



HAWAII CIVIL RIGHTS COMMISSION

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MINUTES

Hawai'i Civil Rights Commission Office
January 22, 2016
1:30 p.m.

Present: Linda Krieger, Raymund Liongson, Kim Coco Iwamoto, Wally Fukunaga, and Artemio Baxa, Commissioners; Bill Hoshijo, Marcus Kawatachi, and Robin Wurtzel, Staff; Peter Fritz, member of the public, was also in attendance.

Chair Linda Krieger called the meeting to order.

Approval of Minutes

The minutes of the December 10, 2015, meeting were approved, with a correction on page 3, to reflect the Commissioners' awareness of the difficulties encountered in trying to reduce investigation backlog with reduced staffing resources, and appreciation for staff efforts. (m/s/p Krieger/Fukunaga; all in favor).

Executive Director's Report

Deputy Executive Director (DED) Marcus Kawatachi presented a FY 2016 HCRC Mediation Program year to date report.

Summary & Details (7/1/15 through 1/22/16)

Referrals:	31
Dispositions:	36
Settlements:	22
Non-agreements:	14
Settlement Rate:	61.1 %
Employment cases settled:	19
Non-employment cases settled:	3
Dual-filed (EEOC/HCRC) settlements:	7

Primary Bases for Complaints Settled in Mediation

Disability	8
Sex	4 (2 pregnancy, 2 sexual harassment)
Age	2
Arrest & Court Record	2
Religion	2
Retaliation	2
National Origin/Ancestry	1
Race	1

Dispositions by Mediation Center

Mediation Center of the Pacific	15/20	(settlement rate 75 %)
Mediation Services of Maui	3/4	(settlement rate 75%)
Private Mediators	2/4	(settlement rate 50 %)
Ku‘ikahi Mediation Services (Hilo)	1/4	(settlement rate 25 %)
West Hawaii Mediation Center	1/2	(settlement rate 50%)
Kauai Economic Opportunity, Inc.	0/2	(settlement rate 0%)
OVERALL	22/36	(settlement rate 61.1%)

DED Kawatachi and Executive Director (ED) Bill Hoshijo reported that Mediation Coordinator Sharon Ferguson-Quick was taking the lead on planning a fair housing mediation pilot program, starting with training for mediators from the community mediation centers. The pilot program had to address HUD concerns and requirements. Chair Krieger asked what concerns HUD had about mediation of fair housing cases. ED Hoshijo said that the primary concern was that the public interest be vindicated, even in predetermination settlements, so the HCRC pilot program would have to provide for that.

DED Kawatachi presented a data and production report showing caseload data through January 22, 2016.

As of January 22, 2016, the report showed 360 open cases, a decrease of 2 cases from the number reported as of December 10, 2015. Of those, 3 (0.8%) filed in 2011, 4 (1.1%) in 2012, 23 (6.4%) in 2013, 65 (18.1%) in 2014, 238 (66.1%) in 2015, and 27 (7.5%) in 2016.

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

	2011	2012	2013	2014	2015	2016	Total
Housing Cases	0	1	0	3	19	0	24
Intake Stage	0	0	6	27	155	26	214
Mediation	0	2	3	6	23	0	34
Pending Assignment	0	0	1	16	16	0	33
Active Investigation	3	1	13	13	25	0	55
TOTAL	3	4	23	65	238	27	362

DED Kawatachi reported that 2 motions for subpoena enforcement, to obtain responses to complaints, had been filed in state circuit court. Hearings were scheduled for February 17, 2016, on Kauai, and February 18, 2016, on Oahu.

Request for Extension of Time to Investigate

Commissioner Kim Coco Iwamoto recused herself from the discussion and vote on the request for extension of time to investigate.

The Commissioners approved a request for extension of time to investigate all cases, through July 31, 2016. (m/s/p Liongson/Fukunaga; 4-0; Iwamoto recused).

Chief Counsel’s Report

In Chief Counsel (CC) Livia Wang’s absence, due to an extended medical leave, ED Hoshijo offered a brief update.

In the *Bate* appeal, the Cross-Appellants’ opening brief was due on February 18,2016, but it was likely an extension of time would be requested, based on the deadline for filing transcripts that are part of the record on appeal.

In the *Elento* appeal, the HCRC opening brief and the DOE/Charter School brief were filed, and the HCRC reply brief was due on February 22, 2016. The Office of the Attorney General was unable to represent the HCRC due to an unresolvable conflict. Lowell Chun-Hoon had agreed to serve as outside counsel for the HCRC, subject to approval of an HCRC’s request to obtain outside counsel.

The FY 2015 HCRC Annual Report was distributed.

Legislation 2016 Session

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

CIVIL RIGHTS COMMISSION

HB ___ Relating to the Civil Rights Commission

SB ___ HCRC – Executive Director’s Authority to Dismiss Complaints

Amends HRS §368-13 to authorize ED to dismiss a complaint and issue a notice to sue if cause is found and conciliation fails

Status: Administration Package Bill not yet introduced

HCRC Position: Support. (m/s/p Liongson/Fukunaga; all in favor).

EMPLOYMENT

SB 2005 Relating to Civil Rights

Amends H.R.S. § 378-2((a) to prohibit retaliation for providing documentation about labor conditions of the premises.

Discussion: Staff recommendation was to oppose, because the new protection did not belong in HRS Chapter 378, Part I.

Chair Krieger suggested that it would be better to support intent, but oppose putting the new retaliation

protection in HRS Chapter 378, Part I, for activities outside of HCRC jurisdiction.

HCRC position: Support intent, but oppose putting new retaliation protection in HRS Chapter 378, Part I, for activities outside of HCRC jurisdiction. The current retaliation provision in HRS 378-2(a)(3) prohibits retaliation for engaging in protected activity under Chapter 378, Part I. This proposed provision expands the scope of "protected activity" under our statute to cover retaliation for engaging in providing documentation, statements, or info about labor conditions generally, which could include OSHA Work Comp, child labor. It would be more appropriate to place retaliation provisions in each chapter or part. (m/s/p Krieger/Iwamoto; all in favor).

HB 1739 Relating to Employment; Personal Social Media Account; Privacy, Employment

Amends HRS Ch. 378 Part I to prohibit employers from requiring or requiring employees to grant access to personal social media accounts, and by adding subsection (10) to prohibit employers from discriminating because of person's refusal to disclose information regarding a personal account
[Similar to HB 561 and SB 1269 from 2015 session]

Discussion: Discussion was deferred until January 29, to allow for review of HCRC's 2015 position. Staff reported that in 2015, HCRC supported the intent but urged placement in a new part of HRS Chapter 378 and provide direct cause of action in court with injunctive relief and attorneys' fees.

HOUSING

HB 1591 Relating to Housing

Prohibits discrimination in the rental of real property based on a veteran's use of HUD-VASH vouchers.

Status: ref. to: HDG/VMI, CPC, JUD

Discussion: Staff recommended support of this bill. There was extensive discussion about housing vouchers, programs, the wait for approval of a rental by the federal agency, during which period a landlord does not receive money, and restricting the prohibition to one particular group. Commissioner Iwamoto said she would vote against support for the bill because it would create additional protections for a specific group, veterans; and by singling out a specific group it would create a smaller pool of housing for others, such as disabled citizens who are unable to serve in the military, and families. Commissioner Baxa said he would also vote against support for the bill.

HCRC Position: Support intent (m/s/p Fukunaga/Liongson; 3-2, Iwamoto and Baxa opposed).

OTHER BILLS OF INTEREST

SB 845, SD 2 Bullying; Safe Schools for All Students

Requires certain state entities and grantee to adopt bullying prevention policies, Establishes a task force to assist the Governor with bullying prevention policies in the state, amends HRS § 302D-34 to include gender identity or expression as a basis for protection against discrimination by a public charter school.

Status: Introduced last year. Referred to EDU/HMS/JDL,WAM

Discussion: Staff recommended support of this bill with an amendment that it would conform to our statute, noting that HCRC took this position last year on a substantially similar bill, HB 819 HD2,SD2.

HCRC Positon: SUPPORT, but suggest that part III section 6 be amended to state “gender, including gender identity or expression. (m/s/p Liongson/Fukunaga; all in favor).

SB 865 , SD1 Bullying; Safe Schools for All Students

Substantially similar to previous bill, with more specificity. Requires certain state entities and grantee to adopt bullying prevention policies. Establishes a task force to assist the Governor with bullying prevention policies in the state, Amends §489-2 to include education facilities as part of public accommodations

Status: Introduced last year. Referred to EDU/HMS/JDL,WAM

Discussion: Staff recommended that the HCRC support intent, but oppose in part, suggesting that it would be better to add a new section to HRS Chapter 368, providing for limited expansion of jurisdiction to include protection of students against discriminatory harassment. The discussion was **deferred** in order for Commissioners to consider this additional information. (m/s/p Krieger/Iwamoto; all in favor).

HB 1675 Relating to Minors (Conversion Therapy: Sexual Orientation; Minors)

Discussion: Staff initially recommended support of the bill, which adds a section to Chapters 302A (Education) and 436B (Uniform Professional and Vocational Licensing Act) prohibiting teachers and professional counselors and therapists from counseling students and people under 18 regarding sexual orientation change. It also prohibits advertising of such services. The Commissioners were concerned that the intent of the bill was unclear, and that it could have unintended consequences, be used against teachers or counselors who provide support for a student who is questioning his or her sexuality. The discussion was **deferred**. (m/s/p Iwamoto/Liongson; all in favor). The Commissioners expressed interest in how other states’ recently enacted laws were worded.

It was agreed that the meeting would be continued to a date after the legislative bill introduction deadline, so the Commissioners could complete review and action on staff recommendations. The date and time for the continued meeting was set for January 29, 2016, at 2:00 p.m.

Based on the timing of the meeting, to be continued on January 29, 2016, it was possible 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 through the bill introduction cut-off on January 27, 2016, which the Commission has not had the opportunity to review and take action on during this January 22 meeting, staff is authorized to identify bills set for hearing before the continued meeting scheduled for January 29, which are similar to bills introduced during the 2015 session or bills reviewed by

the Commission on January 22, 2016, 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 January 29, and the position will be subject to Commission review and action at that time.

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

Old Business

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

New Business

ED Hoshijo shared a recent news story about an anti-Muslim verbal attack on a woman on a downtown Honolulu street. The Commissioners agreed that in the event of a similar attack, ED Hoshijo was authorized to prepare and issue a statement for the HCRC decrying such hate and bias motivated attacks.

Announcements

There were no announcements.

Continued Meeting

The meeting was continued to January 29, 2016, at 2:00 p.m.

Recess

MINUTES

Hawai'i Civil Rights Commission Office
January 29, 2016*
1:30 p.m.

Present: Linda Krieger, Kim Coco Iwamoto, and Wally Fukunaga, Commissioners; Bill Hoshijo, Marcus Kawatachi, and Robin Wurtzel, Staff.

Raymund Liongson and Artemio Baxa, Commissioners, excused.

Chair Linda Krieger called the continued meeting back to order.

Legislation -2016 Session

The Commissioners reviewed Legislative Summary 1A, which had been updated to include HCRC position, bill status, and staff recommendations on new bills, and took action on bills not addressed on January 22, 2016, deciding on HCRC positions as follows:

CIVIL RIGHTS COMMISSION

HB 2366 Relating to the Civil Rights Commission
SB 2895 HCRC – Executive Director’s Authority to Dismiss Complaints

Amends HRS §368-13 to authorize ED to dismiss a complaint and issue a notice to sue if cause is found and conciliation fails

Status: HB 2366 to LAB, JUD, FIN
SB 2895 to JDL

HCRC Position: Support.

EMPLOYMENT

SB 2005 Relating to Civil Rights

Amends H.R.S. § 378-2((a) to prohibit retaliation for providing documentation about labor conditions of the premises.

* Meeting continued from January 22, 2016.

Status: ref. to: JDL

HCRC position: HCRC position: Support intent, but oppose putting new retaliation protection in HRS Chapter 378, Part I, for activities outside of HCRC jurisdiction. The current retaliation provision in HRS 378-2(a)(3) prohibits retaliation for engaging in protected activity under Chapter 378, Part I. This proposed provision expands the scope of "protected activity" under our statute to cover retaliation for engaging in providing documentation, statements, or info about labor conditions generally, which could include OSHA Work Comp, child labor. It would be more appropriate to place retaliation provisions in each chapter or part.

HB 1739 Relating to Employment; Personal Social Media Account; Privacy, Employment

Amends HRS Ch. 378 Part I to prohibit employers from requiring or requiring employees to grant access to personal social media accounts, and by adding subsection (10) to prohibit employers from discriminating because of person's refusal to disclose information regarding a personal account
[Similar to HB 561 and SB 1269 from 2015 session]

Status: ref. to: LAB, JUD (LAB hearing on 1/29/2016)

Discussion: The Commissioners agreed to reaffirm the HCRC's 2015 position on a similar bill, supporting the intent but urging placement in a new part of HRS Chapter 378 and providing a direct cause of action in court with injunctive relief and attorneys' fees.

HCRC Position: Reaffirm the 2015 position. Support intent, and request that the new protection be placed in a new part of Chapter 378, rather than in Part I of Chapter 378 privacy rights in the proposed legislation differ from the bases currently under the Commission's jurisdiction. Recommend that express language be added to provide that nothing in the bill diminishes the employer's authority and obligation to investigate and take corrective action. (m/s/p Iwamoto/Krieger; all in favor).

**HB 1909 Relating to Equal Pay
SB 2313**

Amends §378-2.3 Equal Pay; sex discrimination. It prohibits employer action for wage disclosure, and clarifies the employer defenses.

**Status: ref. to: HB 1909 to LAB, JUD
SB 2313 to JDL (hearing on 2/1/2016), WAM**

Discussion: Staff recommended support of this bill, and the Commissioners adopted staff recommendation. Cathy Betts, the Executive Director of the Hawai'i State Commission on the Status of Women (HSCSW), joined the discussion. There was discussion about a HSCSW proposed amendment, prohibiting an employer from asking job applicants about prior job compensation and seeking salary history, with some concern that employers might need this

information when making a job offer, in order to successfully recruit and retain an applicant. The Commissioners strongly supported the bill, particularly the subsection that an employer may not prohibit an employee from disclosing wages, or discussing, inquiring, aiding or encouraging any other employee from doing so. Chair Krieger suggested amendments to the bill changing “bona fide occupational qualification” to “bona fide factors” because BFOQ is a conclusory term that indicates the exception is granted, and she suggested amending the language to clarify that the employer’s defenses can be set forth, but not necessarily accepted. The Commissioners chose not to support the amendment suggested by the HSCSW about salary history.

HCRC Position: STRONGLY SUPPORT, with support for ----suggested amendment set forth by the Chair. (m/s/p Fukunaga/Iwamoto; all in favor).

HB 2209 Relating to Employment

Amends §378-3 which lists the exceptions for employers, which may be used as defenses. Amends §378-3(3) which states that employers may fail to hire or discharge and employee based on the ability of the individual to perform the work, to state that nothing prohibits an employer from using any reason other than protected bases.

Status: ref. to: LAB, JUD

Discussion: Staff recommended opposition of this bill, based on the bill’s intent to legislatively reverse the decision of the Hawai‘i Supreme Court in *Adams v. CDM Media USA, Inc.*, and negative unintended consequences of the proposed amendment to HRS § 378-3. The *Adams* case raises complex and technical legal issues. In effect, the *Adams* decision makes it easier for plaintiffs in employment discrimination cases brought under Hawai‘i fair employment law to overcome motions for summary judgment and for the jury or judge to make the final determination of whether discrimination occurred in cases relying on circumstantial evidence. The Commissioners agreed and adopted staff recommendation, adding that opposition be worded as “Strong Opposition.”

Subsequent to the meeting, it was discovered that this bill is substantially similar to HB 2444 and SB 3036.

HB 2444 ref to: LAB, JUD

SB 3036 ref to: JDL

HCRC Position: STRONGLY OPPOSE. (m/s/p Fukunaga/Iwamoto; all in favor).

HOUSING

HB 1591 Relating to Housing

Prohibits discrimination in the rental of real property based on a veteran's use of HUD-VASH vouchers.

Status: ref. to: HDG/VMI, CPC, JUD

HCRC Position: Support intent.

OTHER BILLS OF INTEREST

SB 845, SD 2 Bullying; Safe Schools for All Students

Requires certain state entities and grantee to adopt bullying prevention policies, Establishes a task force to assist the Governor with bullying prevention policies in the state, amends HRS § 302D-34 to include gender identity or expression as a basis for protection against discrimination by a public charter school.

Status: Introduced last year. Referred to EDU/HMS/JDL,WAM

HCRC Positon: SUPPORT, but suggest that part III section 6 be amended to state “gender, including gender identity or expression.

SB 865, SD1 Bullying; Safe Schools for All Students

Substantially similar to previous bill, with more specificity. Requires certain state entities and grantee to adopt bullying prevention policies. Establishes a task force to assist the Governor with bullying prevention policies in the state, Amends §489-2 to include education facilities as part of public accommodations

Status: Introduced last year. Referred to EDU/HMS/JDL,WAM

Discussion: Concern that addition of schools as public accommodations will result in expansion of HCRC jurisdiction to include complaints regarding academic matters, including admissions, grades, curriculum and discipline. Commissioners wanted to provide a mechanism to protect students from harassment, and to afford them the same protection that teachers and other employees have from discriminatory harassment.

HCRC Position: Support intent; Oppose in part, specifically the problematic addition of schools and educational institutions as places of public accommodations under Chapter 489. The Commissioners suggests an amendment adding a new section to § 368-1.5, providing for *limited* expansion of jurisdiction to include protection of students against discriminatory harassment, in grades K-12. (m/s/p Krieger/Iwamoto; all in favor).

HB 1675 Relating to Minors (Conversion Therapy: Sexual Orientation; Minors)

SB 2615

Status: HB 1675 ref. to: CPC/HLT, EDN
SB 2615 ref to: EDU/CPH, JDL

Discussion: Staff initially recommended support of the bill, which adds a section to Chapters 302A (Education) and 436B (Uniform Professional and Vocational Licensing Act) prohibiting teachers and professional counselors and therapists from counseling students and people under 18 regarding sexual orientation change. It also prohibits advertising of such services. The Commissioners were concerned that the intent of the bill was unclear, and that it could have unintended consequences, be used against teachers or counselors who provide support for a student who is questioning his or her sexuality.

HCRC Position: The Commissioners chose not to take a position on these bills.

**HB 2084 Relating to Health Insurance and Prohibiting Discrimination based on a
SB 2666 person's gender identity**

Amends the insurance code to prohibit health insurers from discriminating on the basis of actual gender identity or perceived gender identity

**Status: ref. to: HB 2084 to CPC, JUD (CPC hearing on 2/1/2016)
SB 2666 to CPH, JDL**

Discussion: The Commissioners agreed with the staff recommendation to support this bill.

Under Federal and State fair employment laws, an employer is liable for discriminatory employment benefits plans, even if administered by a third party. The HCRC does not have jurisdiction over health insurance providers, except to the extent that there may be aider and abettor liability under Chapter 378, Part I. This bill prohibits such discrimination under the insurance code.

This is an important issue, because the majority of people in Hawai'i have coverage through employment, under Hawai'i's prepaid health law.

HCRC Position: SUPPORT. (m/s/p Iwamoto/Krieger; all in favor).

RELIGIOUS FREEDOM

HB 2532 Relating to Religious Freedom

Known as The First Amendment Defense Act, prohibits the State from taking any action regarding taxes, state contracts, fines, access to school programs, or to investigate a person who has a sincerely held religious belief that marriage is between one man and one woman and that sexual relations should only occur within the context of marriage. Allows a person to obtain compensatory damages and injunctive relief in an administrative proceeding or court hearing if this is the basis for their defense.

Status: ref to: JUD, FIN

Discussion: The Commissioners agreed with the staff recommendation to oppose this bill. If enacted, the bill would allow discrimination against people in employment, housing and public accommodations, as long as it is based on a sincerely held religious belief about marriage or sexual relations. Religious facilities are already exempt from being used to solemnize same sex marriages. The exemption should not be expanded to include other forms//bases of discrimination

HCRC Position: STRONGLY OPPOSE. Commission voted on positions on HB 2532 AND 2764. (m/s/p Fukunaga/Iwamoto; all in favor).

HB 2764 Relating to Religious Freedom – Religious Freedom Restoration Act

States that a religiously neutral law can burden a religion just as much as one that was intended to interfere with religion, and legislates use of the “compelling interest test.” Amends Chapter 489 to allow a business to deny services regarding solemnization of a marriage if it violates their sincerely held religious beliefs. It also amends the definition to state that public accommodations does not include any property used by religious organizations

Status: Status: ref to: JUD, FIN

Discussion: The Commissioners agreed with the staff recommendation to oppose this bill. Allows businesses to refuse to provide services to men and women marrying a spouse of the same gender (example: florists, bakes, hotels). Religious facilities are already exempt from being required to solemnize same sex marriages, but this would allow religious organizations who operate public accommodations to refuse service based on ownership by a church. This bill, like HB 2532, allows a person to seek compensatory damages and injunctive relief in an administrative proceeding or court hearing if this is the basis for their defense.

HCRC Position: STRONGLY OPPOSE. Commission voted on positions on HB 2532 AND 2764. (m/s/p Fukunaga/Iwamoto; all in favor).

Next Meeting

The next meeting of the Commission was scheduled, for February 26, 2016, at 1:30 p.m., subject to polling of and confirmation by the Commissioners.

Adjournment