



HAWAI'I CIVIL RIGHTS COMMISSION

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MINUTES

Hawai'i Civil Rights Commission Office

May 31, 2018

2:30 p.m.

Present: Linda Krieger, Liann Ebesugawa, and Joakim Peter, Commissioners; Robin Wurtzel, Bill Hoshijo, Marcus Kawatachi, and Ahmad Nasser, Staff; Francine Wai and Peter Fritz, Guests.

Joan Lewis, Commissioner, excused.

Chair Linda Krieger called the meeting to order.

Approval of Minutes

The Commissioners reviewed the draft minutes of the April 27, 2018, meeting. The minutes were approved. (m/s/p Peter/Ebesugawa; 3-0).

Executive Director's Report

Deputy Executive Director (DED) Marcus Kawatachi presented a FY 2018 HCRC Mediation Program year-to-date summary.

Summary & Details (7/1/17 through 5/31/18)

Referrals:	37
Dispositions:	35
Settlements:	25
Non-agreements:	10
Settlement Rate:	71.4 %
Employment cases settled:	19
Non-employment cases settled:	6
Dual-filed (EEOC/HCRC) settlements:	21
State-only settlements	4

Primary Bases for Complaints Settled in Mediation

Disability	7
Retaliation	5
Arrest and Court Record	4
Ancestry/National Origin	3
Sex	3 (2 pregnancy)
Age	2
Familial Status	1

Dispositions by Mediation Center

Mediation Center of the Pacific	11/13	(settlement rate 84.6%)
Mediation Services of Maui		
Private Mediators	4/5	(settlement rate 80%)
Ku'ikahi Mediation Services (Hilo)	2/4	(settlement rate 50%)
West Hawaii Mediation Center		
Kauai Economic Opportunity, Inc.	0/2	(settlement rate 0%)
Hawai'i Civil Rights Commission	8/11	(settlement rate 72.7%)

OVERALL 25/35 (settlement rate 71.4%)

Chair Krieger asked if there were additional data points that it would be helpful to include in the mediation report.

DED Kawatachi suggested that it might be useful to track and report on post-mediation dispositions (in cases which do not result in mediated agreements, as well as satisfaction of the parties.

Chair Krieger said it would be helpful to have information on the monetary and non-monetary relief secured in mediation, as an indicator of whether there are any imbalance of power issues in the process.

DED Kawatachi also presented a data and production report showing caseload data through May 31, 2018.

As of May 31, 2018, the report showed 185 open cases, a decrease of 6 cases from the number reported as of April 27, 2018. Of those, 1 (0.5%) were filed in 2015, 12 (6.5%) in 2016, 80 (43.2%) in 2017, and 92 (49.7%) in 2018.

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

	2015	2016	2017	2018	Total
Housing Cases	0	1	12	21	34
Response Monitoring	0	3	26	49	78
Mediation	0	1	7	11	19
Pending Assignment	0	3	23	3	29
Active Investigation	1	4	12	8	25
TOTAL	1	12	80	92	185

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

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

Category	7/1/13 – 5/31/14	7/1/14 – 5/31/15	7/1/15 – 5/31/16	7/1/16 – 5/31/17	7/1/17 – 5/31/18
PCQ Received	639	625	634	553	541
Intake Decision	613	612	649	558	506
Complaint Filed	278	311	367	303	255
Investigation Closed	329	290	443	440	233
Notice of Cause	6	13	19	16	27
Enforcement Closure	7	9	25	12	28

DED noted that the numbers of notices of cause issued (27) and post-cause enforcement closures (28) in FY 2018 to date were substantially higher than in recent fiscal years.

It was clarified that the number of complaints filed in the report was the number of complaints filed with the HCRC under state law, and did not include the charges that were filed with the EEOC and dual-filed with the HCRC, to be investigated by the EEOC. The total number of dual-filed complaints (or charges) would include the complaints filed with the HCRC, plus the number of charges filed with the EEOC, without double-counting any complaints or charges.

Chair Krieger wondered whether the decrease in complaint intakes, when viewed in light of similar decreasing numbers in EEOC charge filings, might be attributable to increasing use of mandatory arbitration agreements as a condition of employment. It would, she suggested, be useful to know how many and which respondent employers require mandatory arbitration agreements. In those cases, only the HCRC and EEOC have access to the courts to vindicate rights under state and federal fair employment laws.

DED Kawatachi noted that the HCRC had recently filled 2 of 3 vacant investigator positions, and the third position would be filled before the end of June.

Executive Director (ED) Bill Hoshijo reported that the HCRC annual public training would be scheduled for October 2018. The focus and target audience for the training would be adjusted for this year. Over time, the audience has been comprised largely of human resources professions, with the programs focused on prevention of unlawful discrimination and avoiding liability. Initial plans for the 2018 training are for an expanded audience, to include worker representatives, with the program agenda to include topics addressing how workers can exercise their rights under state and federal EEO laws.

ED Hoshijo also reported that former HCRC Commissioner Sara Banks invited the HCRC to participate in the 2018 E Ola Pono Campaign Award presentation ceremony held on May 25, 2018, at Ewa Makai Middle School. HCRC Commissioner Joan Lewis represented the Commission.

And, ED Hoshijo reported on a long-pending project in partnership with the Medical-Legal Partnership for Children, HUD, and the EEOC, with plans for outreach to medical service providers on reasonable accommodation requests and medical documentation. It was suggested that the Disability and Communication Access Board (DCAB) should be invited to partner in this effort.

2018 Legislation

Chief Counsel (CC) Robin Wurtzel, reported on the status of the following previously discussed bills, which were pending Governor's review and approval, enactment without signature if not signed or vetoed, or veto:

		HOUSE BILLS
1.	HB 1489, HD 1, SD 1 CD1	Relating to Civil Rights Title IX
		SENATE BILLS
2.	SB 2351, SD 1, HD1, CD1	Equal Pay
3.	SB 2461 SD1, HD1 CD1	Relating to Service Animals

2019 Legislation

It was agreed that the Commission should take a couple of months to digest the results of the 2018 legislative session, and what would follow, to include the LRB study on implementation of the state Title IX bill and enabling legislation to be enacted in 2019.

There was a brief discussion of HRS §368-1.5, and whether the HCRC will seek restoration of broader jurisdiction consistent with its pre-*HTA* decision interpretation of the statute to cover all state-funded programs and activities, regardless of whether they also receive federal funds, and whether to seek jurisdiction over the DOE and UH.

Peter Fritz commented that it was important for the HCRC and the public to pressure the Chief Information Officer of the State Office of Information and Technology to ensure that state fillable online forms should be disability accessible 24/7, noting that tax forms are not currently disability accessible.

Chair Krieger noted that accessibility issues relating to DHRD online application forms would already fall under HRS chapter 378, part I, jurisdiction.

2018 Legislation (continued)

Returning to the discussion of 2018 legislation, ED Hoshijo noted concerns over SB 2461, which created a civil penalty for fraudulent representation of a dog as a service animal.

DCAB Executive Director Francine Wai commented that the civil penalties would be difficult to enforce as drafted, in the absence of a certification process for service animals, but that the intent was to deter people from misrepresenting pets as service animals. The concerns over

enforceability had been raised in the bill review process, but that the bill was not likely to be vetoed. She also noted that the US Department of Transportation was discussing changes to its rules on service animals in air transportation, to harmonize them with standard under Title II and Title III of the ADA.

ED Hoshijo added that the HCRC's concerns and opposition to the bill were focused on the chilling effect that it would have on the exercise of the rights of persons with disabilities in housing, with confusion and conflation of the new law, based on ADA Title III standards, and state and federal fair housing law, which provide for reasonable accommodation for persons with a disability who use an assistance animal, not limited to service animals that are trained to perform a task.

In discussion of the bill, both the HCRC and DCAB had recognized the need for outreach and education, to avoid confusion and unlawful discrimination by housing providers.

Chief Counsel's Report

CC Wurtzel reported that 6 cases were docketed for contested case hearing in 2017, and all settled. The cases raised a variety of issues: employment – disability; housing – sexual harassment; housing – disability; employment – sexual harassment; employment – failure to investigate; and, employment – sex, pregnancy, failure to reinstate.

CC Wurtzel reported on the status of several pending cases.

In the *Bate* case, mediation was ongoing, scheduled for May 31 and June 1, 2018.

In the *Morning Hill Foods (Kyi-Yim)* case, on appeal to the Circuit Court, oral argument was held on the morning of May 31, 2018. Judge Hiraoka ruled from the bench that morning, affirming the Commission's decision and reducing the monetary award to \$1,000 for emotional distress. The Court addressed the four points raised by Appellant in its final decision as follows:

1. The HCRC's grant of extensions to investigate pursuant to H.R.S. § 368-13 is not an unconstitutional denial of due process
2. H.A.R. § 12-46-133 (a) is constitutional
3. Judge Hiraoka expressed reservations about the HCRC's authority to award damages for emotional distress, referring to tort law and the inability to award damages for emotional distress when there is no physical harm, but noted that the respondent had waived the issue by failing to file exceptions. Deputy Attorney General Frances Lum, who argued the case for the HCRC, pointed out that damages are based on the remedies provision in our statutes, H.R.S. § 368-17. The Court also expressed concerns over an award of back pay when the Complainant never worked for Appellant.
4. There was and is no basis for recusal of Commissioner Ebesugawa from the HCRC decision, based on her sister's employment for Appellant.

As reported earlier, in *Cervelli/Buford v. Aloha Bed & Breakfast*, the Intermediate Court of Appeals issued a decision on February 23, 2018, affirming the Circuit Court decision that the Defendant bed and breakfast was a place of public accommodation, and therefore discrimination based on sexual orientation

was prohibited. A petition for certiorari was filed, and a reply would be due in mid-June, after one extension of time.

In the *Shavelson* case, oral argument before the Ninth Circuit Court of Appeals was set for June 11, 2018, in Honolulu.

Old Business

It was reported that discussion of the proposed outreach on sexual harassment would have to be restarted.

New Business

Chair Krieger and the Commissioners requested that follow-up on three legislation-related issues be added to the next meeting agenda under new business: implementing legislation for the new state Title IX law; possible rulemaking for the new equal pay law; and policy discussion around amendment of HRS § 368-1.5.

As a matter of policy, the Commission would have to decide whether it wants amended § 368-1.5 jurisdiction over educational institutions, and whether the HCRC has the capacity to handle the additional workload that it would entail. The HCRC will need to clearly address how to separate and distinguish IDEA/IEP issues and Section 504 issues, in order to avoid review IEP issues.

Similarly, the Commission will have to consider how enforcement of the new Title IX law, if assigned to the HCRC by the legislature, will impact HCRC resources and staffing needs and capacity to effectively enforce the laws currently under HCRC jurisdiction.

Announcements

Commissioner Ebesugawa announced a Talk Story event with University of Hawai'i law professor Eric Yamamoto, centered around his new book, "In the Shadow of Korematsu," on June 28, 2018. The event was co-sponsored by the National Asian Pacific American Bar Association (NAPABA), Hawaii Chapter, Japanese American Citizens League (JACL) – Honolulu, and the Federal Bar Association.

CLOSED EXECUTIVE SESSION

The Commissioners voted to go into closed executive session to discuss a personnel matter. (m/s/p Ebesugawa/Peter; 3-0).

The Commissioners went into closed executive session.

The Commissioners came out of closed executive session.

Next Meeting

The next meeting of the Commission was scheduled, for July 19, 2018, at 1:30 p.m., subject to polling of and confirmation by the Commissioners.

Adjournment