



# HAWAI'I CIVIL RIGHTS COMMISSION

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## MINUTES

Hawai'i Civil Rights Commission Office  
July 19, 2018  
1:30 p.m.

Present: Linda Krieger, Liann Ebesugawa, and Joan Lewis, Commissioners; Robin Wurtzel, Bill Hoshijo, Marcus Kawatachi,, Duffy Jamieson, and Don Edmonds, Staff; Frances Lum and Doris Dvonch, Deputy Attorneys General; Peter Fritz, Guest.

Joakim Peter, Commissioner, excused.

Chair Linda Krieger called the meeting to order.

### Approval of Minutes

**The Commissioners reviewed the draft minutes of the May 31, 2018, meeting. The minutes were approved. (m/s/p Ebesugawa/Lewis; 3-0).**

### CLOSED EXECUTIVE SESSION

**The Commissioners voted to go into closed executive session for a confidential attorney-client discussion with Deputy Attorneys General Frances Lum and Doris Dvonch. (m/s/p Lewis/Ebesugawa; 3-0).**

The Commissioners went into closed executive session.

**The Commissioners came out of closed executive session.**

### Executive Director's Report

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

**Summary & Details (7/1/17 through 6/30/18)**

Referrals:	37
Dispositions:	40
Settlements:	27
Non-agreements:	13
Settlement Rate:	67.5 %
Employment cases settled:	21
Non-employment cases settled:	6
Dual-filed (EEOC/HCRC) settlements:	23
State-only settlements	4

**Primary Bases for Complaints Settled in Mediation**

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

**Dispositions by Mediation Center**

Mediation Center of the Pacific	13/15	(settlement rate 86.7%)
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.	0/3	(settlement rate 0%)
Hawai'i Civil Rights Commission	8/13	(settlement rate 61.5%)

**OVERALL 27/40 (settlement rate 67.5%)**

DED Kawatachi also presented a data and production report showing caseload data through June 30, 2018.

As of June 30, 2018, the report showed 193 open cases, an increase of 8 cases from the number reported as of May 31, 2018. Of those, 1 (0.5%) were filed in 2015, 10 (5.2%) in 2016, 70 (36.3%) in 2017, and 112 (58.0%) 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	0	10	23	33
Response Monitoring	0	1	11	61	73
Mediation	0	1	6	12	19
Pending Assignment	0	0	7	9	16
Active Investigation	1	8	36	7	51
<b>TOTAL</b>	1	10	70	112	193

DED Kawatachi reported that in one case an enforcement attorney was pursuing subpoena enforcement to compel a response to a complaint.

DED Kawatachi went over comparative data for the past ten fiscal years, FY 2008 through FY 2017, including:

<b>Category</b>	<b>7/1/07 – 6/30/08</b>	<b>7/1/08 – 6/30/09</b>	<b>7/1/09 – 6/30/10</b>	<b>7/1/10 – 6/30/11</b>	<b>7/1/11 – 6/30/12</b>
PCQ Received	860	933	874	778	774
Intake Decision	784	934	800	786	684
Complaint Filed - HCRC	357	439	469	365	398
Complaint Filed – EEOC or HUD	329	279	245	266	241
Investigation Closed	291	401	431	372	344
Notice of Cause	21	16	10	10	6
Enforcement Closure	20	15	31	20	22

Category	7/1/12 – 6/30/13	7/1/13 – 6/30/14	7/1/14 – 6/30/15	7/1/15 – 6/30/16	7/1/16 – 6/30/17
PCQ Received	691	699	692	678	610
Intake Decision	708	655	661	709	596
Complaint Filed - HCRC	338	303	359	394	323
Complaint Filed - EEOC or HUD	277	290	239	258	239
Investigation Closed	355	370	332	473	480
Notice of Cause	8	6	15	22	16
Enforcement Closure	22	6	14	25	17

DED Kawatachi explained that the data for past fiscal years was provided as background information, which will be useful for comparison purposes when the FY 2018 annual report data is aggregated and reported.

DED Kawatachi clarified that cases reported as “Complaint Filed – EEOC or HUD” were complaints originally filed with the EEOC or HUD and then dual-filed with HCRC, distinct from the number reported as “Complaint Filed – HCRC,” which reflect the number of complaints originally filed with the HCRC and then dual-filed with EEOC or HUD. Complaints originally filed with the HCRC are normally investigated by the HCRC, as are a small number of cases that are originally filed with EEOC or HUD and later transferred to the HCRC for investigation.

Executive Director (ED) Bill Hoshijo added that EEOC complaint intakes were, like HCRC’s, lower in number than in the past. There has been some discussion of the reasons for the lower number of complaint filings, which might in part be attributed to implementation of a new EEOC online intake system, screening out non-jurisdictional complaints, and barriers facing limited-English proficient persons and those who are not computer proficient.

ED Hoshijo asked HCRC Commissioner Joan Lewis to report on her participation in the 2018 E Ola Pono Campaign Award presentation ceremony held on May 25, 2018, at Ewa Makai Middle School. Commissioner Lewis said the event and the students’ work was amazing. Former Commissioner Sara Banks hopes to expand the annual program, and Commissioner Lewis recommended that the HCRC continue its support.

ED Hoshijo reported that the HCRC annual public training was scheduled for October 2018.

And, ED Hoshijo suggested that the previously discussed HCRC forum on sexual harassment could be scheduled for November 2018, post-election and pre-holiday season..

## 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:

1.	<b>Act 108</b> SB 2351, SD 1, HD1, CD1	Equal Pay
2.	<b>Act 110</b> HB 1489, HD 1, SD 1 CD1	Relating to Civil Rights Title IX  Call for LRB study.
3.	Act 217 SB 2461 SD1, HD1 CD1	Relating to Service Animals  Enacted without Governor’s signature.

The Commissioners discussed whether the equal pay statute, HRS § 378-2.3, should be harmonized with holding in *Adams v. CDM*, so that a “permissible factor other than sex” must be work-related, just as HRS § 378-3(3) requires that a legitimate non-discriminatory reason for an adverse employment action must be work-related.

## 2019 Legislation

CC Wurtzel explained that in *L.E. v. Hawaii Technology Academy*, issued in December, 2017, the Hawai‘i Supreme Court held that the HCRC lacks HRS § 368-1.5 jurisdiction over any state agency or program which is subject to Section 504 of the Rehab Act. She discussed several legislative options for the Commission to consider, if the HCRC seeks to restore HCRC jurisdiction under HRS §368-1.5, to its broader interpretation of the statute to cover all state-funded programs and activities, regardless of whether they also receive federal funds, as interpreted prior to the Hawai‘i Supreme Court’s decision in *L.E. v. Hawaii Technology Academy*. She suggested three possible options for proposed legislation:

- Do nothing, leaving unchanged the drastically restricted HRS § 368-1.5 jurisdiction, covering only state-funded programs and activities that receive no federal funding.
- Restore HRS § 368-1.5 coverage and jurisdiction over all state-funded programs and activities, regardless of whether they also receive federal funds, including educational institutions (DOE and UH).
- Restore HRS § 368-1.5 coverage and jurisdiction over all state-funded programs and activities, regardless of whether they also receive federal funds, except educational institutions (DOE and UH).

Chair Krieger suggested that there was a fourth option: Restore HRS § 368-1.5 coverage and jurisdiction over all state-funded programs and activities, regardless of whether they also receive federal funds, excluding DOE and charter schools, pre-school, primary and secondary schools, because of overlap with federal IDEA jurisdiction and state IDEA issues and process.

**The Commission requested and authorized CC Wurtzel to draft a proposed bill to include this language regarding state-funded programs and activities: “The term does not exclude a state agency or any program or activity that also receives federal funds.” And, the draft should also exclude DOE and charter schools, pre-school, primary and secondary schools. (m/s/p Ebesugawa/ Lewis; 3-0).**

### **Chief Counsel’s Report**

CC Wurtzel reported on the status of two pending cases.

In *Cervelli/Buford v. Aloha Bed & Breakfast*, the Defendant/ Appellant, Aloha Bed & Breakfast, petitioned for certiorari from the Hawai‘i Supreme Court, and it was denied on July 10, 2018. They can petition for certiorari from the U.S. Supreme Court. If they do not, the case will be remanded to the Circuit Court for a trial on damages.

*Shavelson v. Hawai‘i Civil Rights Commission, Constance DeMartino, William Hoshijo and Marcus Kawatachi*, 15-16525 9<sup>th</sup> Cir.-

The Ninth Circuit Court of Appeals issued its decision on July 3, 2018. In an unpublished memorandum decision, the court remanded solely to allow the district court to give the plaintiff a chance to amend her complaint to cure the deficiencies in her equal protection claim. The court affirmed the dismissal of the due process claim with prejudice, ruling that because there was no protected property interest, plaintiff could not assert a due process claim. The court also noted that plaintiff’s equal protection claim was “deficient in several respects,” but believed that the district court should have given the *pro se* plaintiff an opportunity to amend to cure those deficiencies.

CC Wurtzel reported that Commissioners can expect a Proposed Findings of Fact and Conclusions of Law issued after an administrative hearing on June 27, 2018, with a transcript.

### **Old Business**

HCRC outreach on sexual harassment had been briefly discussed as part of the Executive Director’s report.

### **New Business**

Legislation was discussed earlier under 2018 and 2019 legislation.

**Announcements**

There were no announcements.

**Next Meeting**

The next meeting of the Commission was scheduled, for September 7 or 14, 2018, at 10 a.m., subject to polling of and confirmation by the Commissioners.

**Adjournment**