

MINUTES*

Hawai`i Civil Rights Commission Office
January 23, 2019
12:30 p.m.

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

Excused: Joakim Peter, Commissioner.

Chair Linda Krieger called the meeting to order.

Approval of Minutes

The Commissioners reviewed the draft minutes of the November 30, 2018, meeting. The minutes were approved. (m/s/p Lewis/Ebesugawa; 3-0).

Executive Director's Report

Deputy Executive Director (DED) Marcus Kawatachi presented a FY 2019 HCRC Mediation Program year-to-date summary.

Summary & Details (7/1/18 through 1/22/19)

Referrals:	19
Dispositions:	28
Settlements:	20
Non-agreements:	8
Settlement Rate:	71.4 %

Employment cases settled:	11
Housing cases settled:	9
Dual-filed (EEOC/HCRC and HUD/HCRC) settlements:	18
State-only settlements:	2

Primary Bases for Complaints Settled in Mediation

Disability	6
------------	---

* as corrected and approved on March 6, 2019.

Age	3
Sex	3 (1 pregnancy and 2 sexual harassment)
Race	2
Retaliation	2
Arrest & Court Record	1
Color	1
National Origin	1
Sexual Orientation	1

Dispositions by Mediation Center

Mediation Center of the Pacific	7/9	(settlement rate 77.8%)
Mediation Services of Maui	0/1	(settlement rate 0%)
Private Mediators	1/1	(settlement rate 100%)
Ku‘ikahi Mediation Services (Hilo)	0/1	(settlement rate 0%)
West Hawaii Mediation Center	2/2	(settlement rate 100%)
Kauai Economic Opportunity, Inc.	1/3	(settlement rate 33.3%)
Hawai‘i Civil Rights Commission	9/11	(settlement rate 81.8%)

OVERALL 20/28 (settlement rate 71.4%)

DED Kawatachi presented a data and production report showing caseload data through January 22, 2019.

As of, November 30 2018, the report showed 205 open cases, an increase of 18 cases from the number reported as of November 30, 2018. Of those, 0 (0%) were filed in 2016, 31 (15.1%) in 2017, 161 (78.5%) in 2018, and 10 (4.9%) in 2019.

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

	2016	2017	2018	2019	Total
Housing Cases	0	6	18	1	25
Response Monitoring	1	6	83	9	99
Mediation	0	1	9	0	10
Pending Assignment	0	8	29	0	37
Active Investigation	2	10	22	0	34

TOTAL 3 31 161 10 205

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

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

Category	7/1/14 – 1/22/15	7/1/15 – 1/22/16	7/1/16 – 1/22/17	7/1/17 – 1/22/18	7/1/18 – 1/22/19
PCQ Received	389	385	348	322	348
Intake Decision	382	425	373	294	290
Complaint Filed	169	236	197	153	159
Investigation Closed	178	217	239	163	180
Notice of Cause	6	10	9	6	7
Enforcement Closure	7	15	8	12	11

Commissioner Liann Ebesugawa wondered if the HCRC intake data correlated with EEOC data for the same period, indicating a trend of lower numbers of complaint filings.

Chair Krieger said that private dispute resolution, mandatory arbitration agreements, has impacted the number of complaints and lawsuits being filed.

Commissioner Ebesugawa asked what could be done to better serve those who need help.

Chair Krieger noted that there were barriers to people asserting their rights, including a small plaintiffs bar and restrictive interpretations of laws.

Commissioner Ebesugawa suggested that this should be discussed and addressed as an access to justice issue.

Chief Counsel’s Report

Chief Counsel (CC) Robin Wurtzel reported on the status of two cases.

In *Cervelli/Buford v. Aloha Bed & Breakfast*, No. 11-1-3103-12 ECN. the Defendant/ Appellant, Aloha Bed & Breakfast, petitioned for certiorari from the United States Supreme Court, and brief in opposition to the petition would be filed.

In *Morning Hill Foods, LLC, dba Mana Bu’s vs. HCRC (Kyi-Yim)*, CAAP-18-0000573 (Civil No. 18-100034-01 KKH), the case on appeal before the ICA was fully briefed.

2019 Legislation

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

CIVIL RIGHTS COMMISSION

SB 569 HCRC – Relating to Civil Rights

Amends § 368-1.5 to include state agencies which receive federal funds

Amends HRS §368-1.5 to clarify legislative intent. The statute prohibits discrimination based on disability by state agencies, or programs and activities receiving state financial assistance. This bill amends the statute to clarify that agency and programs which receive state assistance includes programs which also receive federal assistance.

Discussion: Staff recommended strong support. This bill would return HRS § 368-1.5 to its pre-*Matter of L.E.* reading, giving HCRC jurisdiction over all state agencies and programs receiving state financial assistance, regardless of whether they also receive federal funds.

HCRC position: Strong support. (m/s/p Lewis/Ebesugawa; 3-0).

EMPLOYMENT

HB 6 Relating to the Uniform Employee and Student Online Privacy Act SB 296

Adopts uniform laws regarding protection of online accounts of employees, interns, applicants students and prospective students from employers and educational institutions

Discussion: Staff recommended support, with the caveat that language should be included for an exception for employers to investigate discrimination cases.

HCRC position: Tabled, until next meeting, scheduled for February 1, 2019.

HB 488 Relating to Employment Practices SB 1041

Prohibits written nondisclosure agreements involving sexual assault and sexual harassment as part of an employee's conditions of employment. Prohibits employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault.

Discussion: Staff recommended comments only. These bills would prohibit non-disclosure agreements as a condition of employment, but permit confidential disposition of individual complaints. Confidential dispositions require victims to remain quiet, thus allowing offenders to continue harassing behavior. Recent news reports chronicle numerous stories about repeated offenses by individuals who made multiple confidential agreements. The inclusion of confidentiality or nondisclosure provisions in settlement agreements for employment-related cases, including sexual harassment and discrimination claims, is standard practice. However, there is growing concern over confidentiality of sexual harassment claims. This bill does not address those.

HCRC position: Support intent, with comments and suggested revisions. (m/s/p Lewis/Ebesugawa; 3-0).

SB 1048 Relating to Sexual Harassment

Bill would make confidentiality clauses in employment contracts unenforceable when an act of sexual harassment is claimed by an employee. Bans mandatory arbitration agreements as to sexual harassment claims beginning July 1, 2019. Makes mandatory confidentiality clauses in an arbitration agreement unenforceable as to sexual harassment claims.

Discussion: Staff recommended comments only. This bill would prohibit confidentiality similar to the bills discussed above. It differs from the 2 bills above in its ban of mandatory arbitration of sexual harassment claims. However, mandatory arbitration clauses have been upheld under federal law, and this ban would likely be pre-empted by current federal law, subject to change in the Federal Arbitration Act (FAA) changes.

Chair Krieger noted a trend, in opposition to confidentiality agreements in private dispute resolution. She also suggested that the legislature could amend state procurement law to prohibit state contractors from imposing mandatory arbitration agreements as a term of employment, similar to Obama administration federal OFCCP prohibitions.

HCRC position: Support intent and offer comment that the State of Hawai‘i could mandate that state contractors cannot have mandatory arbitration clauses as a term or condition of employment. (m/s/p Lewis/Ebesugawa; 3-0).

HB 710 Relating to Employment Practices

Would add 2 new protected bases to § 378 –2 (a)(1) and (9), reproductive health decisions and utilization of family leave. Adds definition of “reproductive health decision” to § 378-1

Discussion: Staff recommended support of the addition of “reproductive health decision” to our statute, but request that use of family leave does not belong in the HRS chapter 378, part I, fair employment statute, but should be placed in chapter 398, the family leave law.

HCRC position: Support the addition of “reproductive health decision” to our statute, but request that use of family leave does not belong in the HRS chapter 378, part I, fair employment statute, but should be placed in chapter 398, the family leave law. (m/s/p Ebesugawa/Lewis; 3-0).

HOUSING

SB 122 Relating to Rental Discrimination

Bill would prohibit housing discrimination based on participation in a housing assistance program

Discussion: Staff recommended support. HCRC has supported prior versions of this bill (HB 25 L. 2015, SB 127 L. 2017), which amended the landlord tenant code to prohibit discrimination based on lawful source of income, or created a right enforced through a private cause of action. This bill offers similar protections, but amends HRS § 515-3, not the landlord tenant code, by adding an additional protected basis, “participation in housing assistance program.” There is a correlation between those that are protected under our fair housing law and those who receive rental assistance, as many people who receive rental assistance are persons with a disability, single female heads of households, families with children, and members of minority groups.

HCRC position: Tabled, until next meeting, scheduled for February 1, 2019.

PUBLIC ACCOMMODATIONS

SB 331 Relating to Movie Theaters - Open Movie Captioning

HB 1340

SB 1235

HB 1009

Amends HRS § 489-9 to require motion picture theaters that have 2 or more acilities to provide open movie captioning for at least 2 showings per week of a motion picture, one of which occurs on a Saturday or Sunday. Repeals the alternative use of lightweight eyewear.

Discussion: Staff recommended strong support. The HCRC supported Act 39, which created the open captioning requirements. Hawai‘i was the first state to require this for the hearing impaired community.

HCRC position: Strong Support, with a preference for the two bills submitted by the Deaf Blind Task Force (HB 1340 & SB 331) which require a weekend showing, over the bills in the Governor’s package (HB 1009; SB 1235). (m/s/p Ebesugawa/Lewis; 3-0).

**HB 322 Relating to Emotional Support Animals
SB 673**

Allows persons with disabilities to be accompanied by an emotional support animal in public places when the emotional support animal has been determined to provide a therapeutic benefit by a licensed medical professional. Amends and broadens the definition of service dog, to include all assistance animals, including emotional support animals

Discussion: Staff recommended no comment. This bill would not amend HCRC statutes. Comments could request clarification whether this would extend to restaurants or places where food is prepared. Currently § 11-50-74 H.A.R. prohibits animals, other than service animals and police dogs, on the premises of a food establishment.

HCRC position: No position. (m/s/p Ebesugawa/Lewis; 3-0).

SB 334 Relating to Assistance Animals

Codifies the administrative rule definition of "assistance animal". Clarifies the type of verification of a reasonable accommodation request for an assistance animal that the individual may provide.

Discussion: Staff recommended oppose as written. “Personal evaluation” is required, but not defined. The addition of the undefined “personal evaluation” requirement may amend the statute so that is no longer substantially similar to the Fair Housing Act. If so, HCRC could lose federal HUD funding, and complainants would be unable to dual-file housing complaints with HCRC.

HCRC supports the codification of the definition of assistance animal currently in the administrative rules, § 12-46-301, H.A.R, and staff recommends support of that addition, but notes that statutory codification is not necessary, as rules have force and effect of law. However, the lack of clarity in the term “personal evaluation” is a serious concern.

HCRC position: Oppose as written. (m/s/p Lewis/ Ebesugawa; 3-0).

HB 696 Relating to Parking for Disabled Persons

Bill would limit the exemption from parking fees to drivers with a disability who are unable to operate a parking meter or pay station because of the driver's disability and who display a distinguishing parking device, code, permit, or decal. Clarifies time limits applicable to the exemption. Establishes a misdemeanor offense for unauthorized sale or purchase of a disability parking permit. Clarifies law enforcement authority to confiscate altered, invalid, or unauthorized disability parking permits.

Discussion: Staff recommended comments only, suggesting that the legislature look into and address the shortage of handicapped parking spaces in the downtown area.

HCRC position: No position.

OTHER

SB 332 Relating to the General Excise Tax

SB 530

HB 345

HB 523

HB 632

Bills would exempt gross receipts from the General Excise tax for prescription drugs, diabetic supplies, prosthetic devices, medical oxygen, human blood and mobility enhancement equipment sold by prescription.

Discussion: Staff recommended support. These bills are not companion bills, and are not identical, but are substantially similar. Suggest provisional support as we seek guidance from DLIR. State protocol requires that testimony involving other state agencies include a caveat on support regarding the impact on the other department, such as language stating that “The HCRC supports this measure, provided that its passage does not impact the priorities detailed in the Governor’s Executive Budget.”

Chair Krieger asked whether it would be best to defer to other agencies, or table the Commission discussion of the bills.

HCRC position: Tabled.

HB 274 Relating to Administrative Procedure
SB 757

Requires agencies to maintain a website with a list of open contested cases and requires access to all documents filed. Requires that each agency establish a subscription-based email notification system that notifies interested parties of all filings made in a contested case proceeding.

Discussion: Staff recommended comment expressing concern. The HCRC supports public access, but has concern about the availability of resources, and the lack of a system that would generate notification. Currently, the public can view contested case records. Notification would require individual e-mails to parties. HCRC contested cases involve multiple filing and this would be onerous. The Hawai'i Circuit Courts do not have this type of system in place.

HCRC position: Support intent, with reservations, expressing grave concern. (m/s/p Ebesugawa/Lewis; 3-0).

HB 378 Relating to Filipino Veterans Burial Assistance

Appropriates funds for burial grants for qualifying Filipino-American World War II veterans to provide funeral and burial services and transportation of their remains to the Philippines. Requires funds for burial grants to not lapse to the general fund and remain available as needed.

Discussion: Staff recommended support. The HCRC has strongly supported this bill in previous years (HB 1944 Leg 2018, HB 1420 L 2017). A similar bill did not pass last year. Burial benefits were provided to soldiers from the Philippines who fought with the U.S. in WW II, 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: Strong support. (m/s/p Ebesugawa/Lewis; 3-0).

SB 674 Relating to Gender Identity
HB 664

Bills would add prohibition of gender identity change efforts to current prohibition of sexual orientation change efforts under Chapter 453J, Hawaii Revised Statutes.

Discussion: Staff recommended support. Chapter 453 J was created last session, and this bill would add a needed protection.

HCRC position: Support. (m/s/p Lewis/ Ebesugawa; 3-0).

HB 662 Relating to Health

Bill would designate the month of October as "Disability Awareness Month: Employment, Enrichment, and Inclusion" to annually recognize the immense contributions and achievements of persons with disabilities in the State.

HCRC position: Support. (m/s/p Lewis/ Ebesugawa; 3-0).

SB 1042 Relating to Civil Rights
HB 483

Requires the Legislative Reference Bureau to submit by 1/24/2019, a report studying how other jurisdictions oversee Title IX enforcement.

Discussion: LRB was required to submit a report in late December, which has not yet been issued. LRB is working on it, but had not yet completed it. When it is complete, a bill regarding enforcement of 2018's Act 110 will be proposed. We assume that the bill will be inserted in these bills

HCRC position: No action at this time.

SB 2 Relating to Criminal Defense
HB 711

Bill would prohibit defendants from claiming that discovery, knowledge, or disclosure of a victim's gender, gender identity, gender expression, or sexual orientation resulted in extreme mental or emotional disturbance sufficient to reduce a charge of murder to a charge of manslaughter unless the other circumstances of a defendant's explanation are already sufficient to reasonably find extreme mental or emotional disturbance. Requires the court to instruct the jury to disregard bias and prejudice regarding gender, gender identity, gender expression, or sexual orientation when a defendant's explanation of extreme mental or emotional disturbance includes discovery, knowledge, or disclosure of a victim's gender, gender identity, gender expression, or sexual orientation.

HCRC position: Support intent. (m/s/p Lewis/ Ebesugawa; 3-0).

SB 568 Relating to Drivers Licenses

Bill would exclude gender or sex markers from limited purpose driver's licenses and limited purpose provisional driver's licenses.

Discussion: Staff recommended support. This position supports the transgender and non-binary community. The proposed exclusion of gender or sex markers cannot extend to all licenses because of REAL ID Act requirements.

HCRC position: Support. (m/s/p Ebesugawa/Lewis; 3-0).

SB 429 Relating to Gender Identification

Requires a license to include a person's full legal name, date of birth, gender category, residence address, and license or identification card number. Includes a third option of gender identification for driver's license and state identification card applicants. Effective 7/1/2020.

Discussion: Staff recommended support.

HCRC position: Support. (m/s/p Lewis/ Ebesugawa; 3-0).

Old Business

There was no old business.

New Business

There was no new business.

Announcements

There were no announcements.

Next Meeting

The next meeting of the Commission was scheduled for February 1, 2019, at 1:30 p.m., subject to polling and confirmation by the Commissioners.

Adjournment.