist/Mediation Coordinator, the HCRC was able to pursue the development of a pilot program for the mediation of housing complaints in FY 2016. To that end a small committee was formed, comprised of representatives from the HCRC, HUD, and the Mediation Centers of Hawaii. In consultation with HUD, the committee began to formalize procedures that would honor the philosophy of the facilitative mediation process

and comply with HUD case processing guidelines. The committee also presented day-long state wide training sessions for the community mediation centers that provide volunteer mediators for the HCRC's mediation program. This included introductions to the basics of fair housing law and the anticipated fair housing pilot expansion. These training sessions were attended by over 100 volunteer mediators and staff from all five community mediation centers across the state.

During FY 2016, 42 cases were referred into mediation, and 53 mediations were completed (dispositions). Of the 53 dispositions, 30 resulted in mediated settlements (56.6%), and 23 cases resulted in no agreement (43.4%). Of the mediated settlements, 24 were in employment cases, and 21 of those were dual-filed with the EEOC. The remaining 6 mediated settlements were in public accommodations cases.

The total disclosed monetary value of mediated agreements was \$233,485 with a wide variety of affirmative relief as well. (In 3 cases, the monetary consideration was subject to a confidentiality clause and not disclosed.) Mediation Center of the Pacific had 21 settlements; Mediation Services of Maui had 3 settlements; Ku`ikahi Mediation Services (Hilo) had 2 settlements; West Hawaii Mediation Center and Kauai Economic Opportunity, Inc. each had 1 settlement; and there were 2 settlements with private mediators.

The primary bases of discrimination of the 30 settlements were as follows: Disability - 12; Sex - 5 (specifically, 3 pregnancy and 2 sexual harassment); Age - 4; Arrest and Court Record - 3; Religion - 2; Retaliation - 2; National Origin - 1; and Race - 1. Many of the completed mediations also included charges on other protected bases.

Although monetary settlements were achieved in most agreements, almost all mediated agreements also 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 or 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.



## **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.

During FY 2016 the HCRC continued to be an active participant in the fair housing committee, comprised of representatives from the housing departments of each county and the State, HUD Honolulu Field Office, Hawaii Public Housing Authority, Legal Aid Society of Hawaii, Fair Housing Enforcement Program, Hawai'i Disability Rights Center, Hawaiian Homelands, and other housing-related private and public entities. The committee met to learn and discuss the latest fair housing cases, legal issues, and recent developments in fair housing from a federal, state and local perspective, to corroborate on local fair housing issues and concerns, and to work together to promote fair housing throughout the islands.

In FY 2016 the HCRC continued to work in partnership with the Medical-Legal Partnership for Children in Hawai'i (MLPCH) to engage in targeted outreach to Micronesian communities. The HCRC and MLPCH worked in collaboration with the U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity (HUD FHEO) and the U.S. Equal Employment Opportunity Commission (EEOC). These outreach efforts resulted in higher consciousness of civil rights and fair housing, leading directly to MLPCH handling an increased number of inquiries and intakes, several which led to the filing of fair housing complaints with the HCRC. The HCRC and MLPCH plan to follow up on this partnership outreach work in FY 2017, to develop and pilot a training for medical service providers at community health centers, on civil rights, disability, and reasonable accommodations.

The HCRC also worked with HUD, state and county housing agencies, community fair housing organizations, non-profit and for-profit organizations, and businesses to co-sponsor fair housing trainings on the Islands of Maui, Kaua'i, Hawai'i, and O'ahu. Representative trainees in the housing area included the Board of Realtors, Property Managers Association, National Association of Residential Property Managers, Community Associations Institute (CAI) Hawaii, Hawaii Center for Independent Living (HCIL), landlords, tenants, homeless veterans, emergency shelter and transitional housing management/staff, case management staff, housing assistance/referral management/staff, and various property management companies and community associations. An estimated 650+ people took advantage of these informative and free trainings.

During FY 2016 the HCRC also conducted outreach and/or participated in the following:

- Various classes, panels, and programs at the William S. Richardson School of Law, University of Hawaii
- Case reviews with law students in the Medical-Legal Partnership for Children in Hawaii legal clinic
- Informational exchanges with U.S. State Department Professional fellows (international civil rights leaders)
- Office visit by students of Le Jardin Academy
- Honolulu Pride Parade and Celebration
- Annual Martin Luther King, Jr. Holiday Parade and Festival
- Training by the Native Hawaiian Legal Corporation (NHLC) on Native Hawaiian Rights and History, followed by reciprocal training of NHLC staff on state and federal civil rights laws
- Statewide Fair Housing Month events, including proclamations by the offices of Governor Ige and Mayor Caldwell
- Training on arrest and court record discrimination at the 2015 Hawaii Criminal Justice Data Center symposium
- Local radio and television appearances

The HCRC website is part of a consolidated website that includes all divisions of the Department of Labor & Industrial Relations. The HCRC relies on the DLIR webmaster for maintenance and updating of the HCRC website, as well as ongoing efforts to improve user-friendliness of the site. The webmaster's detailed monthly index indicates that the site continues to attract broad public interest, particularly to those pages on administrative rules, case decisions, and the mediation program.

## **Caseload Statistics**

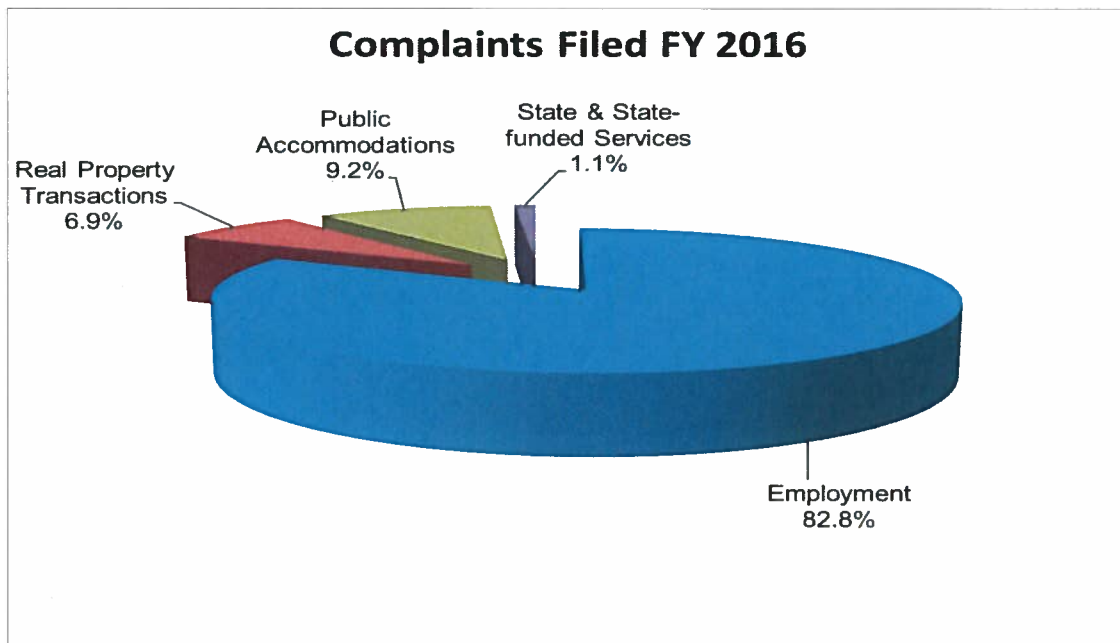
During FY 2016, the HCRC continued its emphasis on maintaining efficiency without sacrificing effective law enforcement.

### **Intake**

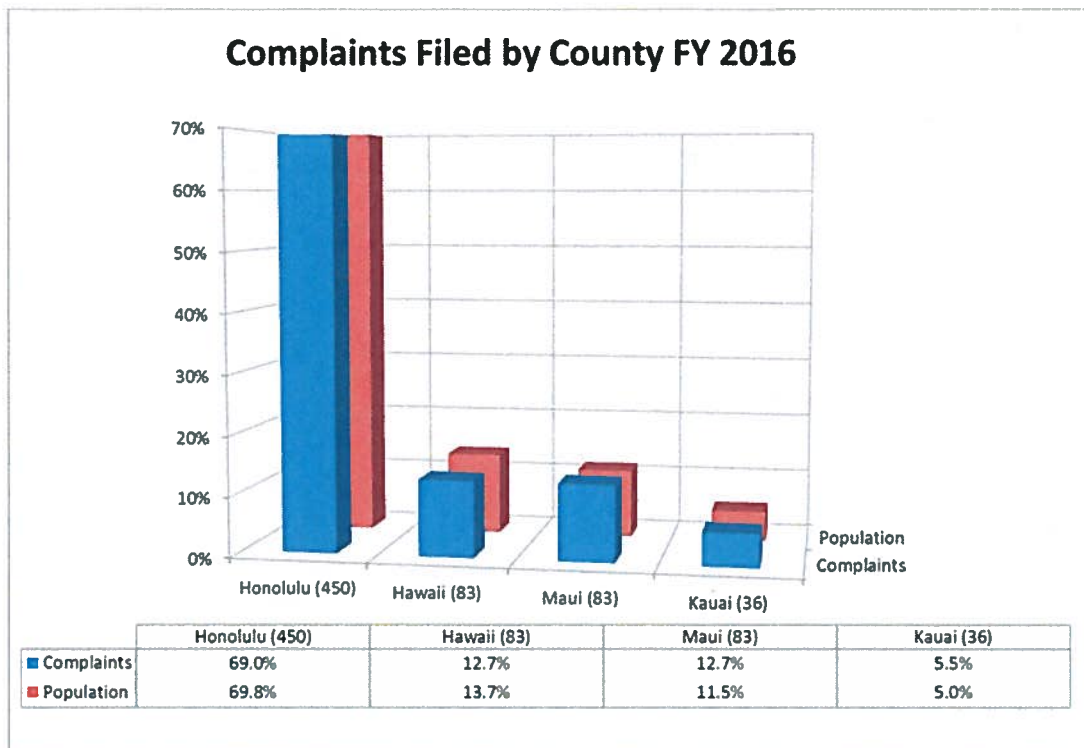
During FY 2016, the HCRC received 3,144 telephone and walk-in inquiries. HCRC investigators completed 711 intakes, and 652 discrimination complaints were filed with the HCRC, an average of 54.3 complaints a month.

Of the 652 complaints that were filed with the HCRC, 394 complaints originated with HCRC investigators (averaging 32.8 per month), and another 258 cases originated with the federal EEOC or HUD. These 258 cases were dual-filed under state law with the HCRC.

The 652 cases included 540 employment cases, 60 public accommodations cases, 45 real property transactions (housing) cases, and 7 access to state and state-funded services complaints. 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 bases; or c) the complainant's decision not to pursue the complaint.



The 652 charges accepted by the HCRC consisted of 450 Honolulu County complaints, 83 Hawai'i County complaints, 83 Maui County complaints, and 36 Kauai County complaints. The number of complaints filed from each county was consistent with its proportion of resident population in the state (Honolulu County 69.8%; Hawai'i County 13.7%; Maui County 11.5%; and Kauai County 5.0%).



## Closures<sup>4</sup>

HCRC investigators and attorneys closed 473 cases during FY 2016 (an increase of 141 cases from FY 2015), for an average closure rate of 39.4 cases per month, up from 27.7 cases per month in FY 2015. HCRC investigations resulted in cause determinations in 25 cases, up from 15 cause determinations in FY 2015. As of

### <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 conciliated, and, if conciliation fails, are docketed for hearing.

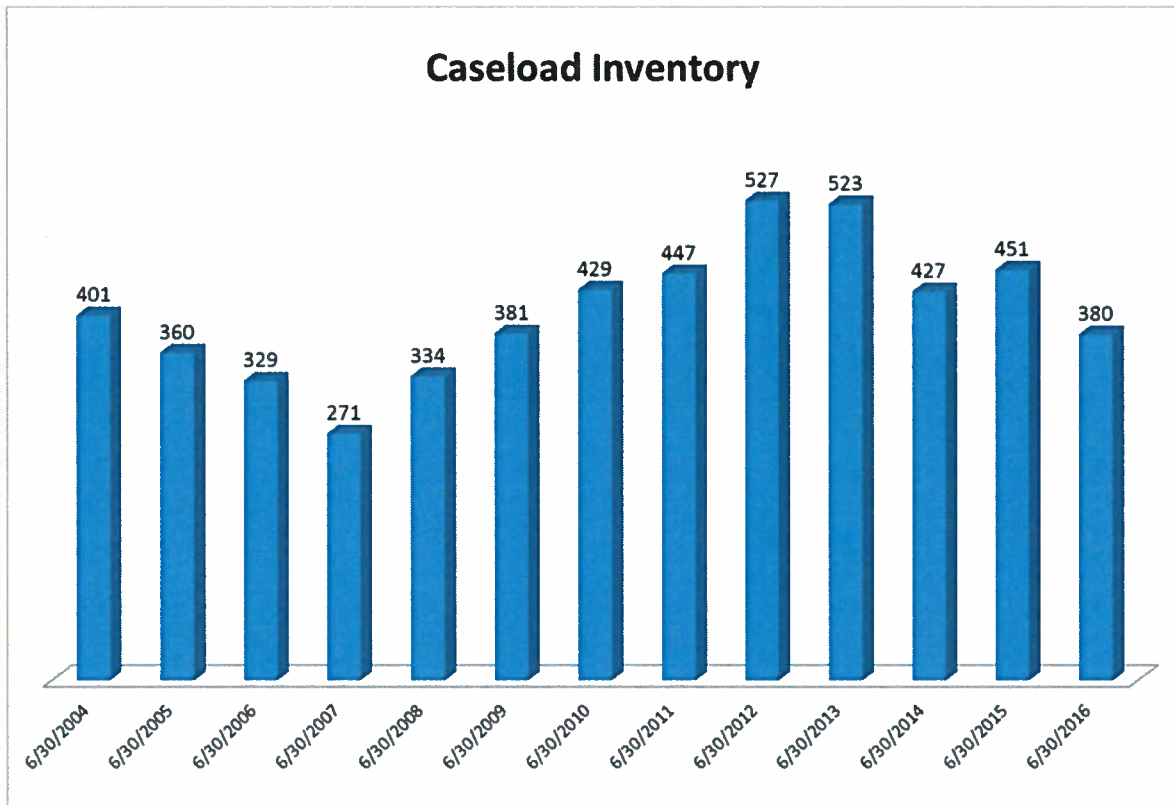
Historically, there is a relationship between the number of cause cases and predetermination settlements/resolutions between parties—the larger the number of notices of cause, the smaller the number of settlements/resolutions, and vice versa. Typically, cause determinations and settlements/resolutions 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 2016, HCRC investigations resulted in 25 cause determinations, and 73 cases were closed on the basis of pre-determination settlement or resolution between parties. 286 cases were closed on the basis of no-cause determinations upon completion of investigation. The ratio of cause determinations and predetermination settlements/resolutions (98) 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 (384) for this fiscal year is 25.5%.

June 30, 2016, there were 380 cases pending with HCRC investigators; on June 30, 2015, there were 451 pending cases.

The average period for case closure by investigators was 473 days, as compared to 498 days for FY 2015, 520 days for FY 2014, and 438 days for FY 2013. A review of this fiscal year shows the following reasons for investigative closures:

<b>Merit Closures</b>	<b>No. of Cases</b>	<b>% of Subtotal</b>	<b>% of Total Closures</b>
Resolved by Parties	45	11.78%	9.51%
Pre-Determination Settlements	28	7.33%	5.92%
Cases Resolved by Attorneys	23	6.02%	4.86%
No Cause Determinations	<u>286</u>	<u>74.87%</u>	<u>60.47%</u>
<b>Subtotal</b>	<b>382</b>	<b>100.0%</b>	<b>80.76%</b>
<b>Non-merit Closures</b>	<b>No. of Cases</b>	<b>% of Subtotal</b>	<b>% of Total Closures</b>
Complainant Elected Court Action	33	36.26%	6.98%
No Jurisdiction	5	5.49%	1.06%
Complaint Withdrawn	8	8.79%	1.69%
Complainant Not Available	10	10.99%	2.11%
No Significant Relief Available	4	4.40%	0.85%
Complainant Failed to Cooperate	27	29.67%	5.71%
Bankruptcy of Respondent	3	3.30%	0.63%
Administratively Closed	<u>1</u>	<u>1.10%</u>	<u>0.21%</u>
<b>Subtotal</b>	<b>91</b>	<b>100.00%</b>	<b>19.24%</b>
<b>Total Number of Closures</b>	<b>473</b>		<b>100.00%</b>



## Employment Cases

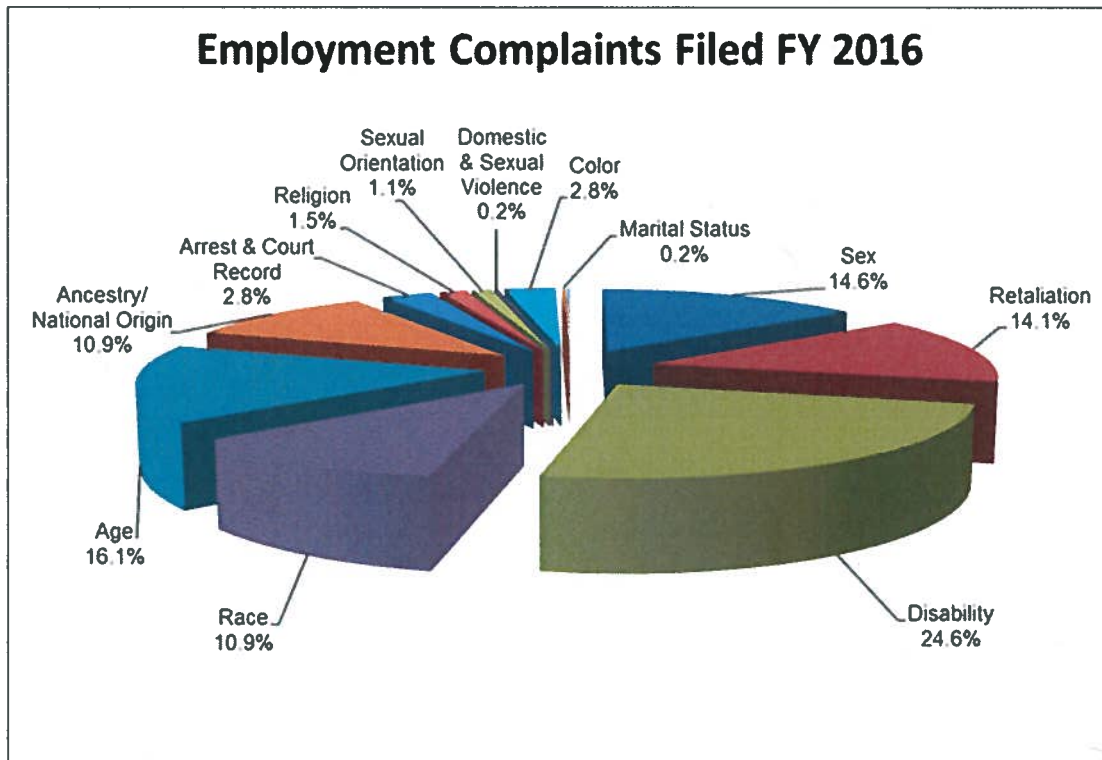
H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex (including gender identity or expression), sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, domestic or sexual violence victim status, credit history or credit report, assignment of income for child support obligations, National Guard participation, and breast feeding/expressing milk. Examples of such practices are outlined in H.R.S. §378-2. A complaint can contain more than one basis for the alleged discriminatory conduct, but for statistical purposes each complaint is identified by only one designated “primary basis”.

The HCRC has a work-share agreement with the EEOC. Under the work-share agreement, a case is filed with both agencies where there is concurrent jurisdiction. However, only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 540 employment cases were accepted by the HCRC. The HCRC was the intake agency for 296 of these cases, and the HCRC dual-filed another 244 cases originating with EEOC. Of the HCRC-originated cases, 83.8% were also filed with EEOC.

Of the 540 employment complaints filed, the primary bases most cited were disability, in 133 cases (24.6%); age, in 87 cases (16.1%); sex, in 79 cases (14.6%); retaliation, in 76 cases (14.1%); and ancestry/national origin and race, in 59 cases each (10.9%). Of the sex discrimination complaints, 10 (12.7% of all sex cases) alleged sexual harassment as the primary basis and 14 (17.7% of all sex cases) were primarily based on pregnancy.

The next most cited primary bases were arrest and court record and color, in 15 cases each (2.8%); religion, in 8 cases (1.5%); sexual orientation, in 6 cases (1.1%); and domestic violence or sexual violence victim status, marital status, and National Guard participation, in 1 case each (0.2%). There were no cases primarily based on credit history or credit report, breastfeeding, or child support obligations.

The case closure period averaged 508 days for the 349 employment cases that were closed or caused by HCRC investigators during FY 2016.

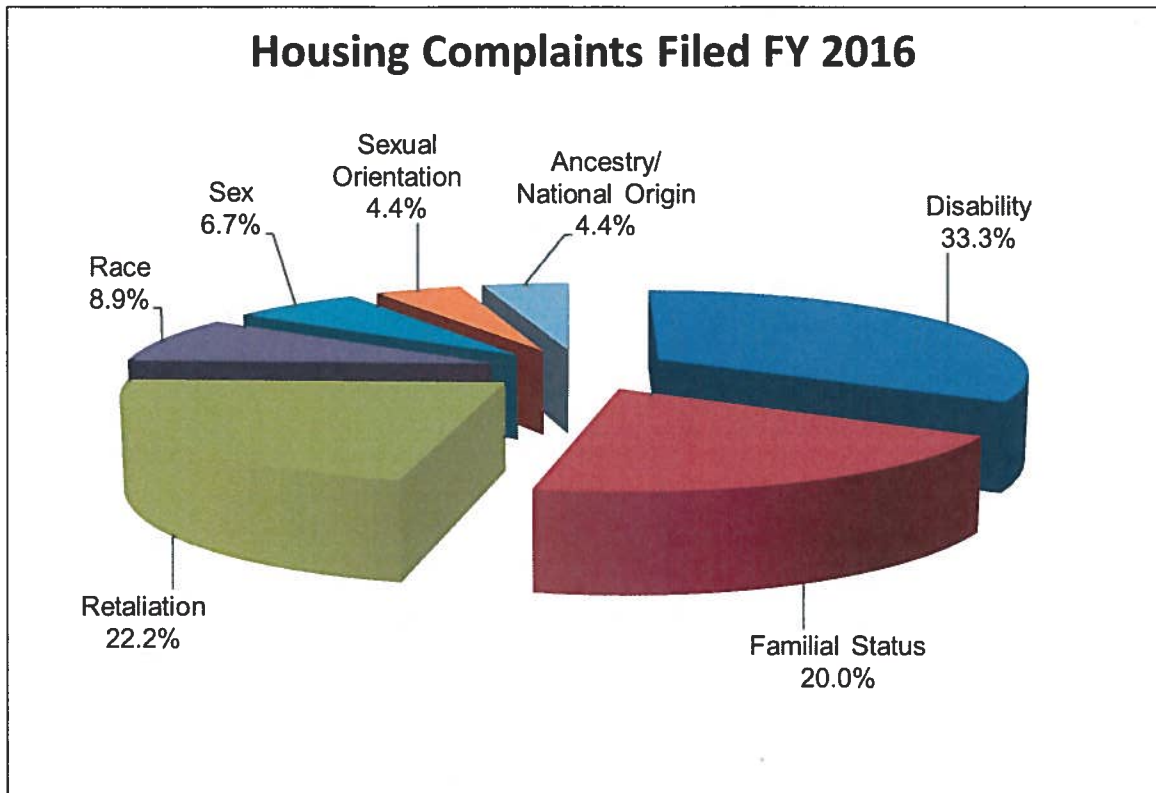


### Real Property Transactions (Housing) Cases

During FY 2016, the HCRC accepted 45 cases of housing discrimination. The primary basis most cited was disability, in 15 cases (33.3%); followed by retaliation, in 10 cases (22.2%); familial status, in 9 cases (20%); race, in 4 cases (8.9%); sex, in 3 cases (6.7%); and ancestry/national origin and sexual orientation, in 2 cases each (4.4%). There were no cases primarily based on

age, color, HIV infection, marital status, or religion.

Housing case closures averaged 264 days for the 47 cases closed or caused during FY 2016.



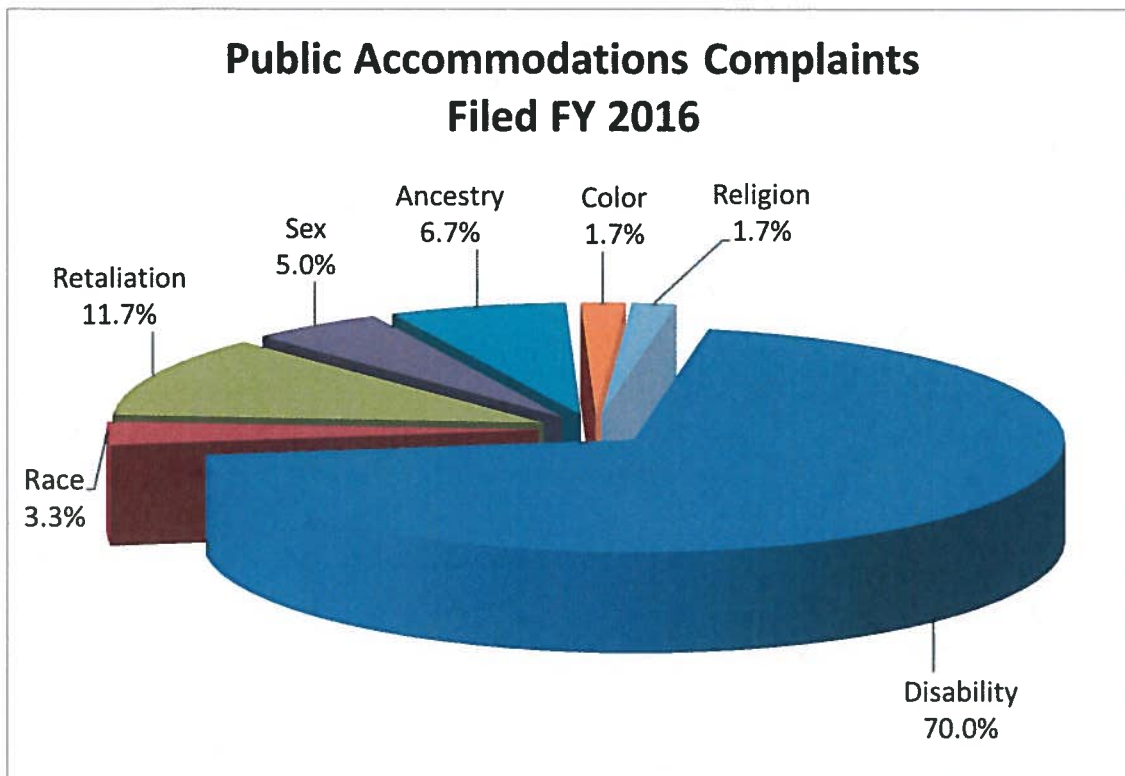
### Public Accommodations Cases

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, 60 new cases of public accommodations discrimination were accepted. Of these, the primary basis most cited was disability, in 42 cases (70.0%); followed by retaliation, in 7 cases (11.7%); ancestry, in 4 cases (6.7%); sex, in 3 cases (5.0%); race, in 2 cases (3.3%); and color and religion, in 1 case each (1.7%). There were no cases primarily based on sexual orientation.

Public accommodations case closures averaged 384 days for the 71 cases closed or caused during FY 2016.





### **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).

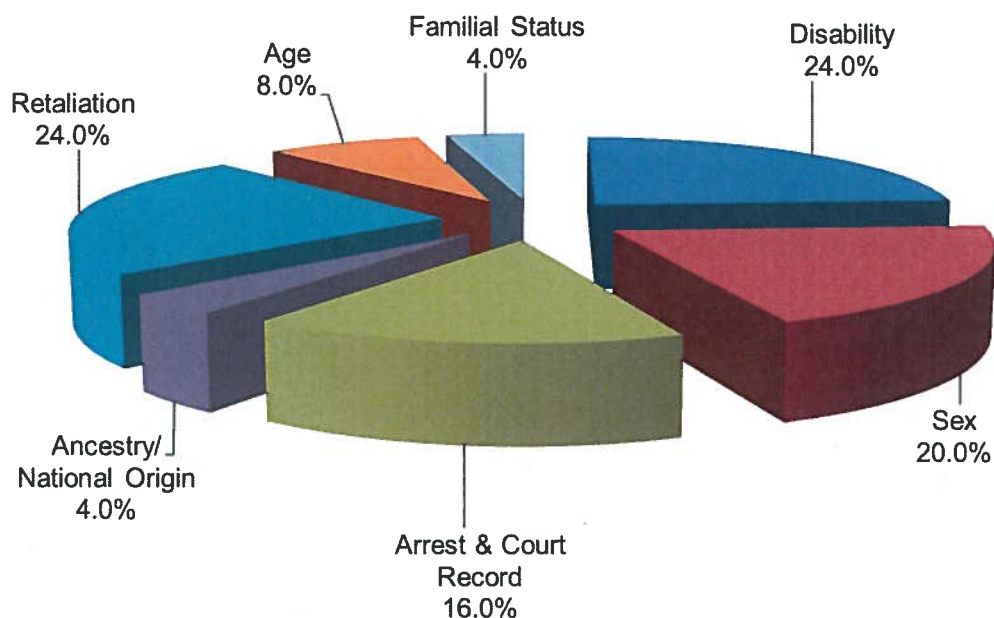
During FY 2016, there were 7 cases filed under § 368-1.5. There were 6 cases filed under § 368-1.5 that closed during the fiscal year, averaging 342 days per closure.

### **Cause Cases**

When an 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 2016, 25 recommendations for cause were brought forward for legal action. Of these cases, 18 (72%) were employment cases, 5 (20%) were housing cases, and 2 (8%) were public accommodations cases.

Of the 25 investigations with a cause recommendation, the primary bases most cited were disability and retaliation, in 6 cases each (24%); followed by sex, in 5 cases (20%); arrest and court record, in 4 cases (16%); age, in 2 cases (8%); and ancestry/national origin, in 1 case (4%).

## Cause Determinations FY 2016



## 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 2016 the HCRC continued to successfully obtain monetary relief through settlement of complaints. In the 23 cause cases that were settled, HCRC attorneys obtained monetary settlements totaling \$565,578. Of the 73 cases settled prior to an investigative finding, 14 of those cases involved confidential settlements, the terms of which were not disclosed to the HCRC. Of the remaining 59 cases settled prior to an investigative finding, monetary relief totaled \$324,615. This figure includes pre-determination settlements obtained through HCRC investigators and settlements between the parties (\$91,130), as well as investigative settlements obtained through the HCRC mediation program (\$233,485). Collectively the HCRC's known monetary settlements for FY 2016 totaled \$890,193. Since the settlement terms are unknown for 14 closed cases, the actual total figure for all monetary settlements in FY 2016 is probably significantly higher than \$890,193.

In addition to monetary relief, significant affirmative relief was 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 contain various types of affirmative relief including the development and implementation of non-discrimination policies, employee and supervisor training on non-discrimination policies, posting non-discrimination policies, and publishing notices informing the public of the HCRC's role in enforcing state non-discrimination laws.

In some instances, non-monetary relief can be an important element of a settlement. For example, some complainants have received a letter 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 were resolved when an employer, housing provider, or public accommodation corrected an unlawful discriminatory policy or practice after notice of the violation.

During FY 2016, 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 obtained during FY 2016:

- The complainant in an employment case alleged that she was suspended and terminated due to her status as a victim of domestic or sexual violence. The HCRC investigated the case and issued a Notice of Cause. The case was settled in conciliation for payment of \$95,000 to the complainant, revisions to the respondent's non-discrimination policy, and training for the respondent's staff.
- An employment case involved a complainant who needed to take leave from work because of her difficult pregnancy. She alleged that her employer failed to allow her to take sufficient leave as required by her doctor, and then terminated her while she was still on pregnancy-related medical leave. The HCRC investigated the case and issued a Notice of Cause. The case was settled in conciliation for a payment of \$50,000 to the complainant, a neutral letter of reference, amendment of the employer's leave policy, posting of the HCRC's pregnancy flyer at all business locations, and training of staff at all business locations.
- The complainant in a housing case alleged that she was subjected to discrimination on the basis of her disability with regard to the respondent's handling of her request for an assistance animal as a reasonable accommodation. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included payment of \$9,700 to the complainant, adoption of a non-discrimination policy, posting of

the non-discrimination policy on the property and the respondent's website, and fair housing training for the respondents' staff.

- The complainant in an employment case alleged that he was subjected to workplace harassment on the basis of his race and sex, and subsequently forced to quit. The HCRC investigated the case and issued a Notice of Cause. The case was settled in conciliation for a payment of \$68,000 to the complainant, adoption of a non-discrimination policy, and training of the respondent's staff.
- The complainant in a public accommodations case alleged that he was subjected to discrimination on the basis of his disability by being denied an American Sign Language interpreter during his vacation on a cruise ship. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included repayment of the cost of the complainant's cruise and revisions to the respondent's policy with regard to customer requests for interpreters.

## **HCRC Warning Letters**

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

During FY 2016 two cases were docketed for contested case hearing and both were settled.

## Appeals

Research Institute for Hawaii USA v. Bate, SCAP-15-0000783. This important case involves the integrity and viability of the Commission's contested case hearing process when a respondent appeals a Commission final decision and order and requests a jury trial. On August 26, 2014 the Commission issued a final decision and order in the underlying contested case and held that Respondents were liable for harassing and terminating Complainant Kay Lorraine Bate based on her religion and sex, and awarded compensatory and punitive damages as well as equitable relief.

Respondents appealed to the First Circuit Court, where the scope of Respondents' right to jury trial pursuant to SCI Management Corp. v. Sims, 101 Hawai'i 438 (2003) was at issue. Respondents argued that pursuant to SCI they are entitled to a completely new proceeding on all claims and should be allowed to re-open discovery, assert new defenses, call new witnesses and present other additional evidence. The Commission and Complainant asserted that pursuant to SCI respondents are not entitled to a jury trial on the termination claims because the Commission only awarded equitable relief for those claims. In addition, the Commission and Complainant argued that because the action is an appeal, the parties are not allowed to conduct further discovery and are limited to the same claims, defenses, witnesses and evidence that were presented at the contested case hearing.

On October 8, 2015 the First Circuit Court entered an order allowing Respondents to conduct limited additional discovery on the grounds that Respondents were prejudiced by certain discovery errors made during the contested case. The court granted Respondents' motion to conduct an independent medical examination of Complainant and production of her expert medical witness' file relating to her case. On October 15, 2015 the court issued a Case Management Order allowing a jury trial only as to the issues in which legal relief was granted by the Commission and limiting the action to the same claims and defenses, witnesses and evidence that were presented at the contested case. The Case Management Order, however, allowed the limited additional discovery stated in its October 8, 2015 order only if Complainant's medical expert was recalled.

The parties filed cross appeals of these two circuit court orders to the Hawai'i Intermediate Court of Appeals. After briefing was completed, on July 15, 2016 the Commission and Complainant filed an application to transfer the case directly to the Hawai'i Supreme Court. The Hawai'i Supreme Court granted the application on August 12, 2016 and oral arguments are pending.

## **Legislation**

One bill relating to civil rights was passed during the 2016 Legislative Session and enacted into law.

HB 2084, enacted as Act 135, prohibits health insurers from discriminating on the basis of actual gender identity or perceived gender identity. Act 135 amends Hawaii Revised Statutes chapter 431, article 10A (accident and health or sickness insurance, chapter 432, article 1 (mutual benefit societies), and chapter 432D (health maintenance organizations), to prohibit the denial, exclusion, or limitation of health care services or treatment of the basis of actual or perceived gender identity. Act 135 also applies the prohibition against discrimination to all health benefit plans under the state Employer-Union Health Benefits Trust Fund (EUTF) under HRS chapter 87A.

## **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 (including gender identity and expression), 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 who are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and their commitment to preserve the civil rights of all individuals.

The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes. During FY 2016 the HCRC had 26 positions (22 permanent and 4 temporary), 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>

Where appropriate, after a complaint is filed with the HCRC, 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, analyzes documents, and contacts and interviews witnesses. Some witnesses 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 course of 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 complaint 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 hearing 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-jurisdictional 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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- 1 "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, arrest and court record or credit history.
  - 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.

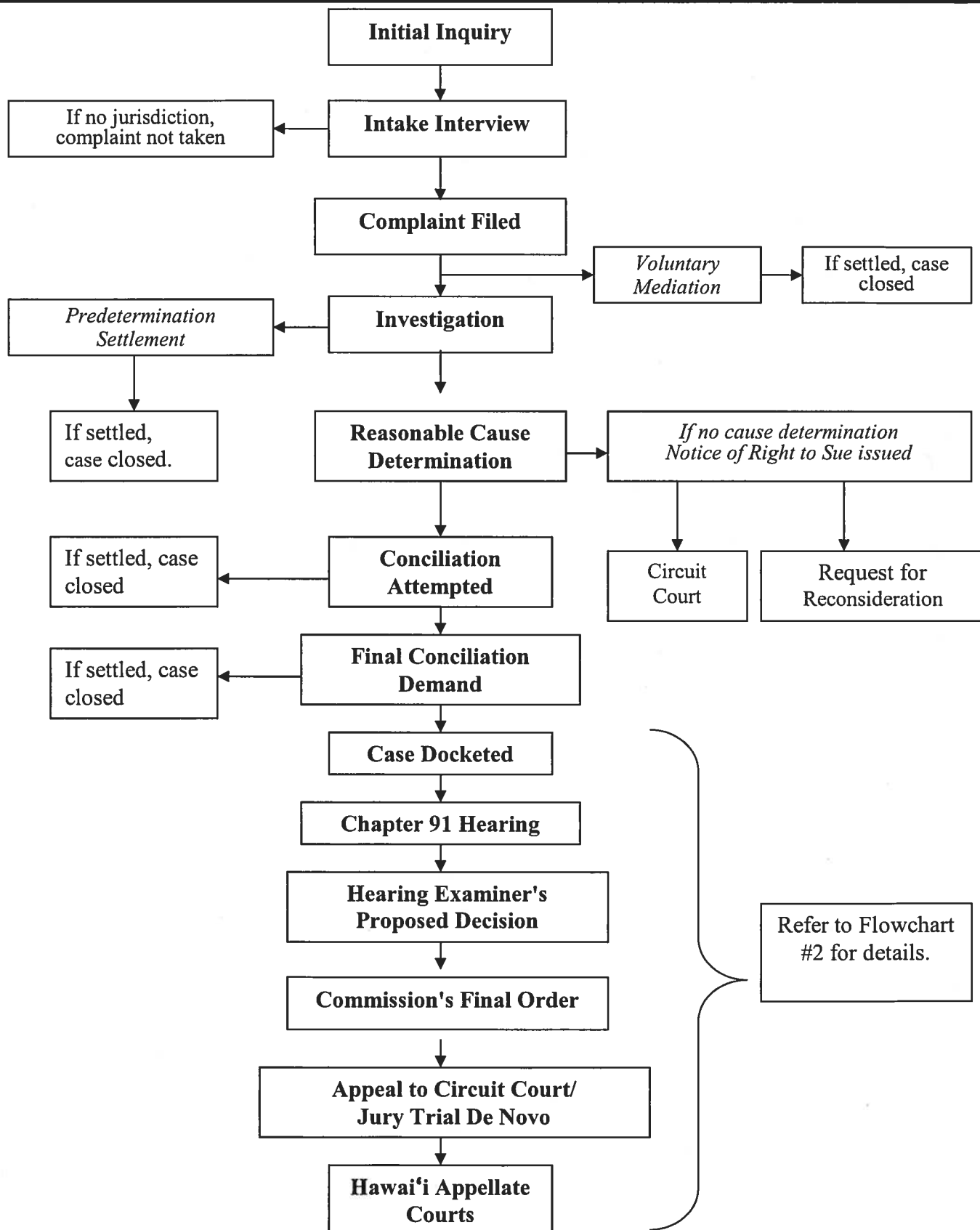
<sup>3</sup> Complaints filed with the HCRC usually involve a discrete act – such as termination, eviction, demotion, etc. – or involve acts that are ongoing and constitute a continuing violation. An example of a “continuing violation” is sexual harassment that began more than 180 days before the complaint 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 2016, of all 473 investigative and attorney case closures, 6.98% (33) were closed on the basis of the complainant electing court action. The remaining cases (440) were closed on the following bases: in 60.47% of the cases (286), the Executive Director found no cause and dismissed the complaint, 15.43% (73) of the investigation cases were settled prior to a cause determination or were resolved by the parties, 4.86% (23) of the cases were resolved by staff attorneys, and the remaining 12.26% of the cases (58) were closed because there was no jurisdiction, the complaint was withdrawn, the complainant was unavailable and could not be located, the complainant failed to cooperate, the complainant failed to accept a just offer of settlement, no significant relief was available, or due to administrative closure."

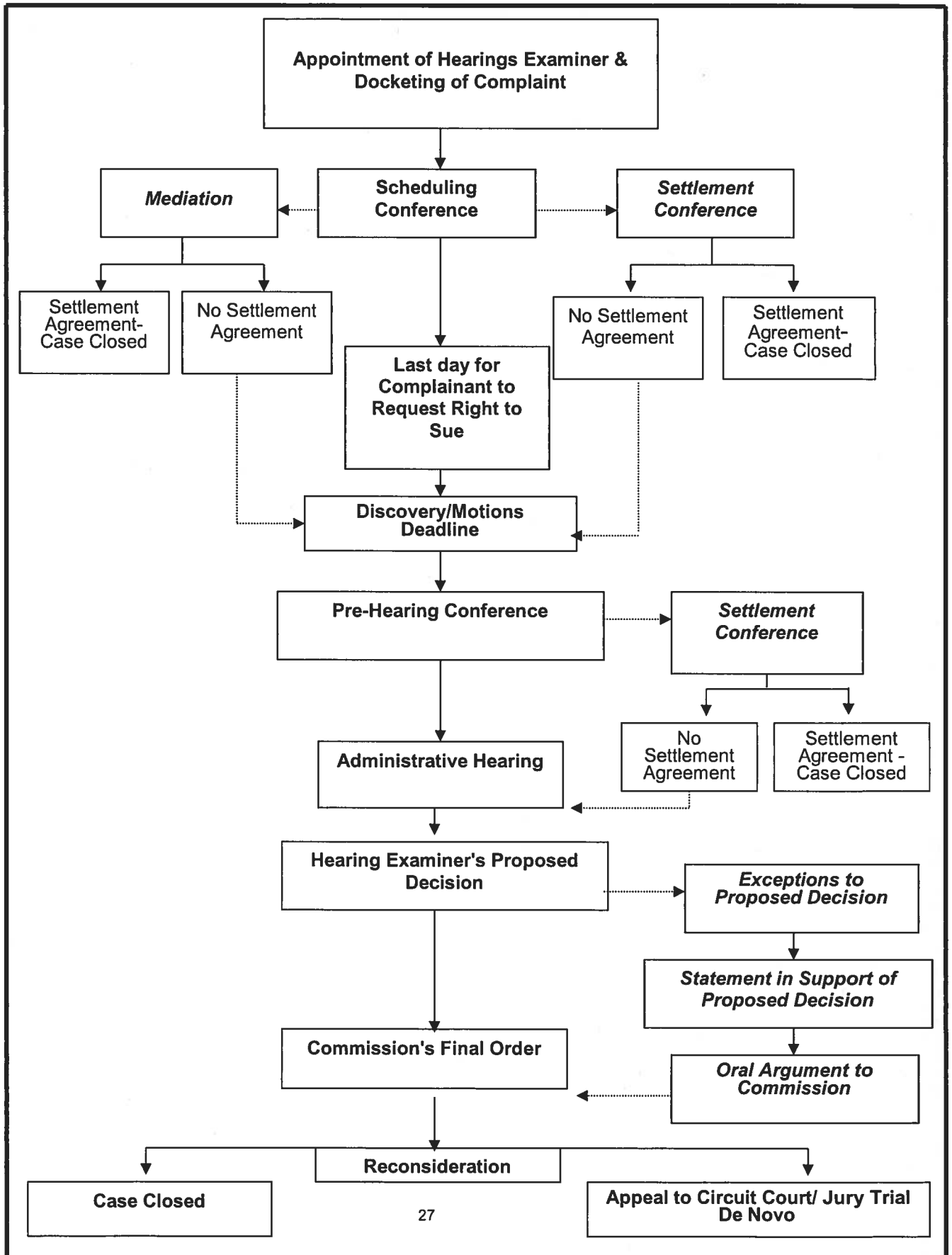
<sup>5</sup> The HCRC enforcement, hearing and appeal procedures are illustrated in Flowchart # 1. In *SCI Management Corporation, et. al. v. Darryllynne Sims, et. al.*, 101 Hawai'i 438, 71 P.3d 389 (2003), the Hawai'i Supreme Court held that "a respondent who appeals a final order of the HCRC, pursuant 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." This does not apply to respondents in housing cases, who can elect to take the case to circuit court after a finding of reasonable cause under HRS §515-9.

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

## HCRC Procedural Flowchart #1



## HCRC Contested Case Flowchart #2



## **HCRC Commissioners**

### **Linda Hamilton Krieger Chair (term 2011-2019)**

Linda Hamilton Krieger grew up in Hawai'i and returned home in 2007 to join the faculty at the William S. Richardson School of Law as a Professor of Law and Director of the Ulu Lehua Scholars Program. Professor Krieger received a BA degree from Stanford University and is a graduate of New York University Law School. Prior to teaching, Professor Krieger worked for 13 years as a civil rights lawyer. From 1980-1986 she was a Staff Attorney and Director of Clinical Programs at the Employment Law Center of the Legal Aid Society of San Francisco, and from 1985-1991 she was a Senior Staff Attorney for the EEOC, San Francisco Regional Office. During that period, she litigated a number of significant state and federal sex and race discrimination cases in the areas of pregnancy discrimination and sexual harassment. She also played a significant role in drafting state and federal legislation in these subject matter areas. Professor Krieger has also published numerous articles on Title VII of the Civil Rights Act of 1964, disability discrimination, affirmative action, international comparative equality law and policy, and theories of law and social change.

### **Raymund Liongson Commissioner (term 2011–2015), served as holdover through June 2016**

Raymund Liongson is an Associate Professor and Coordinator of the Philippine Studies Program at Leeward Community College and the director of Sulong Aral, a program funded by the U.S. Department of Education to help students of Filipino ancestry finish college. He is a board member of the Filipino Community Center, and is also a member and past president of the Filipino Coalition for Solidarity, an advocacy group for Filipino American W.W. II veterans, immigrants and workers in the areas of discrimination, language access, domestic violence and sexual harassment. In 2010, Professor Liongson spearheaded Filipino census fairs in Waipahu and Kalihi to encourage those communities to participate in the 2010 census. In 2009, he was part of a fact-finding commission to investigate labor and management practices at the Pacific Beach Hotel and has been active in promoting job security, wage increases and better benefits for Filipino hotel workers. Professor Liongson received his M.A. in education from Northwestern University in the Philippines and Ph.D. in education from the University of the Philippines.

**Kim Coco Iwamoto****Commissioner, (term 2012-2016) serving as holdover**

Kim Coco Iwamoto is property manager/owner of Affordable Quality Apartment Rentals (dba AQUA Rentals, LLC). She most recently served the people of Hawai'i as an elected member of the State Board of Education from December 2006 – April 2011. Prior to this, Ms. Iwamoto was Managing Attorney at Volunteer Legal Services Hawai'i and a volunteer at Legal Aid Society of Hawai'i. Before becoming an attorney, Ms. Iwamoto interned at the Hawai'i Intermediate Court of Appeals, the New Mexico Supreme Court, the San Francisco Human Rights Commission and the Hawai'i Civil Rights Commission. Ms. Iwamoto was born on the island of Kauai and raised on Oahu. She is a graduate of St. Louis High School, received her BA in Creative Writing from San Francisco State University and her Juris Doctorate from University of New Mexico.

**Wallace T. Fukunaga****Commissioner, (term 2012-2016), served as holdover through August 2016**

Wallace Fukunaga is currently the Interim Executive Director of the Counseling and Spiritual Care Center of Hawai'i. Prior to this, Rev. Fukunaga was a campus minister and lecturer at UH Manoa and was active in several land, anti-war and civil rights issues. Later Rev. Fukunaga became a legislative liaison for the Honolulu Community Action Program, advocating on behalf of the poor, and was an entrepreneur, serving as President of the self-start corporation, Northshore Resources, Inc., which was named "Small Business of the Year" by WorkHawaii. In 1990 he returned to the ministry and served various congregations on Oahu and Kauai. He also served on the Board of Trustees of Pacific School of Religion, the Board of Governors of the Japanese Cultural Center of Hawai'i, and the Boards of Directors of the Japanese American Citizens League and Interfaith Alliance of Hawai'i. Rev. Fukunaga was born in Hawai'i and graduated from McKinley High School. He received his BA from Harvard University, a Master of Divinity from Princeton Theological Seminary, and a Doctor of Ministry from the Pacific School of Religion.

**Artemio Constantino Baxa****Commissioner, (term 2013-2017)**

Artemio C. Baxa first practiced law in the Philippines. He received his law degree from the Ateneo De Manila University, a masters in comparative law from the University of Chicago Law School, and a juris doctorate at the University of Hawai'i William S. Richardson School of Law. In Hawai'i, Mr. Baxa was in private law practice with Lowenthal, August and Graham for five years and

served as a Maui County deputy prosecutor for more than twenty five years. He is a retired Second Circuit Court judge, and appellate attorney with the Maui Prosecutor's Office. Mr. Baxa served as President of the Maui County Bar Association, and as an officer/board director in various civic and community organizations, including Vice-President of the United Filipino Council of Hawai'i, and Board member on Maui Catholic Charities of Hawai'i (present), Maui County Charter Commission (2011-2012), and the University of Hawai'i Board of Regents (2008-2013). Mr. Baxa's interest in civil rights began when he worked as a bellhop; when he served minorities and other underprivileged populations as a Community Aide, Child Care and Transportation Services Director, and Community Improvement and Development Coordinator in an anti-poverty program (MEO); as Maui County's Deputy Director of Housing and Human Concerns; and when he prepared the report, "Filipino Immigration and Social Challenges in Maui County (1972)", a comprehensive analysis of a countrywide survey of the needs and problems of Filipino immigrants in Maui County.

## **HCRC Staff**

During FY 2016 the HCRC staff consisted of 26 positions:\*

- **Enforcement Staff:**
  - Executive Director
  - Deputy Executive Director
  - Enforcement Attorneys (4)
  - Program Specialist – Mediation Coordinator
  - Investigator-Supervisors V (2)
  - Investigator IV (8)
  - Investigator III-IV (temporary) (2)
  - Secretary III
  - Office Assistants (III-IV) (4)
- **Adjudication Staff:**
  - Chief Counsel
  - Secretary II

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\* Staffing levels reflect permanent (22) and temporary (4) positions which were either filled or vacant during FY 2016.