



HAWAII CIVIL RIGHTS COMMISSION

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MINUTES

Hawai'i Civil Rights Commission Office

August 9, 2016

1:00 p.m.

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

Excused: Artemio Baxa, Commissioner.

Chair Linda Krieger called the meeting to order.

Approval of Minutes

The minutes of the July 1, 2016, meeting were approved. (m/s/p Fukunaga/Iwamoto; 3-0 in favor).

Executive Director's Report

Deputy Executive Director (DED) Marcus Kawatachi presented a FY 2017 HCRC Mediation Program year to date summary.

Summary & Details (7/1/16 through 8/9/16)

Referrals:	4
Dispositions:	3
Settlements:	2
Non-agreements:	1
Settlement Rate:	66.7 %
Employment cases settled:	2
Non-employment cases settled:	0
Dual-filed (EEOC/HCRC) settlements:	2
State-only settlements	0

Primary Bases for Complaints Settled in Mediation

Sex	1 (1 pregnancy)
Race	1

Dispositions by Mediation Center

Mediation Center of the Pacific	1/2	(settlement rate 50 %)
Mediation Services of Maui	1/1	(settlement rate 100%)
Private Mediators	0	(settlement rate 40 %)
Ku'ikahi Mediation Services (Hilo)	0	(settlement rate 40 %)
West Hawaii Mediation Center	0	(settlement rate 25%)
Kauai Economic Opportunity, Inc.	0	(settlement rate 33.3%)
OVERALL	2/3	(settlement rate 66.7%)

DED Kawatachi also presented a data and production report showing caseload data through August 9, 2016.

As of August 9, 2016, the report showed 244 open cases, a decrease of 17 cases from the number reported as of July 1, 2016. Of those, 1 (0.4%) was filed in 2011, 2 (0.8%) in 2012, 4 (1.7%) in 2013, 12 (4.9%) in 2014, 75 (30.7%) in 2015, and 150 (61.5%) in 2016.

DED Kawatachi said concerted effort to address the oldest investigation cases would continue.

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	0	5	14	20
Intake Stage	0	0	2	9	32	99	142
Mediation	0	1	1	1	11	14	28
Pending Assignment	0	0	0	0	11	2	13
Active Investigation	1	0	1	2	16	21	41
TOTAL	1	2	4	12	75	150	244

The report included year to date data for the past five fiscal years, showing that the number of investigations closed, notices of cause issued, and enforcement closures for this short period were the highest in the last five years:

Category	7/1/12 – 8/9/12	7/1/13 – 8/9/13	7/1/14 – 8/9/14	7/1/15 – 8/9/15	7/1/16 – 8/9/16
PCQ Received	86	99	86	80	63
Intake Decision	93	71	46	67	72
Complaint Filed	30	28	28	41	39
Investigation Closed	43	45	38	47	54
Notice of Cause	0	0	2	1	3
Enforcement Closure	1	0	2	2	2

Chair Krieger, noting that HRS §368-11(b) apparently limits standing to file HCRC complaints on behalf of a class to the Attorney General and the Commission, suggested that the complaint intake process should gather information on pattern and practice discrimination, perhaps by adding a question regarding

others affected on the pre-complaint questionnaire. This would provide information for potential Executive Director complaints on behalf of a class, and/or joint enforcement efforts with EEOC on dual-filed complaints.

DED Kawatachi reported that there were no actions or pending actions for subpoena enforcement.

Chief Counsel's Report

Chief Counsel (CC) Livia Wang reported on two cases on appeal.

In the *Bate* appeal, briefing was complete, and an application for transfer of the appeal from the Intermediate Court of Appeals to the Supreme Court was pending.

In the *Elento* appeal, oral argument was set for September 1, 2016.

Executive Director's Report - continued

Executive Director (ED) Bill Hoshijo reported that the HCRC, EEOC, and HUD provided a civil rights training for Native Hawaiian Legal Corporation (NHLC) staff, in reciprocation for a training on Native Hawaiian rights and history that NHLC provided for HCRC, EEOC, and HUD staff.

ED Hoshijo added that this was the first step in an ongoing discussion of possible joint HCRC-EEOC work on the impact of arrest and court record discrimination on Hawaiians. As a follow up, HCRC and EEOC were invited to meet with a Task Force on Corrections, Hawaiian sub-committee. The Task Force was established pursuant to House Concurrent Resolution 85. In addition to the discussion of arrest and court record discrimination, the sub-committee was interested in the HCRC's jurisdiction over HRS §368-1.5 complaints of disability discrimination brought by prisoners.

Chair Krieger encouraged joint work with EEOC, noting their access to EEO-1 data, and the importance of systemic interventions that trigger change.

Legislation 2016 Session

ED Hoshijo reported on the Governor's veto of H.B. No. 1739, which would have prohibited employers from requiring employees to grant access to personal social media accounts. The veto was based on the lack of an enforcement scheme or private cause of action.

New Business

ED Hoshijo discussed two issues for potential legislative proposals.

He noted that the public accommodations anti-retaliation prohibition in HRS chapter 489, found in §489-5, only prohibits retaliation when two or more persons conspire to retaliate against a person who oppose a discriminatory practice. It was agreed that a proposed bill should be prepared to remove conspiracy as a required element.

ED Hoshijo noted that in the wake of the *Lales* decision, a supervisor-harasser is not individually liable for sexual harassment or other discriminatory harassment, but that the statute, HRS §378-2(a)(3) provides for aiding and abetting liability. The law provides for individual liability for 3rd party aiders and abettors, but not the supervisor harasser. This, he suggested, was a reason to revisit the issue of individual liability

for supervisor-harassers.

Commissioner Kim Coco Iwamoto asked what the ramifications would be for individual supervisors against whom sexual harassment complaints are made, and whether there were concerns that should be discussed. Chair Krieger agreed that complex issues can be raised, including the employer defendant impleading an individual who is not named in a complaint.

ED Hoshijo suggested that substantive discussion could be deferred to the next meeting. It was agreed that staff should prepare draft language for a bill, and the HCRC position would be subject to further discussion.

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. Chair Krieger raised the question of whether the HCRC and plaintiffs in the case might consider the filing of a request for transfer of the appeal from the ICA to the Supreme Court, as was done in *Bate* and *Elento*.

There was nothing new to report or discuss on the status of Commissioner terms and vacancies.

There was nothing new to report or discuss on rulemaking.

On the subject of the implementation of Act 135, prohibiting discrimination in health insurance based on gender, there was discussion of what an initial letter from the Chair to the Insurance Commissioner and Director of Health should include and address. Chair Krieger and Commissioner suggested that the letter should discuss issues like discriminatory denial caused by coding of services that raise flags and automatic denials. Chair Krieger raised a second issue, the discriminatory denial of services by doctors, suggesting that it might be good to engage the UH medical school in the discussion.

Announcements

There were no announcements.

Next Meeting

The next meeting of the Commission was tentatively scheduled for September 8, 2016, at 2:00 p.m., subject to polling of and confirmation by the Commissioners.

Adjournment