

HAWAI‘I CIVIL RIGHTS COMMISSION

2022-2023 Annual Report

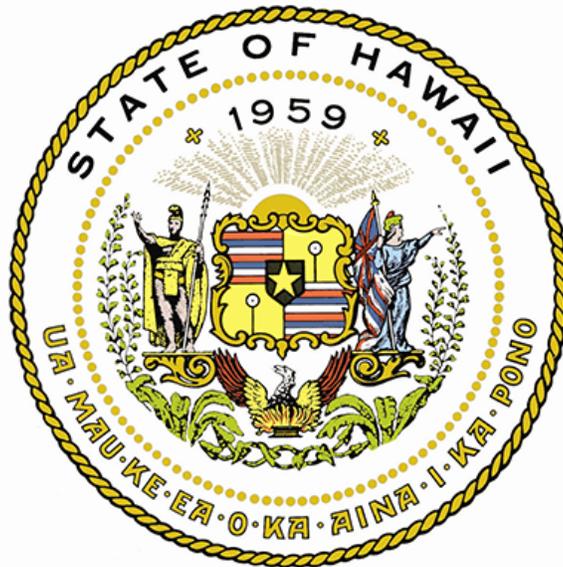
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Mission Statement

The mission of the Hawai'i Civil Rights Commission (HCRC) is to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education.

Overview

The State of Hawai'i's Constitutional Civil Rights Mandate

Article I, Section 5 of the Hawai'i Constitution is the foundation of our state civil rights laws. It provides that: "No person shall ... be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." There is no counterpart to this civil rights mandate in the U.S. Constitution.

Fair and Effective Enforcement – History and Structure of the HCRC

The HCRC was organized in 1990 and officially opened its doors in January 1991. For thirty-two years the HCRC has enforced state laws prohibiting discrimination in employment (Hawai'i Revised Statutes (H.R.S.) Chapter 378, Part I), housing (H.R.S. Chapter 515), public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. § 368-1.5). The HCRC receives, investigates, conciliates, and adjudicates complaints of discrimination.

The HCRC currently has five (5) uncompensated volunteer Commissioners. They are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and commitment to preserve the civil rights of all individuals. The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes.

An Effective and Uniform Enforcement Scheme

Prior to the establishment of the HCRC, jurisdiction over state anti-discrimination laws was split among several state departments. Enforcement was limited and sporadic. State prosecution of discrimination complaints was virtually non-existent. Nearly all aggrieved persons were left with litigation of individual lawsuits as their only recourse. For complainants who could not afford private attorneys to seek remedies in court, there was no administrative process to adjudicate their claims. As a result, few employment discrimination cases were brought to court under state law, and there were few court interpretations of state law.

The intent of the legislature in creating the HCRC was “...to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State’s commitment to preserving the civil rights of all individuals.”¹

The cornerstone of the HCRC statutory scheme was the establishment of a uniform procedure “...designed to provide a forum which is accessible to anyone who suffers an act of discrimination.”²

A Fair Administrative Process

The HCRC is committed and structured to ensure fairness to both complainants and respondents. The HCRC is divided into two separate and distinct sections: a) the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and b) the adjudication section, which conducts hearings, issues orders and renders final determinations on discrimination complaints filed with the HCRC.

The Commissioners have delegated HCRC enforcement authority to the Executive Director. The Commissioners have authority to adjudicate and render final decisions based on the recommendations of their hearings examiners and oversee the adjudication section through their Chief Counsel.

The Commissioners, Chief Counsel, and hearings examiners are not involved in or privy to any actions taken by the Executive Director in the investigation and pre-hearing stages of the HCRC process. Likewise, the Executive Director and enforcement section are not permitted to communicate *ex parte* with the Commissioners, Chief Counsel or hearings examiners about any case.

The HCRC investigates discrimination complaints as a neutral fact-gatherer. At the conclusion of an investigation, a determination is made whether or not there is reasonable cause to believe unlawful discrimination has occurred.

The law requires filing of a complaint with the HCRC in most (but not all) cases before filing a discrimination lawsuit in state court.³ Otherwise, the state courts will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement reduces court caseloads by eliminating claims which are non-jurisdictional, or non-

¹ 1989 House Journal, Standing Committee Report 372.

² Id.

³ Pursuant to H.R.S. § 378-3(10) an employee may file a direct civil action for sexual harassment. Similarly, pursuant to H.R.S. § 515-9(b), an aggrieved person may file a direct civil action for fair housing complaints. While the statutes allow these direct civil actions in these cases, only a small number are filed; the great majority of complaints are still filed with the HCRC.

meritorious, or complaints that are closed or settled through the HCRC administrative process. As a result, the great majority of cases filed with the HCRC are resolved, reach disposition, and are closed without resort to the courts.

Civil Rights Law Enforcement: State & Federal Law

Federal fair employment and fair housing laws are enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and U.S. Department of Housing and Urban Development (HUD) Office of Fair Housing and Equal Opportunity (FHEO), respectively. Pursuant to work share and cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law (“dual-filed” complaints). Both EEOC and HUD contracts require maintenance of state effort and dedication of state resources for investigation of dual-filed complaints. While Hawai‘i and federal fair employment and fair housing laws are similar, they are not identical. Hawai‘i has more protected bases than federal law, and there are substantial differences in the definition of “employer” and the statute of limitations for filing charges of employment and housing discrimination. In addition to these jurisdictional differences, Hawai‘i law provides stronger protections against sexual harassment in employment.

The greater protections in Hawai‘i law are attributable to the strong civil rights mandate contained in the Hawai‘i State Constitution, HCRC statutes, HCRC rules, HCRC Commission and state court decisions. In contrast, federal court interpretations of federal civil rights laws have historically resulted in narrower protections against discrimination. The issue of state versus federal standards is an important one, particularly in states like Hawai‘i that have a strong commitment to equal opportunity and non-discrimination.

Looking Forward: Rebuilding Civil Rights Enforcement Capacity, Evolving in the Post-Covid 19 Workforce, and Reaffirming State Commitment to Civil Rights

FY 2023 was a year of rebuilding and adjusting to a post-Covid 19 workforce. This year also saw the well-deserved but much felt retirement of the HCRC’s longtime Executive Director, William D. Hoshijo, who served as Executive Director from 1997 until 2023, and was instrumental in drafting the statutes that the Commission enforces. It is with gratitude for former Executive Director Hoshijo’s contributions and lessons from the past, that the HCRC’s new Executive Director is looking forward with hope to a future more focused than ever on a commitment to civil rights for Hawai‘i’s people. The HCRC remains committed to vigorously enforcing the civil rights laws protecting Hawai‘i’s people by ending discrimination and increasing diversity.

The HCRC continues to struggle with low staffing dating back to cuts imposed in 2009-2010, when in response to the Great Recession, the HCRC lost 3 of 11 permanent investigator positions, a loss of 27% of investigator capacity which was never restored. Of the HCRC's remaining 8 permanent investigator positions, two were vacant during FY 2023, leaving only 6 permanent investigators or 55% of the HCRC investigator capacity in 2009.

This loss of capacity continues to impact the HCRC's productivity and capacity to conduct intake and timely and effectively investigate discrimination complaints. Training of new staff while short staffed in other positions limits further the capacity to timely process cases. In addition, the HCRC has seen loss of three administrative assistants in 2023. The HCRC has pulled together for cross training, sought eighty-nine-day hires, and recruited summer volunteers to help lighten the burden of those remaining permanent administrative assistants and investigators in an effort to fulfill the HCRC's mission. The HCRC, like other state employers are constantly engaging in the recruitment and selection process to fill vacancies as they arise.

The dedication of the HCRC's staff is notable and in 2023 the HCRC is delighted that despite the challenges facing our agency, our Housing Discrimination Investigation Supervisor was honored as the Department of Labor and Industrial Relations Employee of the Year for her service and dedication to the people of Hawai'i. The HCRC's post-Covid 19 work environment presents new and different demands on the staff at the HCRC as well as the community we serve. Despite these challenges, FY 2023 saw many civil rights successes for the State of Hawai'i.

In light of the lack of progress and efforts to diminish civil rights and civil liberties to Americans on the continental United States in the realms of sexual and reproductive rights, racial violence, gender-based violence, and LGBTI people's rights, it has never before been more crucial that the HCRC and the State of Hawai'i renew our shared commitment to strong civil rights law enforcement.

Mediation Program

The HCRC's voluntary mediation program completed its twenty-fourth full year on June 30, 2023. The program enjoyed a productive year, but it was also a time of continuing adjustments and changes in adapting to the COVID-19 pandemic emergency.

Complainants, respondents, and the HCRC, with the strong support of the Commissioners, want prompt and fair resolutions to discrimination complaints. To help accomplish this goal, the HCRC developed its voluntary mediation program, a process

in which neutral third persons (often a team of two co-mediators with at least one attorney-mediator) help the parties discuss, clarify, and settle complaints.

The HCRC voluntary mediation program uses trained community mediators who are unbiased and do not rule on the merits of the complaint. The HCRC provides the mediators with the basic facts of each case needed to understand the dispute. The mediators then assist the parties to reach voluntary agreements. These agreements may include apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation can save time, money and resources. It also can eliminate the stress of litigation and allow the parties to explain their side of the case and to control the process of resolving the disputes in a non-adversarial manner.

The HCRC works with trained, senior mediators from the Mediation Centers of Hawai'i (MCH), a statewide network of community non-profit mediation centers. MCH utilizes a facilitative approach to mediation. MCH mediators receive training on civil rights laws and settling disputes by HCRC and MCH staff. The HCRC Program Specialist - Mediation Coordinator facilitates the process by explaining, encouraging, referring, and reviewing mediation and its benefits to the parties. There are mediation centers on Oahu (Mediation Center of the Pacific), Maui (Maui Mediation Services), east Hawai'i (Ku'ikahi Mediation Center in Hilo), the West Hawai'i Mediation Center in Kailua-Kona, and Kauai (Kauai Economic Opportunity, Inc. Mediation Program). The centers charge fees on a sliding scale for the sessions, which can be waived or reduced if there is financial hardship.

Private mediation is also available if the parties choose. Private mediations generally utilize an evaluative approach, in which the law and possible damages are emphasized. Private mediation is an important part of the HCRC mediation program. Parties are free to select commercial private mediators who charge market rates or private mediators from the Access ADR program, a reduced fee program of the MCP.

Mediation can occur at any stage of the intake, investigation, conciliation, or hearing process. Mediation is first offered when the complaint is accepted. At this early stage, disputes are often easier to resolve because the facts are fresh, damages may not have accumulated, and the positions of the parties may still be fluid. However, parties may voluntarily choose mediation at any time during the HCRC investigative, conciliation or hearing process.

Since the inception of the HCRC's mediation program, all types of complaints have been eligible for voluntary mediation except for housing complaints. After much research and planning, at the end of FY 2017 the HCRC launched a pilot program to offer the mediation of housing complaints for the first time, with the HCRC's Program Specialist - Mediation Coordinator, Sharon Ferguson-Quick, personally conducting

those mediations. Since then, the HCRC's housing mediation program has flourished under Ms. Ferguson-Quick's leadership, and it has become a standard component of the HCRC's overall mediation system. The changes brought about by the COVID-19 pandemic in the HCRC's mediation program are still in effect and most, if not all, mediations are conducted remotely.

In viewing all the mediation-related events throughout FY 2023, 23 cases were referred into mediation, and 24 mediations were completed (dispositions). Of the 24 dispositions, 12 resulted in mediated settlements (50%), and 12 resulted in no agreement (50%). Of the mediated settlements, 4 were in employment cases, and 2 of those were dual-filed with the EEOC. There were also 8 mediated settlements of housing cases, all of which were dual-filed with HUD.

The total disclosed monetary value of mediated agreements was \$48,000.00 with a wide variety of affirmative relief as well. During this period the HCRC had 7 mediation settlements; Mediation Center of the Pacific and West Hawai'i Mediation Center had 2 settlements each; and 1 settlement was achieved through a private mediator. The primary bases of discrimination of the 12 settlements were as follows: Disability - 8; Familial Status - 2; Religion - 1; and Retaliation - 1. Many of the completed mediations also included charges on other protected bases.

Although monetary settlements were achieved in most agreements, almost all mediated agreements also involved some form of non-monetary affirmative relief. Examples of non-monetary relief (here, in an employment context) include:

- 1) frank discussion of disputes, which often lay the groundwork for eventual settlement or restoration of the prior employment relationship;
- 2) reinstatement and/or restoration of employee benefits;
- 3) formal or informal apologies (by either or both sides);
- 4) increasing hours for part-time employees;
- 5) providing neutral or positive references for former employees;
- 6) removal of inappropriate negative comments in employee records;
- 7) provision of reasonable accommodations;
- 8) changing shifts when practicable;
- 9) policy revisions and postings; and
- 10) clarification of communications between employer and employee, leading to more productive working environments.

Public Education & Outreach

In addition to enforcing anti-discrimination laws, the HCRC is committed to preventing and eliminating discrimination through public education. The HCRC

Commissioners and staff maintained or assisted in a number of civil rights public education efforts, working with civil rights, business, labor, professional, and non-profit organizations, on new and continuing initiatives. The HCRC is looking to strengthen and increase public education and outreach efforts.

During FY 2023, the HCRC continued to be an active participant in the fair housing committee, comprised of representatives from the housing departments of each county and the State, HUD Honolulu Field Office, Hawai'i Housing Authority, Hawai'i Housing Finance and Development Corporation, Legal Aid Society of Hawai'i, Hawai'i Disability Rights Center, and other housing-related private and public entities. The committee met to learn and discuss the latest fair housing cases, legal issues, and recent developments in fair housing from a federal, state and local perspective, to corroborate on local fair housing issues and concerns, and to work together to promote fair housing throughout the islands.

During FY 2023 the HCRC continued to work with HUD, state and county housing agencies, community fair housing organizations, non-profit and for-profit organizations, and businesses to co-sponsor fair housing trainings throughout the state.

Representative trainees in the housing area have included members of the Board of Realtors, Property Managers Association, National Association of Residential Property Managers, Community Associations Institute (CAI) Hawai'i, Hawai'i Center for Independent Living (HCIL), landlords, tenants, homeless veterans, emergency shelter and transitional housing management/staff, case management staff, housing assistance/referral management/staff, and various property management companies and community associations. The largest fair housing training effort came in April, which is National Fair Housing Month. Instead of the usual full-day in-person trainings held on various islands, this year's training was conducted statewide through video conferencing and was spread out in shorter sessions over four consecutive Thursdays. Each session had its own theme and unique team of presenters, allowing for a broader range of information and perspectives.

During FY 2023 the HCRC participated in several other outreach and education events such as:

- Presentation at "Fair Housing for our Future" Laws & Litigation Conference in San Diego, California.
- "Order in the Court – Ethical Interaction with Judges" training with community legal advocacy group hosted by the HCRC.

- Participation at the Disability Access Conference organized by the Disability and Communication Access Board with other community stakeholders.
- Presentation at 'Olelo Television's "Back to the Basics – Fair Housing 101" aired during Fair Housing Month and available online.
- Participation at the William S. Richardson School of Law Public Interest Fair to promote public interest lawyering.
- Participation at Honolulu Pride Parade event.

The HCRC website is part of a consolidated website that includes all divisions of the Department of Labor & Industrial Relations. The HCRC relies on the DLIR webmaster for maintenance and updating of the HCRC website, as well as ongoing efforts to improve user-friendliness and accessibility of the site. The webmaster's detailed monthly index indicates that the site continues to attract broad public interest, particularly to those pages on administrative rules, case decisions, and the mediation program.

Caseload Statistics

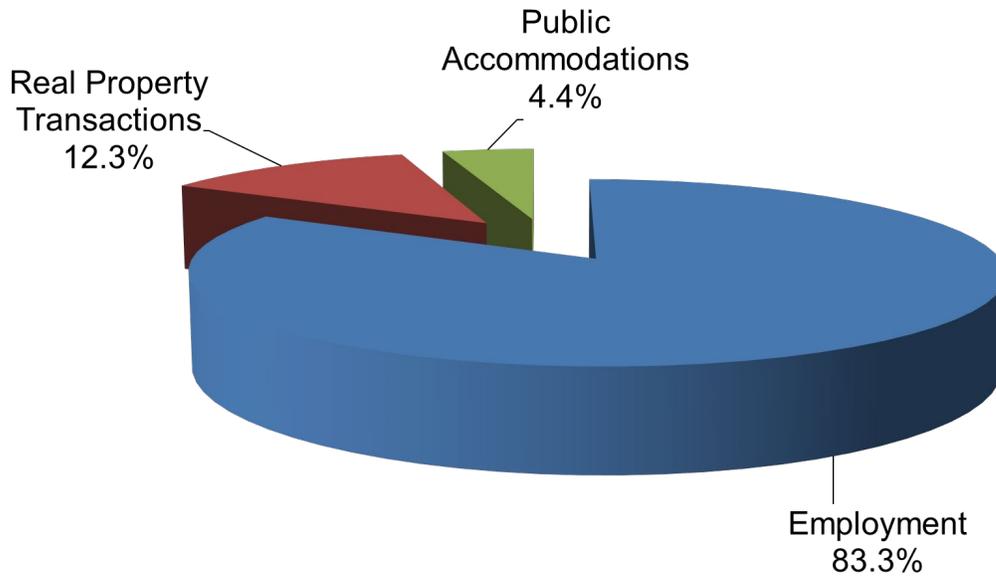
Intake

During FY 2023, the HCRC received 961 telephone and walk-in inquiries. HCRC investigators completed 573 intakes, and 430 discrimination complaints were filed with the HCRC, an average of 35.8 complaints a month.

Of the 430 complaints that were filed with the HCRC, 190 complaints originated with HCRC investigators (averaging 15.8 per month), and another 240 cases originated with the federal EEOC or HUD. These 240 cases were dual-filed under state law with the HCRC.

The 430 cases included 358 employment cases, 19 public accommodations cases, 53 real property transactions (housing) cases, and 0 access to state and state-funded services cases. The other inquiries and intake interviews did not lead to filed charges due primarily to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected bases; or c) the complainant's decision not to pursue the complaint.

Complaints Filed FY 2023



The 430 complaints accepted by the HCRC consisted of 302 Honolulu County complaints, 62 Hawai'i County complaints, 46 Maui County complaints, and 20 Kauai County complaints. The number of complaints filed from each county was consistent with its proportion of resident population in the state (Honolulu County 69.1%; Hawai'i County 14.3%; Maui County 11.4%; and Kauai County 5.1%).

Closures⁴

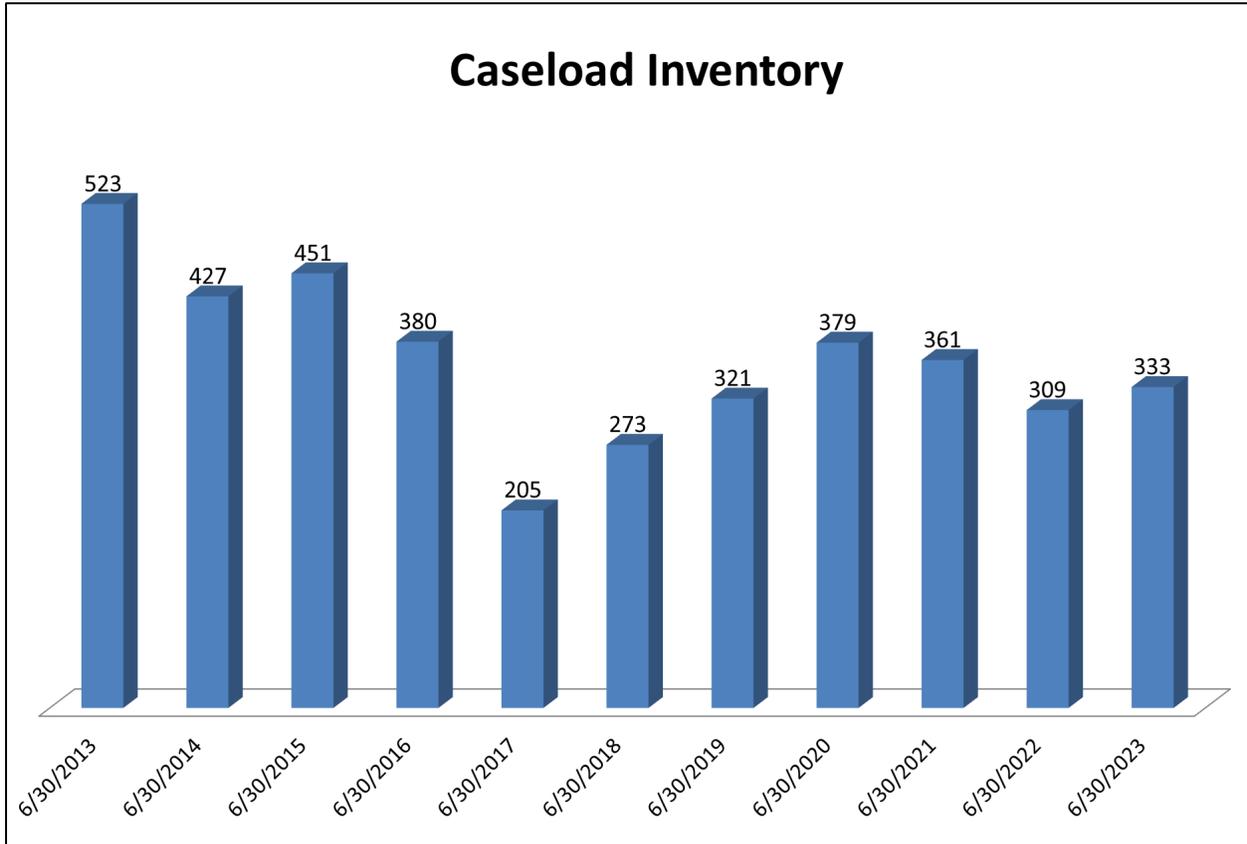
⁴ Analysis and Explanation of Closure Data.

This closure data does not reflect the number of completed investigations that result in cause determinations. Generally, the reason for this distinction is that cases are not closed upon issuance of a notice of cause, but are conciliated, and, if conciliation fails, are docketed for hearing.

Historically, there is a relationship between the number of cause cases and predetermination settlements/resolutions between parties—the larger the number of notices of cause, the smaller the number of settlements/resolutions, and vice versa. Typically, cause determinations and settlements/resolutions constitute between 15-25% of the total of those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties.

During FY 2023, HCRC investigations resulted in 12 cause determinations, and 43 cases were closed on the basis of pre-determination settlement or resolution between parties. 79 cases were closed on the basis of no-cause determinations upon completion of investigation. The ratio of cause determinations and predetermination settlements/resolutions (55) to those cases that are either investigated to a cause/no cause

HCRC investigators and attorneys closed 179 cases during FY 2023 (a decrease from 258 cases in FY 2022) for an average closure rate of 14.9 cases per month. HCRC investigations resulted in cause determinations in 12 cases, an increase from 10 cause determinations in FY 2022. As of June 30, 2023, there were 333 cases pending with HCRC investigators; on June 30, 2022, there were 309 pending cases.



The average period for case closure by investigators was 584 days, as compared to 475 days for FY 2022, 419 days for FY 2021, and 319 days for FY 2020. A review of this fiscal year shows the following reasons for investigative closures:

Merit Closures	No. of Cases	% of Subtotal	% of Total Closures
Resolved by Parties	17	13.28%	9.50%
Pre-Determination Settlements	26	20.31%	14.53%

determination or settled or resolved by predetermination settlement or resolution between the parties (134) for this fiscal year is 41.0%.

Cases Resolved by Attorneys	6	4.69%	3.35%
No Cause Determinations	<u>79</u>	<u>61.72%</u>	<u>44.13%</u>
Subtotal	128	100.0%	71.51%
Non-merit Closures	No. of Cases	% of Subtotal	% of Total Closures
Complainant Elected Court Action	19	37.25%	10.61%
Complainant Failed to Cooperate	11	21.57%	6.15%
Complaint Not Available	11	21.57%	6.15%
Complaint Withdrawn	7	13.73%	3.91%
Administratively Closed	2	3.92%	1.12%
No Jurisdiction	<u>1</u>	<u>1.96%</u>	<u>0.56%</u>
Subtotal	51	100.00%	28.49%
Total Number of Closures	179		100.00%

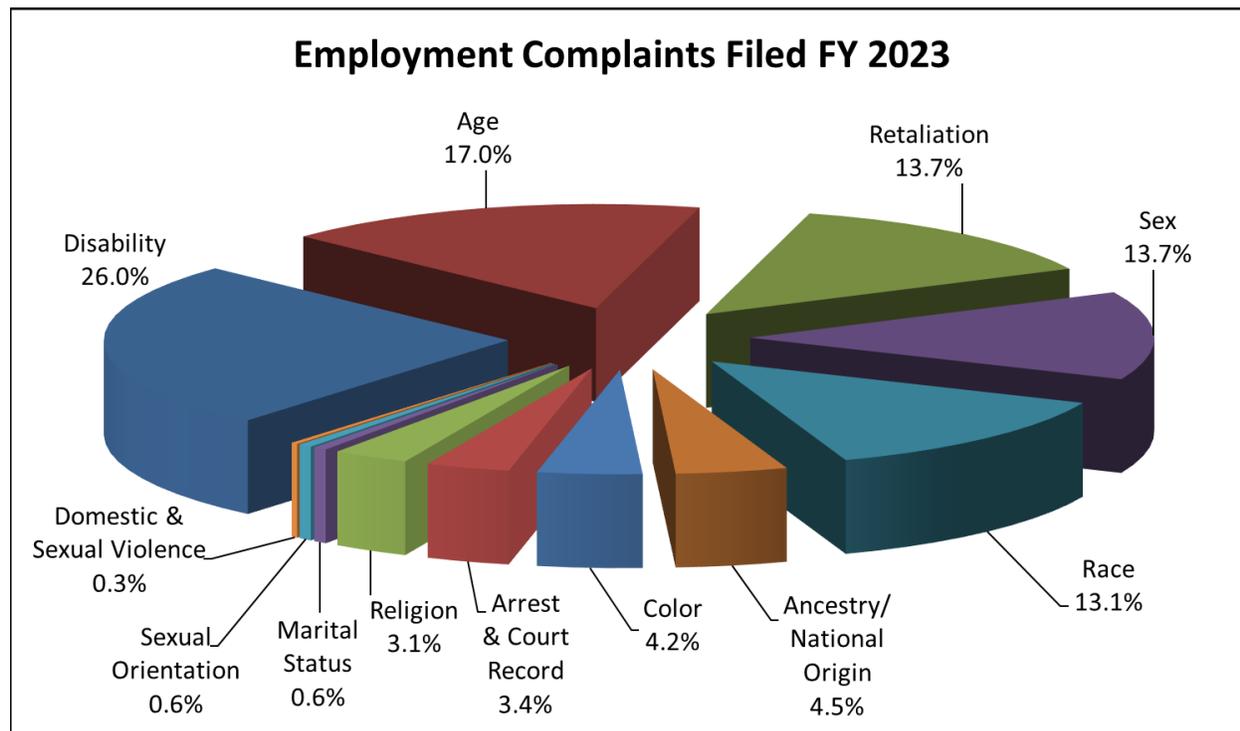
Employment Cases

H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex (including gender identity or expression), sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, reproductive health decision, domestic or sexual violence victim status, credit history or credit report, assignment of income for child support obligations, National Guard participation, and breastfeeding/expressing milk. Examples of such practices are outlined in H.R.S. §378-2. A complaint can contain more than one basis for the alleged discriminatory conduct, but for statistical purposes each complaint is identified by only one designated “primary basis”.

The HCRC has a work-share agreement with the EEOC. Under the work-share agreement, a case is filed with both agencies where there is concurrent jurisdiction. However, only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 358 employment cases were accepted by the HCRC. The HCRC was the intake agency for 128 of these cases, and the HCRC dual-filed another 230 cases originating with EEOC. Of the HCRC-originated cases, 71.9% were also filed with EEOC.

Of the 358 employment complaints filed, the primary bases most cited were disability, in 93 cases (26.0%); age, in 61 cases (17.0%); retaliation and sex, in 49 cases (13.7%) each; and race, in 47 cases (13.1%). Of the sex discrimination complaints, 16 (32.7% of all sex cases) alleged sexual harassment as the primary basis, and 5 (10.2% of all sex cases) were primarily based on pregnancy.

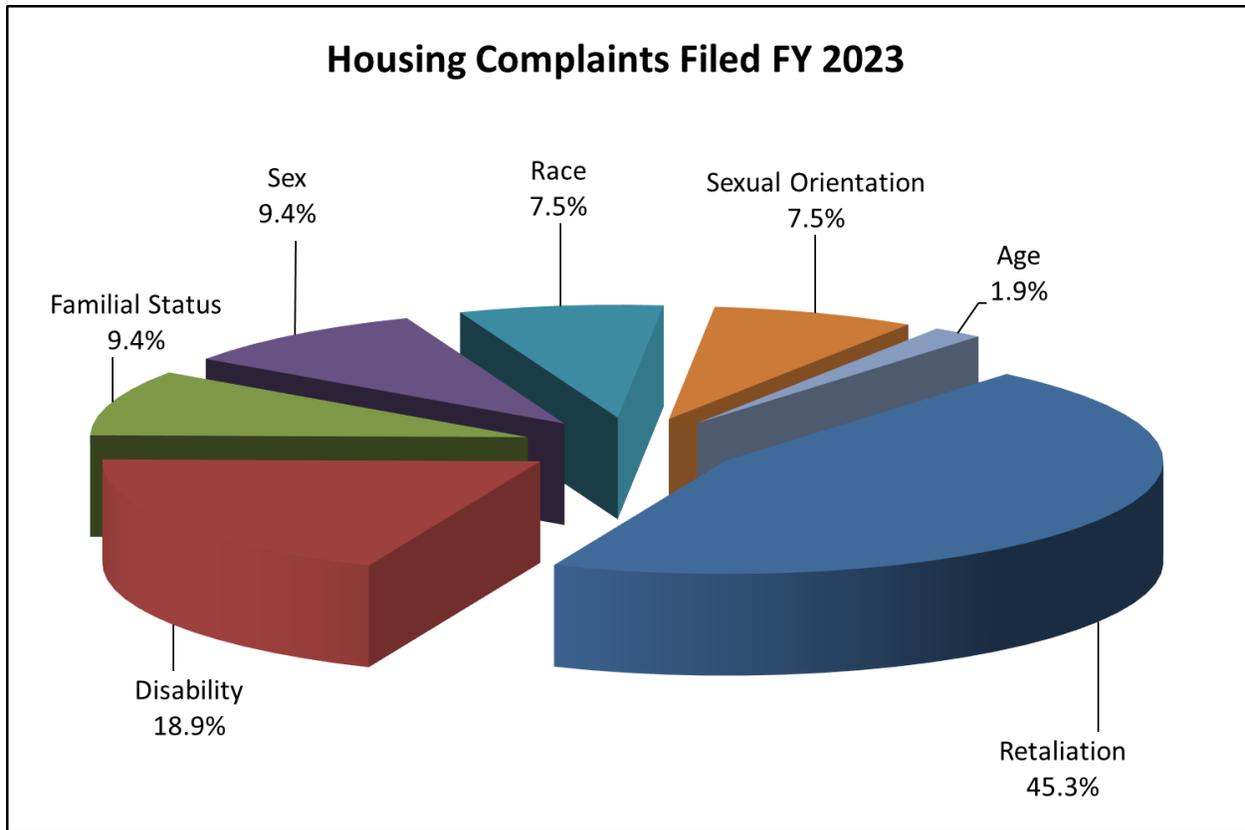
The next most cited primary bases were ancestry/national origin, in 16 cases (4.5%); color, in 15 cases (4.2%); arrest and court record, in 12 cases (3.4%); religion, in 11 cases (3.1%); marital status and sexual orientation, in 2 cases (0.6%) each; and domestic or sexual violence victim status, in 1 case (0.3%). There were no cases primarily based on breastfeeding, child support obligations, credit history or credit report, National Guard participation, or reproductive health decision. The case closure period averaged 677 days for the 133 employment cases that were closed or caused by HCRC investigators during FY 2023.



Real Property Transactions (Housing) Cases

During FY 2023, the HCRC accepted 53 cases of housing discrimination. The primary bases most cited were retaliation, in 24 cases (45.3%); followed by disability, in 10 cases (18.9%); familial status and sex, in 5 cases (9.4%) each; race and sexual orientation, in 4 cases (7.5%) each; and age, in 1 case (1.9%). There were no cases primarily based on ancestry/national origin, color, HIV infection, marital status, or religion.

Housing case closures averaged 414 days for the 41 cases closed or caused during FY 2023.



Public Accommodations Cases

H.R.S. Chapter 489 prohibits unfair discriminatory practices that deny or attempt to deny a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation on the basis of race, sex, sexual orientation, color, religion, ancestry, or disability. Public accommodations include retail stores, restaurants, theaters, sports arenas, public transportation, healthcare providers, hotels, and banks.

During the fiscal year, 19 new cases of public accommodations discrimination were accepted. Of these, the primary basis most cited was disability, in 12 cases (63.2%); followed by race and sex, in 3 cases (15.8%) each; and religion, in 1 case (5.3%). There were no cases primarily based on ancestry, color, retaliation, or sexual orientation.

Public accommodations case closures averaged 380 days for the 11 cases closed or caused during FY 2023.

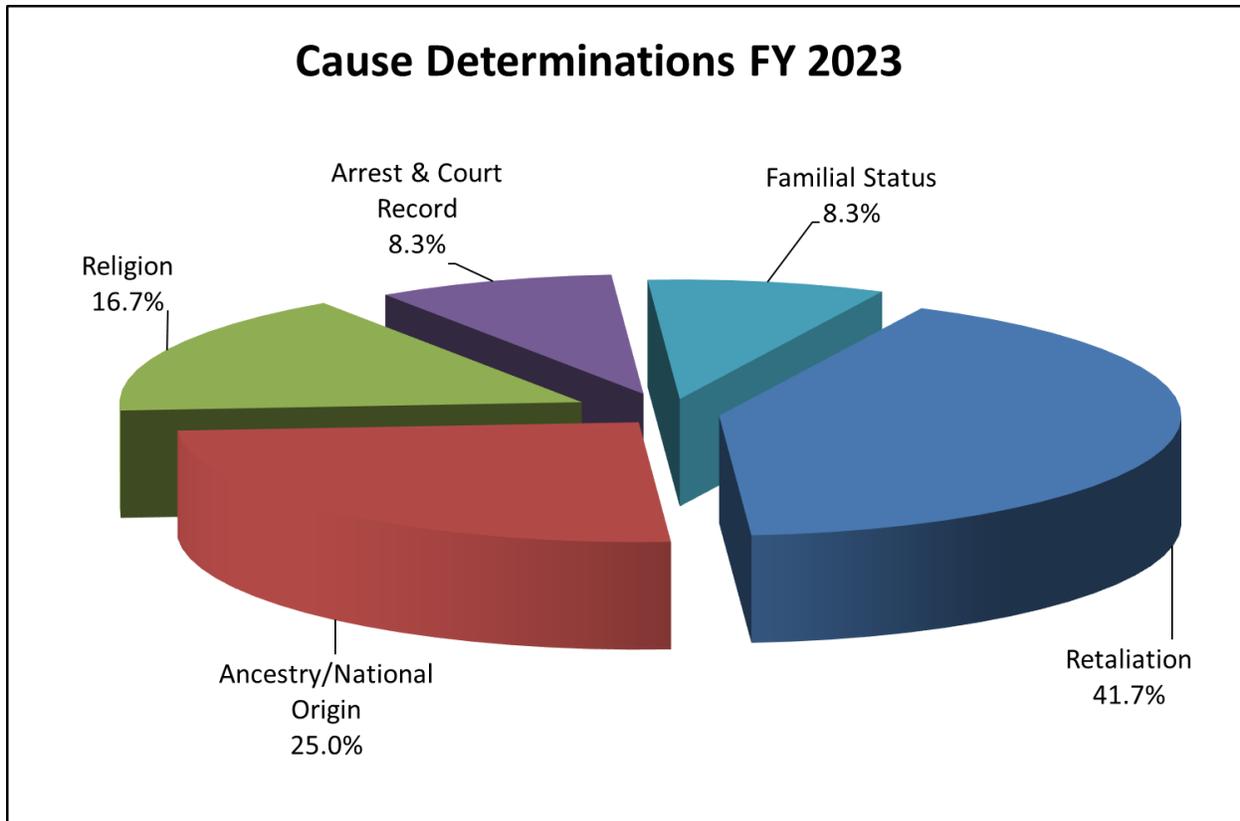
Access to State and State-funded Services Cases

H.R.S § 368-1.5 prohibits state agencies, or any program or activity receiving state financial assistance from excluding from participation, denying benefits or otherwise discriminating against persons with disabilities (the only protected class under this statute). During FY 2023, there were no cases filed under § 368-1.5. In addition, there were no cases filed under § 368-1.5 that closed during the fiscal year.

Cause Cases

When an investigation results in a recommendation that there is reasonable cause to believe that discrimination has occurred, the case is assigned to an HCRC enforcement attorney for legal action. In FY 2023, 12 recommendations for cause were brought forward for legal action. Of these cases, 9 (75%) were employment cases, and 3 (25%) were housing cases.

Of the 12 investigations with a cause recommendation, the primary bases most cited were retaliation, in 5 cases (41.7%); followed by ancestry/national origin, in 3 cases (25%); religion, in 2 cases (16.7%); and arrest and court record and familial status, in 1 case (8.3%) each.



Case Settlements

The HCRC promotes and encourages settlement during all stages of the complaint process. Through pre-determination settlements, mediation, and conciliation, the HCRC obtains relief and resolves complaints while avoiding unnecessary litigation. These settlements provide closure for the parties and conserve HCRC investigation and litigation resources for complex or precedent setting cases.

During FY 2023 the HCRC continued to successfully obtain monetary relief through settlement of complaints. In the 5 cause cases that were settled, HCRC attorneys obtained monetary settlements totaling \$77,000. Of the 43 cases settled prior to an investigative finding, 10 of those cases involved confidential settlements, the terms of which were not disclosed to the HCRC. Of the remaining 33 cases settled prior to an investigative finding, monetary relief totaled \$496,000. This figure includes pre-determination settlements obtained through HCRC investigators and settlements between the parties (\$448,000), as well as investigative settlements obtained through the HCRC mediation program (\$48,000). Collectively the HCRC's known monetary settlements for FY 2023 totaled \$573,000. Since the settlement terms are unknown for 10 closed cases, the actual total figure for all monetary settlements in FY 2023 is probably significantly higher than \$573,000.

In addition to monetary relief, significant affirmative relief was obtained. The HCRC seeks affirmative relief for four basic reasons: to enforce civil rights laws, stop discriminatory conduct, prevent future harm to complainants, and assist respondents in avoiding future violations. HCRC settlements and conciliation agreements routinely contain various types of affirmative relief including the development and implementation of non-discrimination policies, employee and supervisor training on non-discrimination policies, posting non-discrimination policies, and publishing notices informing the public of the HCRC's role in enforcing state non-discrimination laws.

In some instances, non-monetary relief can be an important element of a settlement. For example, some complainants have received a letter of apology pursuant to the terms of a settlement. A simple apology sometimes goes a long way towards healing the rift between a complainant and respondent, and this form of relief is often not available as a court ordered remedy. Some cases were resolved when an employer, housing provider, or public accommodation corrected an unlawful discriminatory policy or practice after notice of the violation. During FY 2023, a significant number of employers, housing providers, and public accommodations voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following are illustrative of the HCRC cases that were resolved through conciliation or mediation and describe the relief obtained during FY 2023:

- The complainant in a housing case alleged that the respondent housing providers refused to rent to her on the basis of her familial status (family with minor children). Prior to an investigative finding the case was successfully mediated through the HCRC's mediation program. The terms of the mediated settlement included a payment of \$5,000 to the complainant, mandatory anti-discrimination training for the respondents, the respondents' adoption of an anti-discrimination policy, and the respondents' inclusion of a fair housing poster in their application package.
- The complainant in an employment case alleged that the respondent employer denied him a reasonable accommodation for his disability and laid him off on the basis of his age and disability. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included a payment of \$15,000 to the complainant, mandatory anti-discrimination training for the respondent's employees, and the respondent's posting and dissemination of an anti-discrimination policy.
- The complainants in a housing case alleged that the respondent housing providers subjected them to various forms of discrimination on the basis of their race and color. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included a payment of \$2,500 to the complainants, the respondents' adoption of an anti-discrimination policy, dissemination of the policy to all current and future tenants, and mandatory anti-discrimination training for the respondents.
- The complainant in an employment case alleged that the respondent employer terminated her on the basis of her ancestry and retaliation. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included a neutral letter of reference and payment of \$5,000 to the complainant, and the respondent's adoption, posting, and dissemination of an anti-discrimination policy.
- The complainant in an employment case alleged that the respondent employer subjected her to discriminatory workplace practices on the basis of her sex (pregnancy). The HCRC investigated the case and issued a Notice of Cause, finding that the respondent had unlawfully subjected the complainant to discriminatory practices. Thereafter, the case was settled for a payment of \$30,000 to the complainant, mandatory anti-discrimination training for the respondents' employees, the respondent's adoption and dissemination of an anti-discrimination policy, and the respondent's posting of the HCRC's general information flyer.

- The complainants in a housing case alleged that the respondent housing providers discriminated against them on the basis of disability. The HCRC investigated the case and issued a Notice of Cause, finding that the respondents had unlawfully denied the complainants a reasonable accommodation and subjected them to discriminatory statements. Thereafter, the case was settled for a payment of \$20,000 to the complainants, mandatory anti-discrimination training for the respondents, and the respondents' maintenance of an anti-discrimination policy, including dissemination of the policy to all tenants.

HCRC Warning Letters

In an effort to prevent future or recurring problems, the HCRC provides respondents with “warning letters” advising them of potentially unlawful practices that the HCRC discovers during the course of its investigation of claims against the respondent. In those instances when the HCRC investigation does not result in a recommendation of reasonable cause on the claims filed, and the HCRC investigator finds evidence of other unlawful practices (such as a discriminatory written policy, employment application, or conduct in the workplace that could rise to the level of unlawful harassment if repeated), the HCRC will advise the respondent of the potential violations and provide the respondent information about how it can correct the possible violation of the law. Warning letters have resulted in policy and application form changes, as well as discrimination prevention training for employees and managers.

Contested Cases

Administrative Hearing

The Enforcement section of HCRC held a contested case hearing on a housing discrimination case, docket no. 22-01-H-D-RET, involving Kauai homeowners and a real estate manager who allegedly refused to rent to a Deaf woman with a service dog and later alleged to have retaliated verbally against both the Deaf woman and her adult son. The case was dismissed, because the evidence failed to show a violation of the housing discrimination statutes by a preponderance of the evidence.

Legislation

Two bills were passed in 2023 and enacted into law that affect the statutes which the Hawai'i Civil Rights Commission enforces.

Act 203, S.B. 1057, S.D.2, H.D.2, C.D.1, relating to employment earnings adds a new statute to Chapter 378 and amends H.R.S. § 378-2.3. The new measure, which goes into effect on January 1, 2024, requires certain job listings to include an hourly rate or salary range, for employers with 50 or more employees. Other amendments include expansion of the protected classes under the equal pay statute, H.R.S. § 378-2.3, to include all protected categories listed in section 378-2(a)(1).

Act 88, H.B. 777, H.D.2, S.D.2, C.D.1, relating to background checks, amended the exemption for the Department of Human Services in section 378-2.5 to allow the department to conduct background checks for current and prospective employees, volunteers, contractors, or subcontractors, for positions that place them or would place them in close proximity with certain minors, young adults, or vulnerable adults. The act also clarifies that any state law permitting a more extensive inquiry into an individual's criminal history for employment purposes will prevail over the limitations under section 378-2.5.

Appendix

Overview

The Hawai'i Civil Rights Commission (HCRC) was established under Act 219, L. 1988, and Acts 386 and 387, L. 1989.

The HCRC's enabling statute, H.R.S. Chapter 368, declares that discrimination because of race, color, religion, age, sex (including gender identity and expression), sexual orientation, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy. Certain bases are not protected under all HCRC laws.

The HCRC exercises jurisdiction over Hawai'i's laws prohibiting discrimination in employment (H.R.S. Chapter 378, Part I), housing (H.R.S. Chapter 515), public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. § 368-1.5). Under its statutory mandate, the HCRC receives, investigates, conciliates, litigates, and adjudicates complaints of discrimination, providing a uniform procedure for the enforcement of the state's discrimination laws.

The HCRC has five (5) uncompensated volunteer Commissioners (one position was vacant during FY 2022, and was filled by an appointment effective after the start of FY 2023) who are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and their commitment to preserve the civil rights of all individuals.

The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes. During FY 2023 the HCRC had 28 positions (23 permanent and 5 temporary), divided into separate enforcement and adjudication sections.

Administrative Procedure

Before the HCRC accepts a complaint of discrimination, a complaining person must allege that: she, he, or they have been subjected to unlawful discrimination⁵ because of a protected basis,⁶ and, the unlawful discrimination occurred within the previous 180

⁵ “Unlawful discrimination” may occur in any of the following ways:

- a. Disparate Treatment – this is the usual form of discrimination; it occurs when individuals are treated in an unequal manner because of a “protected basis.” Examples of disparate (unequal) treatment include: firing an employee because of her race, her age, or because she is pregnant; refusing to serve a person because of his race or his disability; refusing to rent to a person because of her race; or refusing to rent to a family because it has young children.
- b. Reasonable Accommodation – this is the second most common way that discrimination appears; it occurs when an individual is denied a “reasonable accommodation” designed to allow an individual to have equal access or equal benefits. Examples of failure to accommodate include: refusing to allow a seeing impaired customer into a taxicab because he is accompanied by a seeing-eye dog; refusing to allow a pregnant cashier to sit on a stool so that she can work while pregnant; or refusing to make exceptions to a condominium association's "no pets" house rule to allow a disabled resident to keep a service animal.
- c. Disparate Impact -- the least common way that discrimination appears; however, when discrimination occurs in this form, it may impact the greatest number of people. Disparate impact occurs when a policy, practice, or test that has a “disparate impact” on persons with a particular “protected basis.” Examples of disparate impact include: a pre-employment test that includes a number of questions that are not job related but have the effect of disqualifying a large number of women, or men, or any other protected basis.

⁶ “Protected basis” is the criteria upon which it is unlawful for a respondent to discriminate. Protected bases vary depending on the statute involved:

- a. State Funded Services (HRS Chapter 368) The only protected basis is disability.
- b. Employment (HRS Chapter 378, Part I) The protected bases on which an employer, employment agency, or labor organization may not discriminate are: race, sex (which includes gender identity and expression), sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, domestic or sexual violence victim status, credit history, reproductive health decision or lactating employees.
- c. Public Accommodations (HRS Chapter 489) The protected bases on which a public accommodation may not discriminate are: race, sex (which includes gender identity and expression), sexual orientation, color, religion, ancestry, or disability.
- d. Housing (HRS Chapter 515) The protected bases on which an owner, a real estate broker or any person engaging in a real estate transaction, may not discriminate are race, sex (which

days.⁷

Where appropriate, after a complaint is filed with the HCRC, the parties are offered an opportunity to voluntarily mediate the complaint through the HCRC Mediation Program. If the parties agree to mediate, the HCRC mediation coordinator refers the parties to a community mediation center, which schedules and holds mediation sessions. Parties may alternatively choose to hire a private mediator.

In cases not referred to mediation, or those in which mediation is unsuccessful, an HCRC investigator conducts an objective, fact-finding investigation. HCRC investigators are impartial and gather evidence to allow the Executive Director to make a determination in each case. The HCRC investigator collects, reviews, and analyzes documents, and contacts and interviews witnesses. Some witnesses may be identified by the complainant or by the respondent, and some are independent witnesses, including experts, who are identified by the investigator, by other witnesses, or are discovered during the course of the investigation. In many cases, the investigator also attempts to settle the complaint prior to an investigative determination (pre-determination settlement).

After an HCRC investigation is completed, H.R.S. 368-13(b)-(c) requires the Executive Director to determine whether reasonable cause exists to believe that discrimination has occurred. Where no reasonable cause is found, the Executive Director dismisses the complaint and issues a right to sue letter to the complainant. Where a determination of reasonable cause is recommended, the complaint is assigned to an HCRC enforcement attorney for legal review and final recommendation to the Executive Director.

Upon the issuance of a finding of reasonable cause to believe that unlawful discrimination has occurred, the HCRC enforcement attorney attempts to conciliate or settle the complaint.⁸ If conciliation is unsuccessful, the complaint is docketed for a

includes gender identity and expression), sexual orientation, color, religion, marital status, familial status, ancestry, disability, age or HIV (human immunodeficiency virus) infection.

⁷ Complaints filed with the HCRC usually involve a discrete act, such as termination, eviction, demotion, or involve acts that are ongoing and constitute a continuing violation. An example of a “continuing violation” is sexual harassment that began more than 180 days before the complaint is filed, but continued or ended less than 179 days before the complaint is filed. When discrimination involves a discrete act, such as termination, the HCRC can only accept a complaint within 180 days of that complained action.

⁸ During FY 2023, of all 179 investigative and attorney case closures, 10.61% (19) were closed on the basis of the complainant electing court action. The remaining cases (160) were closed on the following bases: in 44.13% of the cases (79), the Executive Director found no cause and dismissed the complaint, 24.03% (43) of the investigation cases were settled prior to a cause determination or were resolved by the parties, 3.35% (6) of the cases were resolved by staff attorneys, and the remaining 17.88% of the cases (32) were closed because the complaint was withdrawn, the

contested case hearing. An HCRC enforcement attorney presents the case in support of the complaint before an impartial hearings examiner. The respondent (represented by themselves or by counsel or representative of their choice) is also given the opportunity to present his/her case at the hearing. Generally, a complainant may intervene in the contested case process as a party and also be represented by counsel or other representative of their choice.

After the completion of the contested case hearing, the hearings examiner issues a proposed decision based on the evidence. The five-member Commission Board then reviews the proposed decision and the hearing record. The parties may file written exceptions and support statements and present oral arguments to the Board. The Commission Board then accepts, rejects, or modifies the proposed decision, issues a final decision and order, and awards remedies, if appropriate. This decision is legally binding. If any party disagrees with the decision, she/he has 30 days to file an appeal to the State Circuit Court. Furthermore, a Respondent who appeals a decision of the Commission Board is entitled to a jury trial on any claims that form the basis for an award of common law damages.⁹

The HCRC enforcement and administrative hearing process is more cost effective than litigation in court. It provides for the investigation of complaints and access to justice for those who lack the resources to pursue their claims in court. This is particularly important in employment discrimination cases, where employees have often lost their source of income through termination and have little or no control over the evidence needed to prove discrimination.

The HCRC enforcement and adjudication process also funnels cases away from the courts, saving judicial resources and associated costs. Complainants who file suit in court must first exhaust administrative remedies by filing a complaint with the HCRC. The primary reason for this requirement is to prevent the courts from being overburdened with non-jurisdictional or non-meritorious complaints, or with complaints that can be closed or settled in the HCRC's administrative process. In fact, the great

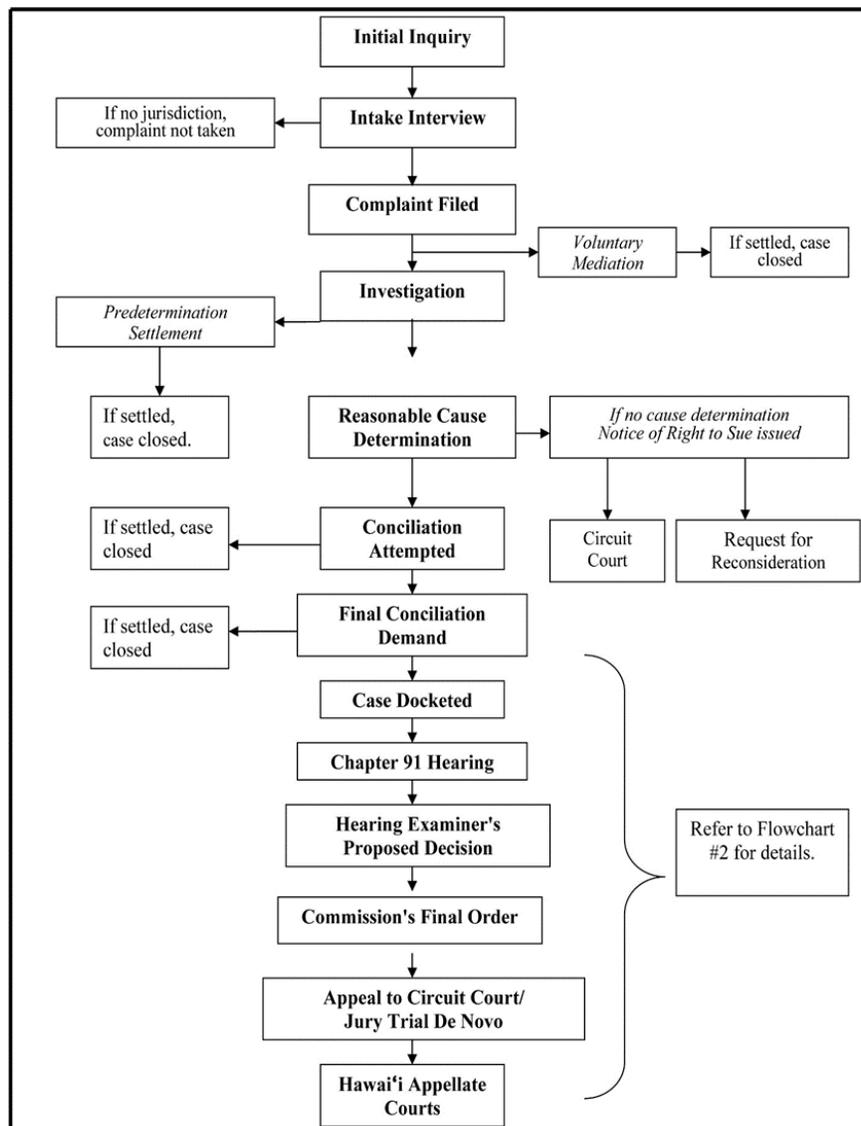
complainant failed to cooperate, the complainant was not available, or due to administrative closure or lack of jurisdiction.

⁹ The HCRC enforcement, hearing and appeal procedures are illustrated in Flowchart # 1. In *SC/ Management Corporation, et. al. v. Darryllyne Sims, et. al.*, 101 Hawai'i 438, 71 P.3d 389 (2003), the Hawai'i Supreme Court held that "a respondent who appeals a final order of the HCRC, pursuant to HRS § 368-16, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the HCRC." This does not apply to respondents in housing cases, who can elect to take the case to circuit court after a finding of reasonable cause under HRS §515-9.

majority of complaints filed with the HCRC are resolved or disposed of without resort to the courts.¹⁰

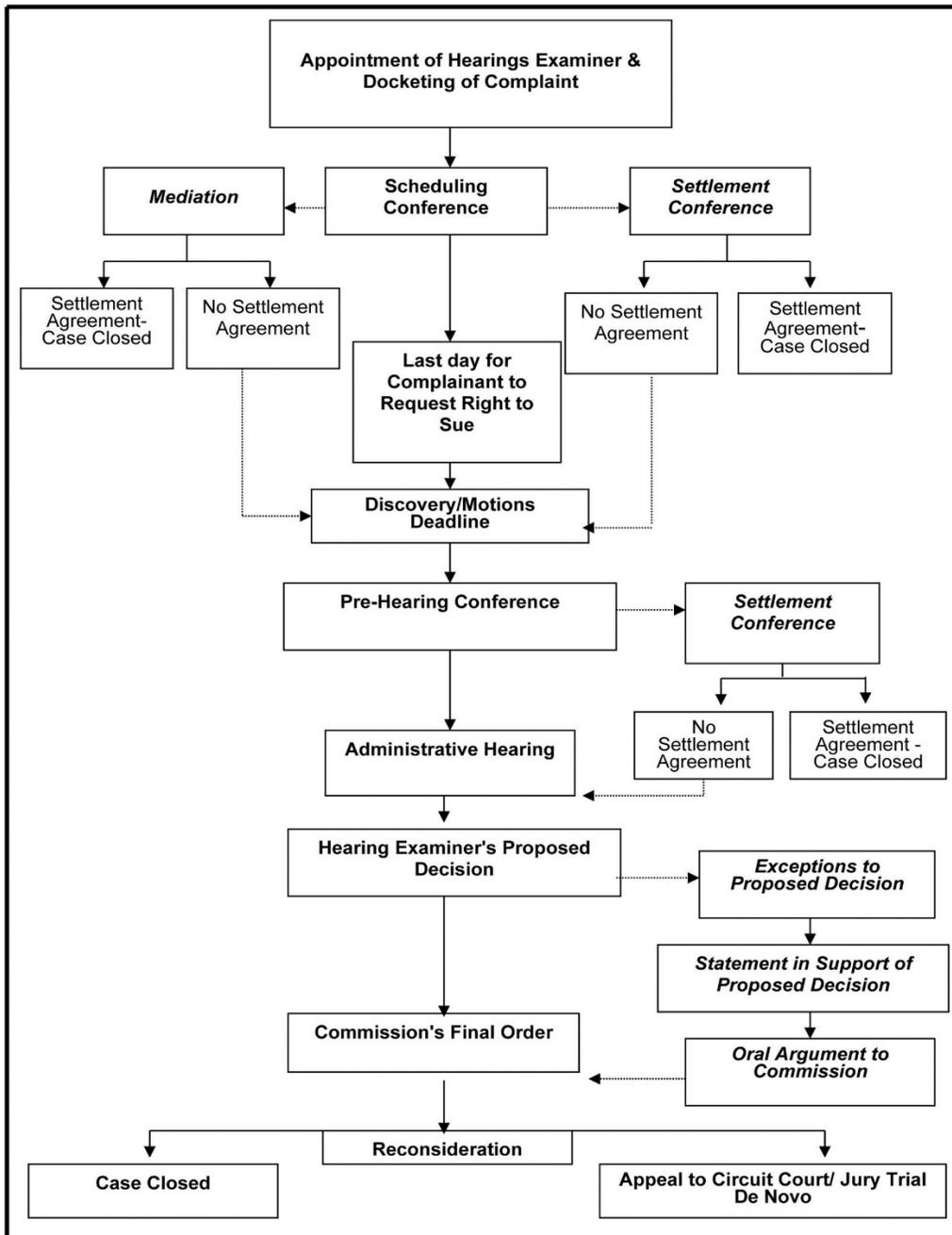
Although only a small number of cases are brought to administrative hearing and result in final Commission decisions, these cases are important because they create a body of legal precedent. Case law precedents, in Hawai'i and across the United States, provide the basis for anti-discrimination principles, such as the doctrine of sexual harassment. Case law also establishes standards that define the rights and protections under civil rights laws, and give guidance to employers, landlords, and businesses on how to prevent and eliminate discrimination.

HCRC Procedural Flowchart #1



¹⁰ HCRC contested case procedures are illustrated in Flowchart # 2.

HCRC Contested Case Flowchart #2



Commissioners

Liann Ebesugawa
Chair (term: 2017-2024)

Liann Ebesugawa was designated by the Governor to serve as the Chair of the Commission beginning July 1, 2020. She is Assistant General Counsel for Hawaiian

Electric Industries, Inc. Previously she served as an Associate General Counsel for Hawaiian Electric Company, Inc. where she provided legal support to personnel and management and advice in obtaining regulatory approvals for various projects. She also served as Executive Director of the Hawai'i State Board of Education, where she provided legal and administrative services for matters before or involving the Board of Education.

Ms. Ebesugawa is currently the Second Vice President of the Honolulu Chapter of the Japanese American Citizens League's Board of Directors. During her tenure as the JACL's past Board President, she addressed issues related to marriage equality, homelessness, Native Hawaiian self-determination, and other civil rights issues that face the community. She also currently serves on the Board of Directors of the National Asian Pacific American Bar Association and has coauthored several academic publications and presentations regarding privacy in the workplace, Japanese American redress, and racial discrimination.

Joan Lewis (term: 2017-2024)

Joan Lewis is a 30 year Hawai'i public school teaching veteran and a long time education advocate. Ms. Lewis has been a part of the teaching staffs of Nānākuli High and Intermediate School and Kapolei High School where her work with Native Hawaiian and Pacific Island students shaped her approach to teaching and learning. Ms. Lewis is one of the founders of the Hō'ola Leadership Academy, a 9-12th grade academy within the Kapolei High School community that provides a safe learning space for students that face many obstacles that can undermine their success. Graduation rates for students in this program have been in the upper 90 percentile.

Ms. Lewis has also served as a school, district and state leader for the Hawai'i State Teachers' Association. Her work as part of the HSTA has provided culturally sensitive training and support for teachers in the Leeward District of the DOE, the development and delivery of courses to support students of diverse economic backgrounds, and the expansion of the teacher voice in support of Hawai'i's students. Ms. Lewis' other experiences include service as: a foster parent for Hale Kipa Inc.; an educational staff member for Palama Settlement's In-Community Treatment Program; a house parent for Child and Family Services Ila Humphrey home for girls recovering from sexual assault; and as a trustee for the Hawai'i Employer-Union Health Benefits Trust Fund. These have been instrumental in developing Ms. Lewis' belief that we must work together to provide the Aloha that all citizens, but especially the most vulnerable among us, need to survive and thrive. Ms. Lewis earned her Bachelor's degree at Drake University (B.S. in Education) and her Master's degree from the University of Hawai'i at Mānoa.

William J. Puette (term: 2019-2025)

Dr. Puette was recruited from the mainland to teach English at a public school in 1969 just as public sector collective bargaining was enacted. In his first two years of teaching, he became a delegate at the founding convention of the Hawai'i State Teachers' Association, and organizer for the teachers first representation election, and picket captain on Maui in the union's first strike.

He holds an M.A. from the University of Pennsylvania at Edinboro and a Ph.D. from the University of Hawai'i at Mānoa.

He is currently Director of the Center for Labor Education & Research at the University of Hawai'i – West O'ahu in Kapolei. For more than thirty-five years, he has been teaching Labor Studies classes, and is the author of the books: The Hilo Massacre; Through Jaundiced Eyes: How the Media View Organized Labor; A Readers Guide to the Tale of Genji, and the co-author with Dr. Keao NeSmith of Nā Lula Hālāwai: A Parliamentary Guide to Conducting Meetings in Hawaiian. In addition he has written numerous booklets and pamphlets, including *CLEAR Guide to Hawai'i Labor History* and *Pa'a Hui Unions: the Hawai'i State AFL-CIO, 1966-1991*. Over the years he has worked with the HCRC on many joint educational programs, and was the volunteer webmaster that created the first website for the HCRC (1997-2003) before it was able to afford a professional webmaster. Likewise, he helped the Executive Director and staff at the local office of the EEOC to design PowerPoint presentations used in HCRC public education programs between 2000 and 2008.

Dr. Puette is also a labor arbitrator; a Professional Registered Parliamentarian, a member of the Association of Hawai'i Archivists, and the Hawaiian Historical Society. Winner of Penn State's Lowell-Mellett Award for Outstanding Media Criticism in 1993, he received the George Meany Award for Outstanding Service to Youth by the Hawai'i State AFL-CIO and the Aloha Council of the Boy Scouts of America in 1994; and in 2005 the University of Hawai'i awarded him the Hung Wo and Elizabeth Lau Ching Foundation Award for Faculty Service to the Community.

Jon Matsuoka (term: 2019-2023, holdover)

Dr. Jon K Matsuoka completed his graduate studies in social work and psychology at the University of Michigan in 1985 and in the same year assumed a faculty position at the University of Hawai'i Myron B. Thompson School of Social Work. In 2010 he became dean of the school and remained in the position for 10 years until becoming President of Consuelo Foundation. He is currently the Vice Chancellor at Hawai'i Tokai International College. He serves on the boards of Native Hawaiian Legal Corporation, InPeace, Project Dana, Living Treasures of Hawai'i, and Papakolea

Community Development Corporation. He has been a resident of Papakolea for 25 years and enjoys backyard farming and raising bees.

Arsima Muller (term: 2022-2023, holdover)

Ms. Muller is a partner with the law firm of Carlsmith Ball LLP in Honolulu. Her practice includes administrative/regulatory law, with an emphasis on environmental and land use law. She actively practices in Hawaii, Guam, and the Marshall Islands, where she is originally from. She received her J.D. from The George Washington University Law School in Washington, DC and a B.A. in Economics and Political Science from Boston College in Massachusetts.

Ms. Muller is the current President of the Board of Directors of We Are Oceania, a non-profit organization providing support services to the Micronesian and Pacific Island communities in the State. She is also on the Board of Directors of the Legal Aid Society of Hawaii.

HCRC Staff

During FY 2023 the HCRC staff consisted of 28 positions: ¹¹

Enforcement Staff:

- Executive Director
- Deputy Executive Director
- Enforcement Attorney (3)
- Enforcement Attorney (temporary) (2)
- Program Specialist V – Mediation Coordinator
- Legal Clerk
- Investigator-Supervisor V (2)
- Investigator IV (8)
- Investigator III-IV (temporary) (2)
- Secretary III
- Office Assistant IV (3)
- Office Assistant III (temporary)

Adjudication Staff:

- Chief Counsel
- Secretary II

¹¹ Staffing levels reflect permanent (23) and temporary (5) positions which were either filled or vacant during FY 2023.