



HAWAI'I CIVIL RIGHTS COMMISSION

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MINUTES

Hawai'i Civil Rights Commission Office
January 23, 2017
1:30 p.m.

Present: Linda Krieger, Artemio Baxa, Liann Ebesugawa, and Joan Lewis, Commissioners; Livia Wang, Bill Hoshijo, and Marcus Kawatachi, 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 November 22, 2016, meeting were approved. (m/s/p Ebesugawa/Baxa; all).

The minutes of the December 15, 2016, meeting were approved. (m/s/p Lewis/Ebesugawa; all).

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 1/23/17)

| | |
|-------------------------------------|--------|
| Referrals: | 19 |
| Dispositions: | 23 |
| Settlements: | 14 |
| Non-agreements: | 9 |
| Settlement Rate: | 60.9 % |
| Employment cases settled: | 14 |
| Non-employment cases settled: | 0 |
| Dual-filed (EEOC/HCRC) settlements: | 10 |
| State-only settlements | 4 |

Primary Bases for Complaints Settled in Mediation

| | |
|-------------------------|-----------------|
| Sex | 3 (2 pregnancy) |
| Ancestry | 3 |
| Disability | 3 |
| Race | 2 |
| Age | 1 |
| Arrest and Court Record | 1 |
| Color | 1 |

Dispositions by Mediation Center

| | | |
|------------------------------------|--------------|--------------------------------|
| Mediation Center of the Pacific | 8/12 | (settlement rate 66.7 %) |
| Mediation Services of Maui | 1/2 | (settlement rate 50%) |
| Private Mediators | 2/2 | (settlement rate 100%) |
| Ku'ikahi Mediation Services (Hilo) | 2/5 | (settlement rate 40 %) |
| West Hawaii Mediation Center | 0/1 | (settlement rate 0%) |
| Kauai Economic Opportunity, Inc. | 1/1 | (settlement rate 100%) |
| OVERALL | 14/23 | (settlement rate 60.9%) |

DED Kawatachi also presented a data and production report showing caseload data through January 23, 2017.

As of January 23, 2017 the report showed 181 open cases, a decrease of 12 cases from the number reported as of December 14, 2016. Of those, 1 (0.6%) was filed in 2012, 1 (0.6%) in 2013, 4 (2.2%) in 2014, 14 (7.7%) in 2015, 139 (76.8%) in 2016, and 22 (12.2%) in 2017.

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

| | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | Total |
|----------------------|----------|----------|----------|-----------|------------|-----------|------------|
| Housing Cases | 1 | 0 | 0 | 3 | 16 | 2 | 22 |
| Response Monitoring | 0 | 0 | 3 | 6 | 57 | 22 | 86 |
| Mediation | 0 | 0 | 0 | 3 | 14 | 0 | 17 |
| Pending Assignment | 0 | 0 | 0 | 0 | 8 | 0 | 8 |
| Active Investigation | 0 | 1 | 1 | 2 | 44 | 0 | 48 |
| TOTAL | 1 | 1 | 4 | 14 | 139 | 22 | 181 |

Chair Krieger asked DED Kawatachi about why the number of complaints in investigation was decreasing.

DED Kawatachi said the fiscal year to date data reflected a relatively smaller number of pre-complaint questionnaires (PCQs) received than in the same period over the past five fiscal years, a comparable number of complaints filed, and a larger number of investigation closures. He said he would expect those numbers to even out over time.

DED Kawatachi then went over the year to date data for the past five fiscal years:

| Category | 7/1/12 – 1/23/13 | 7/1/13 – 1/23/14 | 7/1/14 – 1/23/15 | 7/1/15 – 1/23/16 | 7/1/16 – 1/23/17 |
|----------------------|---------------------|---------------------|---------------------|---------------------|---------------------|
| PCQ Received | 406 | 401 | 390 | 365 | 348 |
| Intake Decision | 453 | 388 | 388 | 423 | 373 |
| Complaint Filed | 187 | 174 | 169 | 236 | 195 |
| Investigation Closed | 200 | 209 | 179 | 217 | 241 |
| Notice of Cause | 4 | 0 | 6 | 10 | 9 |
| Enforcement Closure | 5 | 3 | 7 | 15 | 8 |

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

Extension of Time to Investigate

Executive Director (ED) Bill Hoshijo explained to the recently appointed commissioners the need for an extension of time to investigate cases in which a determination of reasonable cause was not made within one-hundred and eighty days from the date of the filing of a complaint, pursuant to HRS § 368-13(b) and HAR § 12-46-12(f), citing the discussion of such extensions in *Steinberg v. Hoshijo*, 88 Haw. 10, 960 P2d. 1218 (1988).

Chair Krieger provided historical background, that 180 days to investigate complaints was not realistic, even with more aggressive investigations and subpoena enforcement actions. She said the request was reasonable.

Commissioner Liann Ebesugawa asked about the request for extension being for all cases in investigation rather than individual cases. ED Hoshijo responded that the ED and DED could not engage in ex parte discussion with the Commission about open cases in investigation, per HCRC rules, because there was a “wall” separating enforcement from adjudication. Chief Counsel (CC) Livia Wang added that this practice under HRS § 368-13(b) and HAR § 12-46-12(f) was the one considered by the Court in *Steinberg*.

Commissioner Joan Lewis suggested that the approval of extensions of time to investigate was a “band-aid” rather than a fix, but that it works.

Chair Krieger agreed, noting that a change would require both amendment to the statute and rule.

The Commission approved a request for extension of time to investigate all cases, from March 31, 2017, through September 30, 2017. (m/s/p Baxa/Lewis; all).

Chief Counsel’s Report

Chief Counsel (CC) Livia Wang reported oral argument in the *Bate* appeal was scheduled for March 9, 2017, at 8:45 a.m.

The *Elento* appeal remained pending.

2017 Legislation

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

HCRC

B **Relating to Retaliation in State and State-funded Services**
Prohibits retaliation against people who assert rights under HRS § 368-1.5 or against people who oppose disability discrimination in state and state-funded services.

Status: pending introduction of Administration Package

HCRC position: Support. HCRC requested inclusion and introduction as part of Administration Package.

B **Relating to Retaliation and other discriminatory practices in public accommodations.**
Removes requirement of a conspiracy of two or more persons as an element of retaliation and other prohibited practices in places of public accommodation.

Status: pending introduction of Administration Package

HCRC position: Support. HCRC requested inclusion and introduction as part of Administration Package.

HB 77 **Office of Administrative Hearings**
Creates a central hearing agency to hear all state agency contested cases.

Status: ref. to _____

Discussion: Staff recommendation was to oppose, because his bill would eliminate the HCRC's adjudication functions. Hearings, proposed decisions and final decisions on HCRC cases would be made by the Office of Administrative Hearings instead of HCRC hearings examiners and the Commission. The laws that the HCRC enforces are very complex and would be difficult for hearings officers on a central panel to grasp and correctly apply.

Commissioner Baxa added that the HCRC should strongly oppose the bill, because it took away and wasted expertise in adjudication.

HCRC position: Oppose, based on staff recommendation. (m/s/p Baxa/Lewis; all in favor).

EMPLOYMENT

HB 671
SB 509

Equal Pay

Encourages equal pay between men and women by amending HRS 378-2.3 by adding a provision to prohibit enforced wage secrecy and prohibit retaliation or other discrimination against employees who disclose, discuss or inquire about their own or their co-workers' wages in order to exercise equal pay rights.

Status: ref. to ____

Discussion: Staff recommendation was to support. Disclosure protection similar to provision in HB 1909 and SB 2313 which the HCRC supported in 2016 session. Oftentimes women are not aware of pay differentials because employees are prohibited from disclosing their wages or inquiring about the wages of their co-workers, and/or are retaliated against if they do.

HCRC position: Support, based on staff recommendation. (m/s/p Ebesugawa/Lewis; all in favor).

SB 675

Exceptions to Fair Employment Practices Act (HCC bill)

Narrows exceptions which allow employers to not hire or discharge for any reasons unrelated to specified sections of HRS Chapter 378 instead of requiring employers to show reasons related to the ability of the individual to perform the work.

Status: ref. to ____

Discussion: Staff recommendation was to oppose. In both 2016 and 2017, the Hawai'i Chamber of Commerce legislative package included proposals to legislatively address (reverse) Adams v. CDM Media USA, Inc., 135 Hawai'i 1 (2015). In 2016, the HCRC opposed S.B. No. 3036, based on these concerns:

The amendments to HRS 378-3(3) proposed in S.B. No. 3036 and its S.D.1, ostensibly intended to clarify or correct the meaning of a "legitimate, nondiscriminatory reason" in the Shoppe / McDonnell Douglas analysis, could be interpreted to result in the following unintended consequences:

- 1) Eliminating the requirement in the Shoppe / McDonnell Douglas analysis that requires an employer's proffered articulated reason for its action be both legitimate and nondiscriminatory. This would allow employers to carry their burden by articulating virtually any reason other than a discriminatory reason for their actions, even explanations that are illegitimate and not worthy of credence.
- 2) Arguably create an affirmative defense for employers that does not exist, where an employer can overcome circumstantial evidence discrimination claim by showing any plausible reason for its action that is not based on a prohibited bases, regardless of the circumstantial evidence of discriminatory intent.

3) Possibly undermine and diminish employer responsibility for adverse acts that are partly, but not wholly, motivated by discriminatory intent, a departure from state and federal law on mixed motive cases.

ED Hoshijo presented a brief summary of the *Adams* decision, as discussed in the 2016 testimony.

Chair Krieger explained the basic analysis used in circumstantial evidence cases, with shifting burdens of production and proof. She emphasized the importance, in the analytical framework, of the employer's proffer of a "legitimate" nondiscriminatory reason for an alleged discriminatory adverse act.

HCRC position: Oppose, based on staff recommendation. (m/s/p Ebesugawa/Lewis; all in favor).

HOUSING

SB 127

Housing discrimination based on source of income

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

Status: ref. to CPH, JDL

Discussion: Staff recommendation was to support. In the past, HCRC supported prior versions of this bill (HB 25 L. 2015), noting that protection against source of income discrimination was different in kind from the protections under state fair housing law, and urging that the new protection be placed in a chapter other than HRS chapter 515. 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. At least 13 other states have source of income protection statutes.

Chair Krieger recommended that HCRC position should be "strongly support."

HCRC position: Strongly support, based on staff recommendation and Chair Krieger's recommendation. (m/s/p Ebesugawa/Lewis; all in favor).

PUBLIC ACCOMMODATIONS

HB 475

Relating to Movie Theatres

Eliminates sunset provision and makes permanent the requirements that a motion picture theater in more than two locations in the state must

provide: 1) open movie captioning; and 2) audio description upon request or any picture that is produced and offered with audio description.

Status: ref. to ____

Discussion: Staff recommendation was to support. The HCRC supported Act 39, which created these requirements. We are the first state to require this for the hearing and sight impaired community. Act 39 sunset provision repeals the act effective January 1, 2018.

HCRC position: Support, based on staff recommendation. (m/s/p Lewis/Krieger; all in favor).

OTHER CIVIL RIGHTS RELATED BILLS

HB 412

Civil Rights Board for the Homeless

Creates a Civil Rights Board within the Dept. of Health to request law enforcement to initiate proceedings for emergency examinations and hospitalization of individuals who pose a danger to the public health and safety

Status: ref. to ____

Discussion: Staff recommendation was to monitor. This is outside of our jurisdiction; monitor to make sure this is not added to our jurisdiction.

HCRC position: Monitor. (m/s/p Baxa/Ebesugawa; all in favor).

SB 311

Relating to Law Enforcement Racial Profiling

Requires state and county law enforcement officers (AGs, police, conservation officers, DOT, public safety) to develop policies to prohibit officers from using a person's race or ethnicity to form probable cause or reasonable suspicion to stop a vehicle, but can use race or ethnicity to confirm a previously obtained description of a suspect.. Appropriates funds to annual racial profiling prevention training.

Status: ref. to ____

Discussion: Staff recommendation was to support intent and monitor.

Commissioner Ebesugawa stated that racial profiling in law enforcement is an important issue. Chair Kreiger agreed that it is a very important issue, given the impact of racial profiling on immigrants and minorities.

Commissioner Artemio Baxa expressed opposition to the continuing "use [of] race or ethnicity to confirm a previously obtained description of a suspect." He recommended that the HCRC

position should be to support elimination of the use of race or ethnicity in law enforcement descriptions.

Commissioner Lewis agreed, suggesting that the HCRC urge the elimination of the use of race or ethnicity, which may be inaccurate and subject to stereotyping.

HCRC position: Support intent, but strongly oppose continuing used of race and ethnicity in law enforcement descriptions, and propose a draft to effect that position, based on Commission discussion. (m/s/p Baxa/Lewis; all in favor).

Discussion of other legislation, not covered in Legislative Summary 1 and/or not yet introduced

1. Bill to prohibit employers from requiring or requesting employees and potential employees to grant access to personal social media account usernames and passwords.

ED Hoshijo discussed a bill not yet introduced, but likely to be introduced.

In 2016, the Governor vetoed H.B. No. 1739, H.D.2, S.D.1, which would have provided protection of privacy in social media for employees and potential employees, because of faulty enforcement provisions. In the interim, the proponents of the social media privacy legislation have agreed to provide enforcement through direct civil action.

The HCRC supported the social media privacy protection, noting that it was different in kind from the protections against jurisdiction that the HCRC enforces, with the suggestion that enforcement be provided through a direct civil action, and provided that the bill include language expressly providing that “nothing in the new section shall diminish the authority and obligation of an employer to investigate complaints, allegations, or the occurrence of sexual, racial, or other prohibited harassment under chapter 378.”

HCRC position: Same position as in 2016. (m/s/p Ebesugawa/Baxa; all in favor).

2. Bill to amend HRS §368-1.5, to add protection against discrimination in state and state-funded services on the basis of sex, including gender identity and expression, or sexual orientation.

Chair Krieger discussed concern over anticipated roll-backs of federal sex-based protections against discrimination based on sexual orientation or gender identity or expression, including federal agency implementation and interpretation of Title IX and other civil rights laws as interpreted during the Obama administration. She anticipated the introduction of a bill to amend HRS §368-1.5 to extend these sex-based protections in state and state-funded services, to fill the void that federal inaction would create. The proposal would extend beyond education, to all state and state-funded services.

Commissioner Baxa agreed that Hawai‘i should adopt such protections, be in the forefront, recalling that Maui’s own Patsy T. Mink was the pioneer in the fight against sex discrimination.

HCRC position: The Commission approved a motion to support a bill to extend protections against sex discrimination by establishing Title IX type protections, not limited to education, whether by amendment to HRS §368-1.5, or by other means. (m/s/p Ebesugawa/Baxa; all in favor).

3. Bills not yet reviewed that are introduced through the bill introduction cut-off on January 25, 2017, and set for hearing before the January 27, 2017, continued meeting.

It had been 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 27, 2017, at 1:00 p.m.

Based on the timing of the meeting, to be continued on January 27, 2017, 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, and the Commission approved this motion:

On bills introduced through the bill introduction cut-off on January 25, 2017, which the Commission has not had the opportunity to review and take action on during this January 23 meeting, staff is authorized to identify bills set for hearing before the continued meeting scheduled for January 27, which bills are similar to bills introduced during the 2015-2016 sessions or bills reviewed by the Commission on January 23, 2017, which the Commissioners have acted on, and to submit testimony consistent with those positions. Any such testimony will be reported to the Commission at its continued meeting on January 27, and the position will be subject to Commission review and action at that time. (m/s/p Baxa/Ebesugawa; 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 subject of the implementation of Act 135, ED Hoshijo reported that the next step was to request meetings with HMSA, Kaiser, and other health insurance providers, to discuss their implementation of the prohibition against discrimination in health insurance.

Chair Krieger emphasized that the HCRC follow any related legislation closely and oppose any attempt to change implementation date of state law, given uncertainty of federal HHS implementation of ACA nondiscrimination regulations.

On rulemaking, Chair Krieger reported that her seminar students were working on first draft rules early in the spring semester.

New Business

ED Hoshijo shared information regarding University of Hawai'i President Lassner's recent announcement reaffirming UH's commitment to serve all students, regardless of immigration status.

The Commission authorized and directed ED Hoshijo to prepare a letter from the Executive Director and Chair to President Lassner, expressing appreciation for the reaffirmation of this commitment. (m/s/p Ebesugawa/Krieger; all).

Announcements

There were no announcements.

Continued Meeting

The meeting was continued to January 27, 2017, at 1:00 p.m.

Recess

MINUTES

Hawai'i Civil Rights Commission Office
January 27, 2017*
1:00 p.m.

Present: Linda Krieger, Liann Ebesugawa, and Joan Lewis, Commissioners; Livia Wang, Bill Hoshijo, and Marcus Kawatachi, Staff.

Artemio Baxa, Commissioner, excused.

Chair Linda Krieger called the continued meeting back to order.

Legislation -2017 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 23, 2017, deciding on HCRC positions as follows:

HCRC

| | |
|----------------|---|
| HB 1489 | Civil Rights - state Title IX Act |
| SB 1265 | Amends HRS § 368-1.5 to add Sex, including gender identity and expression and sexual orientation as protected bases |

Status: ref. to: _____

HCRC position: At the 1-23-2017 meeting, the Commission decided to support a state Title IX bill as either an amendment to HRS § 368-1.5 to include sex (including gender identity and expression) and sexual orientation, or as a stand alone provision to HRS Chapter 368.

Further discussion: Staff additional recommendation that this bill be amended to be a stand alone provision that clearly prohibits sex and sexual orientation discrimination in state public educational institutions.

Chair Krieger pointed out that the bill deleted “solely” from HRS §368-1.5, a limitation that was taken from the Rehab Act, but is not in the ADA. The change should allow for mixed motive claims.

* Meeting continued from January 23, 2017.

Chair Krieger reiterated that the HCRC does not want to limit the new state protection to education.

Commissioner Ebesugawa agreed that the bill creates a state analog to Title IX, and extends it to cover all state and state-funded services.

HCRC position: Support, with suggestion for amended preamble, acknowledging and clarifying that the bill expands coverage beyond Title IX, covering education, but going beyond coverage of education to cover all state and state-funded services. (m/s/p Lewis/Ebesugawa; all in favor).

EMPLOYMENT

HB 1010

Discriminatory practices based on employee's status as a qualified patient under the medical use of marijuana law

Amends HRS § 378-32 (not under HCRC jurisdiction) to make it unlawful for any employer to suspend, discharge or discriminate against an employee based on status as a registered qualifying patient under the Medical Use of Marijuana Law or on an employee's positive drug test for marijuana unless the employee used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment, or if the failure to suspend or discharge would violate federal laws or regulations, or cause the employer to lose a monetary or licensing-related benefit under federal law.

Status: ref. to: ____

Discussion: Staff recommendation was to support. The HCRC supported a similar bill in 2015 (HB 795).

HCRC position: Support. (m/s/p Ebesugawa/Lewis; all in favor).

HB 1011

Adding familial status as a protection under HRS § 378-1

Amends HRS § 378-1 to add familial status as a protected basis. Defines "familial status" as the status of a parent having legal custody of and domiciled with a minor child or children, a person who is domiciled with a minor child or children and who has written or unwritten permission from the legal parent, a parent who is pregnant, or any person who is in the process of securing legal custody of a minor child or children."

Status: ref. to: ____

Discussion: Staff recommendation was to support. Although this is already a protected basis for women with children under the "sex plus" theory of discrimination, this bill would also protect

men who have children. New York state has a similar law; however the NY law does not require reasonable accommodations.

HCRC position: Support. (m/s/p Lewis/Ebesugawa; all in favor).

HB 1031 **Relating to criminal history record checks**
SB 897 Authorizes the Child Support Enforcement Agency and the Depts. of Taxation, Labor and Human Services to conduct criminal history record checks for employees, applicants and contractors who will have access to federal tax information.

Status: SB 897 ref. to JDL/HMS, WAM

Discussion: Staff recommendation was no opposition – required under federal law.

HCRC position: No opposition. (m/s/p Ebesugawa/Lewis; all in favor).

SB 1096 **Relating to criminal history record checks**
Requires counties to establish standards to require individuals who operate a public passenger vehicle service to submit a set of electronic fingerprints and to consent to a criminal history record check

Status: ref. to ____

Discussion: Staff recommendation was no opposition. If such individuals are employees, under HCRC’s arrest and court record law (HRS § 378-2.5), such inquiries could only be made post-offer. If such individuals are independent contractors, they would not be subject to our law.

HCRC position: No opposition. (m/s/p Lewis/Ebesugawa; all in favor).

HOUSING

HB 1529 **Discrimination against veterans in rental transactions**
Amends HRS Chapter 521 (not under HCRC jurisdiction) to prohibit discrimination in rentals based on a veteran’s use of HUD-VASH vouchers

Status: ref. to ____

Discussion: Staff recommendation was to support intent and monitor. In 2016 session, the Commission decided to support the intent of a similar bill (HB 1591) and monitor it to make sure this is not placed under HCRC jurisdiction.

HCRC position: Support intent and monitor. (m/s/p Lewis/Ebesugawa; all in favor).

HB 1599 Service and emotional support animals in housing; penalties for misrepresentation

Amends HRS 347-2.5 to define emotional support animals; amends HRS chapter 708 to make it a misdemeanor to knowingly and willfully misrepresent themselves as being disabled in order to use a service/emotional support animal

Status: ref. to: _____

Discussion: Staff recommendation was to oppose. Restricting accommodations to service and emotional support animals is more narrow than assistance animals as allowed under the FHA, HRS 515-3(9) and HAR 12-46-306. In 2015 the HCRC opposed a similar bill (SB 760) because if insufficient representations are criminalized, it may have a chilling effect on residents with a disability who want to request an accommodation.

HCRC position: Oppose. (m/s/p Ebesugawa/Lewis; all in favor).

PUBLIC ACCOMMODATIONS

HB 956 Gender equality in providing diaper changing facilities

Adds a new part to HRS Chapter 489 to require all places of public accommodation constructed or substantially modified after June 30, 2017 to provide baby diaper changing accommodations equally accessible to men and women. Provides a private cause of action (so not enforced by HCRC).

Status: ref. to: _____

Discussion: Staff recommendation was to support. Promotes full participation of men and women in family life and dispels gender roles/expectations that only women care for infants.

HCRC position: Support. (m/s/p Lewis/ Ebesugawa; all in favor).

SB 1157 Requiring health care providers to provide communication auxiliary aids and services
HB 955

Amends HRS Chapter 432E (not under HCRC jurisdiction) to create a penalty equal to 3 times the cost of providing a qualified auxiliary aid or service for health care providers who fail to provide auxiliary aids or services (including qualified sign language interpreters) to patients with a communication disability

Status: ref. to ____

Discussion: Staff recommendation was to support.

Chair Krieger expressed concern over impact on small practitioners, because treble damages were punitive, in the absence of willful, intentional discrimination

Commissioner Lewis expressed concern over impact on health care providers, suggesting that cost should be covered by health plan insurers, not only health care providers.

CC suggested that the HCRC support the intent, and point out that auxiliary aids and services are already required under Title III of the ADA and HRS chapter 489.

HCRC position: Support intent, and point out that auxiliary aids and services are already required under Title III of the ADA and HRS chapter 489. (m/s/p Ebesugawa/Lewis; all in favor).

OTHER CIVIL RIGHTS ISSUES

HB 422 **Relating to Selective Service**
SB 491 Requires compliance with the Military Selective Service Act to be eligible for enrollment in a state support college, to qualify for state financial assistance for college, or to be eligible for state or county employment.

Status: HB 422 ref. to VMI, CPC, JUD
SB 491 ref. to PSM/HRE/TRE, JDL

Discussion: Staff recommendation was to strongly oppose. In 2015, the HCRC strongly opposed a similar bill (HB 52) on the grounds that it codified sex discrimination – it only applies to males and imposes a discriminatory burden on men that does not apply to women. It also may affect conscientious objectors who do not register for religious reasons.

HCRC position: Strongly oppose. (m/s/p Lewis/Ebesugawa; all in favor).

HB 823 **Relating to Religious Rights (state Religious Freedom Restoration Act)**
Amends HRS Chapter 7 to prohibit the state or any county from burdening any person's right to exercise religion absent that burden being the least restrictive means of furthering a compelling governmental interest.

Status: ref. to ____

Discussion: Staff recommendation was to oppose. The Commission has consistently opposed similar bills because this is the strictest standard used to justify burdens on religious exercise

imposed by neutral laws (such as non-discrimination laws), and would be used to strike down many laws against discrimination.

HCRC position: Strongly oppose. (m/s/p Lewis/Ebesugawa; all in favor).

HB 886 **Relating to Filipino Veterans**
Requires and funds the Office of Veterans' Services to establish a Filipino Veterans Legacy Exhibit at the Honolulu International Airport.

Status: ref. to ____

Discussion: Staff recommendation was to support. The exhibit would honor, preserve, and share the legacy of Filipino WWII veterans from Hawaii and the mainland who were at first not allowed to serve because they were not U.S. citizens, as well as Filipinos from the Philippines who were denied many of the promises made to them.

HCRC position: Strongly support. (m/s/p Lewis/Ebesugawa; all in favor).

HB 942 **Relating to Filipino Veterans**
Appropriates funds for the Hawaii State Foundation on Culture and the Arts to commission an artist to design and build a monument at the Filipino community Center in Waipahu that honors Filipino WWII veterans.

Status: ref. to ____

Discussion: Staff recommendation was to support for same reasons as HB 886 above.

HCRC position: Strongly support. (m/s/p Lewis/Ebesugawa; all in favor).

HB 1420 **Relating to Filipino Veterans Burial Assistance**
Appropriates funds for burial grants for qualifying Filipino American vets living in Hawaii to transport their remains to the Philippines if federal funds are unavailable

Status: ref. to ____

Discussion: Staff recommendation was to support. Burial benefits were provided to Filipino soldiers but only at U.S. national and state cemeteries. Many Filipino veterans have unsuccessfully petitioned for decades to have their relatives granted residence in Hawaii and are dying without family here. This grant would enable their remains to be to their families in the Philippines for burial.

HCRC position: Strongly support. (m/s/p Lewis/Ebesugawa; all in favor).

HB 1349 **Training on cultural competency, implicit bias and racial and ethnic sensitivity for police officers**
Requires police commission to establish training programs on cultural competency, implicit bias, racial and ethnic sensitivity and how to interact with people with mental disabilities and homeless people, and for police officers to complete such training programs.

Status: ref. to ____

Discussion: Staff recommended support for reasons similar to supporting SB 311/HB 1405 – eliminate bias in police interactions with the public.

HCRC position: Support. (m/s/p Ebesugawa/Lewis; all in favor).

SB 954 **Relating to Health Insurance**
HB 1088 Section 4 of this bill corrects a technical non-substantive drafting error in Act 135, L. 2016 - HRS § 431:10A-118.3's definition of "perceived gender identity".

Status: ref. to ____

Discussion: Staff recommendation was to monitor to make sure no substantive changes are made to the statute.

HCRC position: Carefully monitor. (m/s/p Ebesugawa/Lewis; all in favor).

HB 1371 **Workplace Violence**
Creates a new part in HRS Chapter 378 that directs DLIR to provide procedures for state employees to report incidents of workplace violence, conduct investigations on such reports, take action to ensure safety of the employee, provide support services and prohibit retaliation. Also amends HRS Chapter 378 part VI (DV victims protection act) to add definitions for "violence" and "workplace".

Status: ref. to ____

Discussion: Staff recommendation was to monitor. Probably will not be placed under HCRC jurisdiction; also concerns about including definitions in HRS Chapter 378 part VI.

HCRC position: Monitor, and express concern about ambiguity. (m/s/p Lewis/Ebesugawa; all in favor).

BILLS ALREADY DISCUSSED AT JANUARY 23, 2017 MEETING

HCRC

HB 1116 **Relating to Retaliation in State and State-funded Services**
SB 982 Prohibits retaliation against people who assert rights under HRS § 368-1.5
or again people who oppose disability discrimination in state and state-
funded services.

Status: ref. to ____

HCRC position: Support. HCRC requested inclusion and introduction as part of Administration Package.

HB 1113 **Relating to Retaliation and other discriminatory practices in public**
SB 979 **accommodations.**
Removes requirement of a conspiracy of two or more persons as an
element of retaliation and other prohibited practices in places of public
accommodation.

Status: ref. to ____

HCRC position: Support. HCRC requested inclusion and introduction as part of Administration Package.

HB 77 **Office of Administrative Hearings**
Creates a central hearing agency to hear all state agency contested cases.

Status: ref. to JUD, FIN

HCRC position: Oppose. This bill would eliminate the HCRC's adjudication functions. Hearings, proposed decisions and final decisions on HCRC cases would be made by the Office of Administrative Hearings instead of HCRC hearings examiners and the Commission. The laws that the HCRC enforces are very complex and would be difficult for hearings officers on a central panel to grasp and correctly apply.

EMPLOYMENT

HB 671
SB 509

Equal Pay

Encourages equal pay between men and women by amending HRS 378-2.3 by adding a provision to prohibit enforced wage secrecy and prohibit retaliation or other discrimination against employees who disclose, discuss or inquire about their own or their co-workers' wages in order to exercise equal pay rights.

Status: SB 509 ref. to JDL

HCRC position: Support. Disclosure protection similar to provision in HB 1909 and SB 2313 which the HCRC supported in 2016 session. Oftentimes women are not aware of pay differentials because employees are prohibited from disclosing their wages or inquiring about the wages of their co-workers, and/or are retaliated against if they do.

SB 675
HB 809

Exceptions to Fair Employment Practices Act (HCC bill)

Narrows exceptions which allow employers to not hire or discharge for any reasons unrelated to specified sections of HRS Chapter 378 instead of requiring employers to show reasons related to the ability of the individual to perform the work.

Status: SB 675 ref. to JDL

HCRC position: Oppose. In both 2016 and 2017, the Hawai'i Chamber of Commerce legislative package included proposals to legislatively address (reverse) Adams v. CDM Media USA, Inc., 135 Hawai'i 1 (2015). In 2016, the HCRC opposed S.B. No. 3036, based on these concerns:

The amendments to HRS 378-3(3) proposed in S.B. No. 3036 and its S.D.1, ostensibly intended to clarify or correct the meaning of a "legitimate, nondiscriminatory reason" in which the Supreme Court used a "just cause" standard, i.e., the reason has to be related to the individual's ability to perform the job duties. The bill could be interpreted to result in the following unintended consequences:

- 1) Eliminating the requirement in the Shoppe / McDonnell Douglas analysis that requires an employer's proffered articulated reason for its action be both legitimate and nondiscriminatory. This would allow employers to carry their burden by articulating virtually any reason other than a discriminatory reason for their actions, even explanations that are illegitimate and not worthy of credence.
- 2) Arguably create an affirmative defense for employers that does not exist, where an employer can overcome circumstantial evidence discrimination claim by showing any plausible reason for its action that is not based on a prohibited bases, regardless of the circumstantial evidence of discriminatory intent.

3) Possibly undermine and diminish employer responsibility for adverse acts that are partly, but not wholly, motivated by discriminatory intent, a departure from state and federal law on mixed motive cases.

HOUSING

SB 127 **Housing discrimination based on source of income**
Amends the Landlord Tenant Code (HRS Chapter 521) to prohibit discrimination based on lawful source of income in rental transactions

Status: ref. to CPH, JDL

HCRC position: Strongly support. In the past, HCRC supported prior versions of this bill (HB 25 L. 2015), noting that protection against source of income discrimination was different in kind from the protections under state fair housing law, and urging that the new protection be placed in a chapter other than HRS chapter 515. 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. At least 13 other states have source of income protection statutes.

PUBLIC ACCOMMODATIONS

HB 475 **Relating to Movie Theatres**
SB 1156 Eliminates sunset provision and makes permanent the requirements that a motion picture theater in more than two locations in the state must provide: 1) open movie captioning; and 2) audio description upon request or any picture that is produced and offered with audio description.

Status: HB 475 ref. to EDB, FIN

HCRC position: Support. The HCRC supported Act 39, which created these requirements. We are the first state to require this for the hearing and sight impaired community. Act 39 sunset provision repeals the act effective January 1, 2018.

OTHER CIVIL RIGHTS RELATED BILLS

HB 412

Civil Rights Board for the Homeless

Creates a Civil Rights Board within the Dept. of Health to request law enforcement to initiate proceedings for emergency examinations and hospitalization of individuals who pose a danger to the public health and safety

Status: ref. to HUS, JUD, FIN

HCRC position: Monitor. This is outside of our jurisdiction; monitor to make sure this is not added to our jurisdiction.

SB 311

HB 1405

Relating to Law Enforcement Racial Profiling

Requires state and county law enforcement officers (AGs, police, conservation officers, DOT, public safety) to develop policies to prohibit officers from using a person's race or ethnicity to form probable cause or reasonable suspicion to stop a vehicle, but can use race or ethnicity to confirm a previously obtained description of a suspect. Appropriates funds to annual racial profiling prevention training.

Status: ref. to PSM/JDL, WAM

HCRC position: Support intent, but strongly oppose continuing used of race and ethnicity in law enforcement descriptions, and propose a draft to effect that position, based on Commission discussion.

Next Meeting

The next meeting of the Commission was scheduled, for February 24, 2017, at 1:30 p.m., subject to polling of and confirmation by the Commissioners.

Adjournment