



HAWAII CIVIL RIGHTS COMMISSION

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MINUTES*

Hawai'i Civil Rights Commission Office
September 8, 2016
2:00 p.m.

Present: Linda Krieger, Kim Coco Iwamoto, Artemio Baxa, and Liann Ebesugawa, Commissioners; Wally Fukunaga, departing Commissioner; Livia Wang, Bill Hoshijo, and Marcus Kawatachi, Staff.

Chair Linda Krieger called the meeting to order.

Newly appointed Commissioner Liann Ebesugawa was introduced and welcomed.

Commissioners and staff bade farewell to departing Commissioner Wally Fukunaga, thanking him for his service and the thoughtful perspective he brought to the Commission.

Approval of Minutes

The minutes of the August 9, 2016, meeting were approved. (m/s/p Iwamoto/Krieger; 4-0 in favor).

Executive Director's Report

Deputy Executive Director (DED) Marcus Kawatachi presented a data and production report showing caseload data through September 8, 2016.

As of September 8, 2016, the report showed 238 open cases, a decrease of 6 cases from the number reported as of August 9, 2016. Of those, 1 (0.4%) was filed in 2011, 2 (0.8%) in 2012, 4 (1.7%) in 2013, 10 (4.2%) in 2014, 56 (23.6%) in 2015, and 165 (69.3%) 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 | 0 | 5 | 17 | 23 |
| Intake Stage | 0 | 0 | 2 | 8 | 23 | 108 | 141 |
| Mediation | 0 | 1 | 2 | 1 | 9 | 17 | 30 |
| Pending | 0 | 0 | 0 | 0 | 2 | 5 | 7 |

* as corrected and approved on October 11, 2016.

Assignment

| | | | | | | | |
|----------------------|---|---|---|---|----|----|----|
| Active Investigation | 1 | 0 | 0 | 1 | 17 | 18 | 37 |
|----------------------|---|---|---|---|----|----|----|

| | | | | | | | |
|--------------|----------|----------|----------|-----------|-----------|------------|------------|
| TOTAL | 1 | 2 | 4 | 10 | 56 | 165 | 238 |
|--------------|----------|----------|----------|-----------|-----------|------------|------------|

The report included year to date data for the past five fiscal years:

| Category | 7/1/12 – 9/8/12 | 7/1/13 – 9/8/13 | 7/1/14 – 9/8/14 | 7/1/15 – 9/8/15 | 7/1/16 – 9/8/16 |
|----------------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| PCQ Received | 144 | 145 | 140 | 147 | 144 |
| Intake Decision | 148 | 143 | 101 | 118 | 141 |
| Complaint Filed | 58 | 52 | 47 | 63 | 82 |
| Investigation Closed | 72 | 104 | 61 | 85 | 83 |
| Notice of Cause | 0 | 0 | 0 | 3 | 4 |
| Enforcement Closure | 1 | 0 | 4 | 4 | 2 |

Chair Krieger, calling attention to the Breakdown by Type of Case data, suggested that the category of “Intake Stage” should be renamed, to more accurately reflect what was involved. She pointed out that the “intake” stage included much more than initial screening, drafting of complaint, and filing, but included active investigation, including gathering of evidence from the complainant, supplemental requests for information and responses from respondents. Calling this intake did not accurately describe what is involved. Executive Director (ED) Bill Hoshijo added that the “intake” label was less appropriate than before, as there was less specialization in investigation, with investigators now conducting both intake and investigation.

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

DED Kawatachi also presented a FY 2017 HCRC Mediation Program year to date summary.

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

| | |
|-------------------------------------|--------|
| Referrals: | 8 |
| Dispositions: | 9 |
| Settlements: | 5 |
| Non-agreements: | 1 |
| Settlement Rate: | 55.6 % |
| Employment cases settled: | 5 |
| Non-employment cases settled: | 0 |
| Dual-filed (EEOC/HCRC) settlements: | 3 |
| State-only settlements | 2 |

Primary Bases for Complaints Settled in Mediation

| | |
|-----|-----------------|
| Sex | 2 (2 pregnancy) |
|-----|-----------------|

| | |
|-------------------------|---|
| Ancestry | 1 |
| Arrest and Court Record | 1 |
| Race | 1 |

Dispositions by Mediation Center

| | | |
|------------------------------------|------------|--------------------------------|
| Mediation Center of the Pacific | 3/5 | (settlement rate 60 %) |
| Mediation Services of Maui | 1/1 | (settlement rate 100%) |
| Private Mediators | 0 | |
| Ku‘ikahi Mediation Services (Hilo) | 1/3 | (settlement rate 33.3 %) |
| West Hawaii Mediation Center | 0 | |
| Kauai Economic Opportunity, Inc. | 0 | |
| OVERALL | 5/9 | (settlement rate 55.6%) |

ED Hoshijo reported that the HCRC Public Training on EEO for Women in the Workplace had been rescheduled from October 2016 to May 2017.

Chief Counsel’s Report

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

In the *Bate* appeal, the application for transfer of the appeal from the Intermediate Court of Appeals to the Supreme Court was granted.

In the *Elento* appeal, oral argument was held on Thursday, September 1, 2016.

Chair Krieger commended CC Wang for her excellent oral argument.

2017 Legislation

Three potential bills were discussed:

1. Individual liability. At the August Commission meeting, it had been noted that HRS §378-2(a)(3) provides for individual liability for aiders and abettors, but, in the wake of the *Lales* decision, not for supervisor harassers.

ED Hoshijo expressed reservations about reopening a discussion of *Lales* at the legislature, given the recent controversy over proposed amendments to adopt federal affirmative defenses against employer vicarious liability.

Chair Krieger said there were policy concerns raised by individual liability. If an individual supervisor is liable, a defendant employer could implead them, even if plaintiff employee did not want them named. The plaintiff could lose control of the action, to their detriment. The key, she said, is employer liability, respondeat superior and vicarious liability. Employment discrimination complaints are not tort claims, but involve a public interest in eliminating discrimination.

Commissioner Liann Ebesugawa pointed out that a supervisor harasser could be held individually liable, sued in tort.

Chair Krieger emphasized that employer or organization liability keeps the focus on

discrimination as institutional and systemic, not limited to individual harms.

No action was taken on this potential bill.

2. Amendment to retaliation prohibition in HRS §489-5, to remove conspiracy requirement.

Relating to retaliation in public accommodations, a motion was approved for submission of a bill for inclusion in the administration package. (m/s/p Ebesugawa/Iwamoto; 4-0 in favor).

3. Amendment of HRS §368-1.5, to add a prohibition against retaliation.

ED Hoshijo noted that the HRS §368-1.5 protection against discrimination on the basis of disability in state and state-funded services did not include a prohibition against retaliation for engaging in protected activity, as found in chapter 378, part I (employment), chapter 489 (public accommodations), and chapter 515 (housing).

Chair Kreiger pointed out that a retaliation prohibition should include an opposition clause, similar to the Title VII retaliation protection.

Commissioner Kim Coco Iwamoto expressed concern over why the protections of HRS §368-1.5 should be expanded to include retaliation, but not to include other protected bases other than disability.

ED Hoshijo noted that the scope of HRS §368-1.5 was narrow at time of enactment, because it was meant to create a state analogue to Section 504 of the Rehab Act of 1973. CC Wang recalled that the HCRC had held a public hearing on the advisability of expanding §368-1.5 to include other protected bases, and that there were concerns raised over possible unintended consequences affecting programs benefitting Native Hawaiians.

Commissioner Iwamoto reiterated that there was a need to ask for expansion to move forward and engage. She indicated that she would vote against the proposal because it did not go far enough.

Relating to retaliation in state and state-funded services, a motion was approved for submission of a bill for inclusion in the administration package. (m/s/p Baxa/Ebesugawa; 3-1 in favor, Iwamoto opposed).

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 subject of the implementation of Act 135, Chair Krieger reported that she had attended a meeting on the subject, and was interested in organizing a program on Transgender Health at the UH William S. Richardson School of Law.

On rulemaking, Chair Krieger reported that her rulemaking seminar was in its 3rd week, and that her students had chosen subjects.

Announcements

ED Hoshijo announced that the HCRC would again have a contingent in the 2016 Pride Parade, scheduled for October 22, 2016, and that staff was collecting contributions to cover the parade fee and a car rental for those who could not walk the route.

Next Meeting

The next meeting of the Commission was tentatively scheduled for October 11, 2016, at 2:00 p.m., subject to polling of and confirmation by the Commissioners.

Adjournment