



HAWAII CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 • PHONE: 586-8636 FAX: 586-8655 TDD: 586-8692

MINUTES

Hawai'i Civil Rights Commission Office

January 26, 2015

1:30 p.m.

Present: Linda Krieger, Raymund Liongson, Kim Coco Iwamoto, and Wally Fukunaga, Commissioners; Livia Wang, Bill Hoshijo, and Marcus Kawatachi, Staff; Francine Wai, Executive Director of DCAB, and Peter Fritz, member of the public, were also in attendance.

Artemio Baxa, Commissioner, excused.

Chair Linda Krieger called the meeting to order.

Approval of Minutes

The minutes of the December 15, 2014, meeting were approved. (m/s/p Fukunaga/ Iwamoto; all in favor).

Executive Director's Report

Deputy Executive Director (DED) Marcus Kawatachi's reported on FY 2015 HCRC Mediation Program Year-to-Date progress, noting that one additional case had been mediated with no settlement agreement. He also reported that the HCRC mediation coordinator position had been temporarily filled on an 89 day appointment, pending recruitment for the position.

Summary & Details (7/1/14 through 1/26/15)

Referrals:	11
Dispositions:	19
Settlements:	10
Non-agreements:	9
Settlement Rate:	52.6 %
Employment cases settled:	10
Non-employment cases settled:	0
Dual-filed (EEOC/HCRC) settlements:	8
State-only settlements:	2

Primary Bases for Complaints Settled in Mediation

Sex (3 pregnancy & 1 SH)	6 (3 pregnancy and 3 sexual harassment)
Race	2
Ancestry/National Origin	1
Disability	1

Dispositions by Mediation Center

Mediation Center of the Pacific	5/11	(settlement rate 45.5 %)
Kauai Economic Opportunity, Inc.	2/3	(settlement rate 66.7%)
West Hawaii Mediation Center	1/2	(settlement rate 50 %)
Private Mediators	2/2	(settlement rate 100 %)
Ku'ikahi Mediation Services (Hilo)	0/1	(settlement rate 0 %)
Mediation Services of Maui	0/0	(settlement rate 0%)
OVERALL	10/19	(settlement rate 52.6%)

DED Kawatachi presented a data and production report showing caseload data through January 26, 2015.

As of January 26, 2015, the report showed 364 open cases, a decrease of 7 cases from the number reported as of December 15, 2014. Of those, 3 (0.8%) were filed in 2009, 11 (3.%) filed in 2010, 23 (6.3%) filed in 2011, 46 (12.6%) in 2012, 93 (25.6%) in 2013, 175 (48.14%) in 2014, and 13 (3.6%) in 2015. DED Kawatachi also reported that the HCRC had filled two permanent investigator positions, filling the full complement of eight permanent investigator positions.

The report also showed a breakdown of the status of the open cases by investigation stage.

	2009	2010	2011	2012	2013	2014	2015	Total
Housing Cases	0	0	1	5	2	13	2	23
Intake Stage	0	0	2	0	46	129	11	188
Mediation	0	0	0	1	5	24	0	30
Pending Assignment	0	2	13	36	30	1	0	82
Active Investigation	3	9	7	4	10	8	0	41
TOTAL	3	11	23	46	93	175	13	364

It was reported that: 23.6% of all investigation cases were 2 years old or older (from date of filing); 11.5% were over 18 months but less than 2 years old; 16.0 % were over 12 months but less than 18 months old; 17.3% were over 6 months but less than 12 months old, and 31.6% were 6 months old or less.

DED Kawatachi reported that no administrative subpoenas were issued.

Legislation -2015 Session

Executive Director (ED) Bill Hoshijo reported that the HCRC bill submitted for consideration was not included in the Administration Package of legislation. This bill would provide for Executive Director discretion to either issue a final demand or dismiss the complaint and issue a notice of right to sue in

cause cases after failed conciliation efforts.

ED Hoshijo also reported that the HCRC's add-on (wish-list) budget requests were not included in the Administration Budget, so the HCRC fiscal biennium administration budget request was for a status quo budget.

The Commissioners expressed concern that the new administration did not give favorable consideration to any of the HCRC requests, for inclusion of legislation or budget request in its administration package.

The Commissioners reviewed Legislative Summary 1, with staff recommendations prepared by CC Wang, and decided on HCRC positions as follows:

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HB 683 HCRC – Executive Director Authority to Dismiss Complaints SB 362

Amends HRS §368-13 to authorize the Executive Director to exercise discretion to either issue a final demand and docket for hearing or dismiss a complaint and issue a notice to sue in cause cases after failed conciliation efforts.

Discussion: Chair Krieger explained the purpose of the bill, to provide for prosecutorial discretion and allow for better and more efficient use of enforcement resources. She also offered and urged staff to call on Commissioners to brief legislators and legislative caucuses on bills affecting the HCRC and the laws it enforces.

HCRC position: Support. (m/s/p Iwamoto/Liongson; all).

EMPLOYMENT

HB 244 Employment Discrimination; Labor; Smoking SB 1005

Amends H.R.S. § 378-2((a) to prohibit discrimination against, or terminating an employee solely for the employee's use of tobacco products outside of working hours. Exempts organizations whose primary purpose is to discourage the use of tobacco products by the general public.

Discussion: Staff initially recommended taking no position on the bill, but expression of concern for the placement of proposed protection under HRS chapter 378, because it was different from other protected bases under HCRC jurisdiction. The staff recommendation was not adopted. Chair Krieger suggested opposition to the bill, because of concern over piecemeal regulation of employee behavior outside of work, and resource constraints of the HCRC.

HCRC position: Oppose. The Commission opposes piecemeal regulation of employee behavior outside of working hours; should not be placed under HCRC jurisdiction because of budget constraints. (m/s/p Krieger/Fukunaga; all).

HB 536 Government Contractors; Pay Equity SB 728

Amends HRS Ch. 103 to require government contractors to give equal pay for men and women who do similar work and requires government contractors to report wages paid to employees by gender. Also provides for penalties for pay equity violations.

Discussion: Chair Krieger recommended that this language should be deleted from the bill, "... except where such payment is made pursuant to a differential based on any factor other than gender." That language should be stricken, because it allows consideration of prior salary, which could have been set in a discriminatory fashion.

HCRC position: Support with proposed amendments to delete last sentence in proposed § 103-__ (a) on page 3. Similar to protections under OFCCP; keep enforcement under HRS Ch. 103. (m/s/p Krieger/Iwamoto; all).

HB 561 Personal Social Media Account; Privacy, Employment
SB 1269

Amends HRS Ch. 378 Part I to prohibit employers from requiring or requesting employees and applicants to grant access to personal social media account user names and passwords

Discussion: Staff initially recommended taking no position on the bill, but expressing concern that it involved a privacy issue which should not be placed under HCRC jurisdiction. The Commissioners wanted to take a position on the bill. Commissioner Kim Coco Iwamoto emphasized that many people post protected information on their personal social media, which employers should not have access to. Chair Krieger noted that at pre-employment stage, employer access could be an unlawful pre-offer inquiry under current law. It was agreed that subsection (e) of the proposed statute should be deleted, because it could affect the employers obligation to investigate prohibited discriminatory harassment.

HCRC position: Support intent with amendment to delete subsection (e) and urge placement in a new part of HRS Ch. 378 and provide direct cause of action in court with injunctive relief and attorneys' fees. In pre-employment and employment context, information related to protected bases gained from social media accounts is already prohibited by HRS § 378-2. (m/s/p Krieger/Fukunaga; all).

HB 684 Employer Liability; Adding Federal Law Faragher/Ellerth Affirmative Defense
SB 1012

Amends HRS Chapter 378 to allow affirmative defense for supervisor discriminatory conduct if supervisor's conduct does not result in adverse tangible employment action. "Adverse tangible employment action" defined as including, but not limited to, firing, failure to promote, assigning of significantly different responsibilities, and significantly reducing benefits of an employee. "Supervisor" defined as a person who is employed and empowered by the employer to take tangible employment actions towards the employee (from U.S. Supreme Ct. decision in *Vance v. Ball State*.)

Discussion: Chair Krieger explained the federal *Faragher/Ellerth* affirmative defense, noting that it has had a disastrous impact on victims of sexual and other prohibited harassment bringing claims under federal law, even in cases in which an employee suffered a sexual assault at the hands of a supervisor, where there was no "adverse tangible employment action." ED Hoshijo and CC Wang discussed the

impact of importing the federal *Faragher/Ellerth* concept of “adverse tangible employment action” and the *Vance* federal definition of “supervisor.”

HCRC Position: Strongly oppose. Current administrative rules provide strict vicarious liability (i.e., no affirmative defense) for supervisor harassment. These rules were recently upheld by the Hawai‘i Supreme Court in the *Lales* case, and the Commission recently rejected such changes to its administrative rules. *Lales* also held that individual supervisors could not be liable, so liability now rests entirely with employers. If this is a concern, HRS 378-1 should be amended to define “employer” to include agents and supervisory employees. Also oppose definition of “supervisory employee” so narrowly; it should include persons who direct the day to day activities of employees. The proposed amendments would also conflict with the intent of HRS § 378-3(10), which allows an employee to bypass the HCRC complaint process and directly file a civil action for sexual harassment or sexual assault in circuit court. (m/s/p Iwamoto/Liongson; all).

HOUSING

HB 25 Discrimination in Rental Transactions; Source of Income

Amends HRS Chapter 521 (Residential Landlord Tenant Code) to prohibit discrimination in the rental of residential property based on lawful source of income.

HCRC position: Support. Lawful public sources of income include Section 8 vouchers, social security disability insurance, unemployment compensation, food stamps, temporary assistance to needy families; lawful private sources of income can include special needs trusts, and income from legal settlements. The majority of people who receive rental assistance are people with disabilities, single female heads of households, families with children and members of certain minority groups. Therefore, there is a correlation between those that are protected under our fair housing law and those who receive rental assistance. 13 other states have source of income protection statutes. (m/s/p Iwamoto/Liongson; all).

HB 31 Condominiums; Medical Marijuana; Discrimination

Amends HRS Chapter 421J by voiding any condominium or community association document provision that discriminates against a person who holds a valid medical marijuana certificate and resides in a condominium property regime of planned community association unless the documents prohibit smoking tobacco and the medical marijuana is used by means of smoking

HCRC position: Oppose exemption for condominium or community associations from HRS § 515-3 reasonable accommodation provisions that would allow smoking of medical marijuana for persons with disabilities. (m/s/p Fukunaga/Krieger; all).

SB 644 False representation of animal as an assistance animal in housing

Amends HRS § 711 to make it a misdemeanor for any person to falsely represent that an animal is an assistance animal needed as a reasonable accommodation in housing.

Discussion: ED Hoshijo explained that the bill would have a chilling effect on the right of persons with disabilities to request a reasonable accommodation under federal and state fair housing law. DCAB Executive Director Francine Wai noted that in last year's HCRC rulemaking process, DCAB had asked how the rules would be enforced, whether a housing provider could ask for reasonable verification.

HCRC position: Strongly oppose. Housing providers can just deny the accommodation if the animal is not an assistance animal needed by a person with a disability as a reasonable accommodation. May have a chilling effect on residents who want to ask for accommodations if mistaken representations are criminalized. (m/s/p Fukunaga/Krieger; all).

PUBLIC ACCOMMODATIONS

**HB 738 Misrepresentation of representing oneself as the owner or trainer of a
SB 760 service dog**

Amends HRS Chapter 347 to make it a misdemeanor for any person to misrepresent themselves as the owner or trainer of a service dog.

Discussion: Staff gave a brief explanation of the definition of "service animal," and the limited scope of inquiry allowed under federal law, Titles II and III of the ADA; contrasted with the use of "assistance animal" as a reasonable accommodation under other state and federal laws, including the federal Fair Housing Act.

HCRC position: Oppose. The bill would encourage prohibited inquiries. Also could result in arrest of people using assistance animals who might mischaracterize their animals as service dogs. (m/s/p Iwamoto/Liongson; all).

SB 700 Exemption for non-profit corporations from HRS Ch. 489

Amends HRS Ch. 489 to exclude non-profit corporations as defined in HRS Ch. 414D (i.e., all non-profit corporations) from definition of "place of public accommodation" and exempts them from requirements of chapter.

HCRC position: Strongly oppose. Many non-profits operate services and business that are offered to the general public and they should not be allowed to discriminate on any bases. Conflicts with federal Title II law that does not have such exemptions. (m/s/p Liongson/Iwamoto; all).

**SB 940 Exemption for religious facilities from HRS Ch. 489
HB 1337**

Amends HRS Ch. 489 to exclude religious facilities owned or operated by a religious organization and used for religious purposes from definition of "place of public accommodation".

HCRC position: Strongly oppose. Many religious organizations own facilities that are offered to the general public and they should not be allowed to discriminate. Also conflicts with federal Title II law that does not have such exemptions. Terms "used for religious purposes" is vague, and

would require HCRC to determine whether facilities are being used for religious purposes. These facilities are already exempt under the marriage equity law from being used to solemnize same sex marriages; the exemption should not be expanded to include other forms/bases of discrimination. (m/s/p Liongson/Iwamoto; all).

OTHER CIVIL RIGHTS ISSUES

HB 631 New Birth Certificate; Gender Designation

Amends HRS §338-17.7 to change gender designation on birth certificate based on attestation from a licensed medical or social service provider that current birth certificate does not align with birth registrant's gender identity and provides cause of action if DOH refuses to issue new birth certificate

Discussion: Commissioner Iwamoto emphasized the importance of having one standard for all applicants. Initially, Commissioner Raymund Liongson indicated he would abstain on the vote, but after reviewing the bill and further discussion voted in the affirmative.

HCRC position: Strongly support. Related to HRS Ch. 378 prohibitions against discrimination based on gender identity and expression in that employers are to address and treat employees based on their gender identity and not their ID records; this bill enables employees to more easily change their IDs. Current law creates 2 classes of people who have to go through 2 different processes to change their birth certificates; bill would create one standard and one process. (m/s/p Fukunaga/Iwamoto; all).

OTHER ADMINISTRATIVE PROCEDURE ISSUES

SB 235 Administrative Procedure; Administrative Rules; Public Hearings

Requires state agencies to hold public hearings in the counties primarily impacted by the proposed adoption, amendment, or repeal of any administrative rule. If proposed rule is likely to have a significant monetary impact on residents or communities of a particular island, at least one public hearing must be conducted with 30 days' notice on that island.

Discussion: Staff discussed additional costs of holding hearings on each island, given the statewide impact of any HCRC rules adoption. Francine Wai of DCAB, noted that boards and commissions could send one member, or one member and a staff person, to receive testimonies at hearing, or have Neighbor Island members do that, in order to reduce costs.

HCRC position: Support but raise concerns about added costs of having hearings on every island should be added to HCRC budget (e.g., flying at least one Commissioner and staff, etc.). (m/s/p Iwamoto/Liongson; all).

SB 784 Accessible public meeting notices

Amends HRS § 92-7 to require notices of public meetings to include contact person to request an accommodation, and requires electronic notices to be accessible unless compliance imposes an

undue burden.

Discussion: Chair Krieger noted that the HCRC already had jurisdiction over HRS § 368-1.5 claims, and that inaccessible meeting notices may violate Section 504 of the Rehab Act as well. Francine Wai of DCAB added that it would also be a violation of the ADA. Peter Fritz provided background information on how inaccessible meeting notices exclude persons with disabilities, in violation of both state and federal law. Chair Krieger thanked Mr. Fritz for his assistance in bringing the HCRC into compliance. Staff had originally recommended monitoring this bill, but the Commissioners were in agreement that the HCRC position should be in strong support.

HCRC position: Strongly support because it is important to give accessible notice to people with disabilities and violates federal law and HRS § 368-1.5. (m/s/p Iwamoto/Liongson; all).

It was agreed that the meeting would be continued to a date after the legislative bill introduction deadline, so the Commissioners could review and act on staff recommendations. The date and time for the continued meeting was set for February 2, 2015, at 3:15 p.m.

ED Hoshijo reviewed the roles of commissioners and staff, and the process of Commission reviewing bills and making policy decisions which staff implement. Based on the timing of the meeting, to be continued on February 2, 2014, he indicated that hearings could be scheduled in the interim on bills that the Commission had not yet reviewed or taken positions on.

Staff requested a motion to partially address the scheduling issue:

On bills introduced between January 26-29, 2014, which the Commission has not had the opportunity to review and take action on during this January 26 meeting, staff is authorized to identify bills set for hearing before the continued meeting scheduled for February 2, which are similar to bills introduced during the 2013 or 2014 sessions or bills reviewed by the Commission on January 26, 2015, which the Commissioners have acted on, and to submit testimonies consistent with those positions. Any such testimony will be reported to the Commission at its continued meeting on February 2, and the position will be subject to Commission review and action at that time.

The motion was approved. (m/s/p Fukunaga/Liongson; all in favor).

Old Business

ED Hoshijo said there was nothing new to report on *Cervelli v. Aloha Bed & Breakfast*, which remained pending before the Intermediate Court of Appeals.

On the issue of discriminatory exclusions in health plan coverage, ED Hoshijo reported that Pride at Work had sponsored a very informative presentation on the issue, which he, Chair Krieger, and Commissioner Iwamoto were able to attend. Commissioner Iwamoto reported that there would be continued conversation on these issues.

New Business

There was no new business.

Announcements

There were no announcements.

Continued Meeting

The meeting was continued to February 2, 2015, at 1:30 p.m.

Recess