

Annual Report

July 1, 2001 — June 30, 2002

Hawaii Civil Rights Commission

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Table of Contents

MISSION STATEMENT

OVERVIEW: FAIR AND EFFECTIVE ENFORCEMENT

- AN EFFECTIVE AND UNIFORM ENFORCEMENT SCHEME
- A FAIR ADMINISTRATIVE PROCESS
- CIVIL RIGHTS LAW ENFORCEMENT: STATE & FEDERAL LAW
- HCRC TODAY
- ACTION PLANS FOR THE FUTURE

MEDIATION PROGRAM

PUBLIC EDUCATION AND OUTREACH

- SPECIAL ADVISORY COMMITTEE ON DIVERSITY

CASELOAD STATISTICS

- INTAKE
- CLOSURES
- EMPLOYMENT CASES
- HOUSING CASES
- PUBLIC ACCOMMODATIONS CASES
- ACCESS TO STATE & STATE-FUNDED SERVICES CASES
- CAUSE CASES

CASE SETTLEMENTS

CASE DECISIONS

- CONTESTED CASE HEARINGS
- CIRCUIT COURT

LEGISLATION

APPENDIX

- OVERVIEW
- ADMINISTRATIVE PROCEDURE
- HCRC COMMISSIONERS
- HCRC STAFF



Mission Statement

The mission of the Hawaii Civil Rights Commission is to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education.

Overview: Fair and Effective Enforcement

The State of Hawaii has a strong commitment to the protection of civil rights. Article I, Section 5 of the Hawaii Constitution provides that “no person shall ... be denied the enjoyment of ... civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.” The legislature gave meaning to this commitment by creating the Hawaii Civil Rights Commission (HCRC), through enactment of Act 219 in 1988 and Acts 386 and 387 in 1989.

The HCRC was organized in 1990 and officially opened its doors in January 1991. For eleven years the HCRC has enforced state 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). The HCRC receives, investigates, conciliates, and adjudicates complaints of discrimination.

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 litigation to enforce fair employment practices law was virtually non-existent. Nearly all aggrieved were left with litigation of individual law suits as their only recourse. Few employment discrimination cases brought under state law were adjudicated, and there was little case law. For complainants who could not afford private attorneys to seek remedies in court, there was no administrative process to adjudicate their claims.

The intent of the legislature in establishing 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 to, and its procedural safeguards are structured to ensure, fairness to both complainants and respondents. The HCRC is a five-member Commission with jurisdiction to enforce state civil rights laws. The HCRC is divided into two separate and distinct sections: the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and the adjudication section which hears, issues orders and renders final determinations on complaints of discrimination filed with the HCRC.

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

The Commissioners and Hearings Examiner 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 or Hearings Examiner about any case.

The HCRC investigates complaints of discrimination 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 before filing a discrimination lawsuit in state court. Otherwise, the circuit court will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement prevents overburdening the courts with non-jurisdictional and non-meritorious cases, as well as those cases that can be closed or settled in the administrative process. 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), respectively. Pursuant to workshare cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law (“dual-filed” complaints).

While Hawai`i and federal fair employment and fair housing laws are similar, they are not identical. Hawai`i has protected bases that are not covered under federal law, and there are substantial differences in the definition of “employer” and the statute of limitations for filing a charge of employment discrimination. In addition to these jurisdictional differences, Hawai`i law provides stronger protection against pregnancy discrimination, sexual harassment, and disability discrimination in employment.

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

There is a trend of limiting jurisdiction and process under civil rights statutes: sovereign immunity barring individual claims against the states under several federal civil rights statutes; free speech and free exercise of religion claims raised in defense of discrimination complaints; and equal protection and other constitutional claims raised to challenge enforcement processes. In this context, strong enforcement of state civil rights laws is more important than ever before.

THE HCRC TODAY

During FY 2001-2002, the HCRC focused its efforts and resources on activities in several key areas:

Investigation and charge processing. The HCRC continued to make its investigation and charge processing more efficient through prioritization, specialization, and improved case management. This resulted in closure of the oldest complaints pending investigation and dedication of more resources to complex and meritorious cases. An intense program of enforcement staff training was planned and implemented, providing a foundation for more effective investigation and resolution of complaints.

Mediation. The HCRC continued to develop its voluntary mediation program, working with community mediation centers on Oahu, Hawai'i, Maui, and Kauai. The number of cases referred to mediation increased and 70% of the cases referred to mediation settled.

Public education. The HCRC continued its commitment to prevent and eliminate discrimination through public education. HCRC staff made numerous presentations on civil rights and discrimination to labor, business, professional organization, civil rights advocacy, and other community organization audiences. An updated and enhanced HCRC website was also an effective outreach tool, recording nearly 9,000 hits per month.

Litigation. The HCRC briefed and argued two major cases on appeal to the Hawai'i Supreme Court. The issues on appeal included state versus federal standards in interpreting state disability discrimination law, and the constitutionality of the HCRC administrative hearing process. These two cases are pending on appeal. In addition, a declaratory ruling was issued on whether the HCRC exercises jurisdiction over complaints alleging transgender discrimination. The declaratory relief order was also appealed to the state circuit court.

The HCRC Commissioners and staff continue their unwavering commitment to the HCRC mission - to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and

education. We renew our pledge to fair and effective enforcement, so that no person shall be denied his or her civil rights under Hawaii law.

ACTION PLANS FOR THE FUTURE:

1. Maintain case inventory at a level that allows for timely investigation of complaints and allocation of resources to complex and meritorious complaints.
2. Work to improve and expand the HCRC voluntary mediation program to offer mediation in more cases.
3. Continue to focus on HCRC public education activities; working with federal, state, business, labor, and community partners to expand Neighbor Island outreach and public education.
4. Continue and expand outreach to the schools, through sponsorship of the annual Hawaii Civil Rights Art Contest.

The accompanying report is submitted pursuant to H.R.S. §§ 368-4 and 515-9.

¹1989 House Journal, Standing Committee Report 372.

² Id.

Mediation Program

HCRC's voluntary mediation program successfully completed its third fiscal year on June 30, 2002. Complainants, respondents, and the HCRC, with strong support from 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 parties (usually a team of two co-mediators) help the parties discuss, clarify, and settle complaints.

Mediators do not take sides or rule on the merits of the complaint. Instead, the HCRC provides them with the basic facts of each case needed to understand

the dispute. The mediators then assist parties in reaching agreements such as apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation saves time, money and resources, and reduces stress by allowing the parties to explain their side of the case and to control the process of resolving their dispute.

HCRC works with trained and senior mediators from the Mediation Centers of Hawaii (MCH), a statewide network of community non-profit mediation centers. There are mediation centers on Oahu, Maui, Hawaii, and Kauai. MCH mediators are trained in civil rights laws by HCRC staff on a regular basis. The mediation centers charge minimal fees for the sessions, which can be waived or reduced where there is financial hardship. The HCRC mediation coordinator facilitates the process by explaining mediation to the parties and how it benefits them.

Mediation can occur at any stage of the complaint process. Mediation is first offered when the complaint is accepted, because disputes are often easier to resolve while the facts are fresh and before potential damages accumulate and the positions of the parties become hardened. For FY 2001-2002, 41 cases were referred into mediation, 30 were disposed of during the year, and 21 of those resulted in mediated settlements. This represented a 70% overall settlement rate, which comports with rates of other programs. The total monetary value of mediated agreements was \$173,878. (This did not include 2 privately mediated agreements, for which the figures were not disclosed).

Most of the mediation referrals (58.5%) were to the Mediation Center of the Pacific in Honolulu; followed by Mediation Services of Maui (12.2%); West Hawaii Mediation Center (12.2%); and Ku'ikahi Mediation Center in Hilo (7.3%). Four cases (9.8%) were referred to private mediation upon the parties' request. The three most typical protected bases of referred cases were: disability (32%); retaliation (19%); and sex (17%). Other bases included: race, religion, age, national origin, color, and arrest and court record. Employment cases accounted for 38 referrals and public accommodations for 3 referrals.

Satisfaction with mediators remains high. Evaluations are sent to the parties

in all mediated cases, successful or otherwise. Of those returned, the average rating of whether the parties "would recommend the program to others", was a 4.2 (on a 1-5 scale, with 1 "strongly disagree" and 5 "strongly agree").

The following are examples of cases settled in mediation:

- A senior sales representative, who had been with a company for eighteen years and had earned \$75,000 in the prior year, was laid off, he alleged, due to his disability. The company asserted that he did not meet a required sales quota, which complainant alleged was not adjusted for his lengthy period of disability leave. In mediation, the parties agreed on a settlement of \$50,000 and a non-compete clause. Both parties were represented by counsel in the mediation.
- A complainant alleged he was denied promotion to a coordinator position with a non-profit social services organization because of his sex (male) and race (Caucasian). He complained to management that female staff persons were given raises whereas their male counterparts were not and that a less-qualified non-Caucasian female was hired for the coordinator position. As a result of his complaint, he alleged, he was then subjected to retaliation in the form of a reduction of hours and placement on administrative leave. In mediation, the parties agreed upon a settlement of \$31,000 to the complainant, who withdrew his complaint.
- A complainant who was terminated from her position performing general office and customer service duties, alleged that she was discriminated against because of her sex (pregnancy). She was terminated shortly after she informed management of her pregnancy and inability to perform certain heavy tasks. The firm asserted she was fired for poor work performance. In mediation, the parties agreed that complainant would receive a \$35,000 settlement and a positive job reference.
- A complainant alleged that during her employment with a state agency she was sexually harassed by a supervisor, creating a hostile and offensive work environment. Although she reported the first incident to her other

supervisors, immediate and corrective action was not taken and the harassment continued. Complainant mediated with the agency's civil rights compliance officer and agreed to a settlement of \$4,500, restoration of certain sick leave time, and continuation of a cease and desist order against the supervisor.

- A complainant alleged he was denied a psychiatric assistant position at a hospital based on his record of having a disability. He alleged he was offered the job, but after the respondent became aware of his disability record, the offer was withdrawn. Complainant provided verification from his physician that he was able to perform the essential job duties and passed the functional capacity examination, but was still denied the position. The parties agreed to a settlement of \$10,000 and withdrawal of the complaint.

Although monetary settlements were achieved in many agreements, all mediated agreements involved non-monetary affirmative relief. Examples of non-monetary relief included:

- 1) training of employers and employees on civil rights laws;
- 2) restoration of employee benefits;
- 3) providing neutral or positive references for former employees;
- 4) increasing hours for part-time employees;
- 5) formal apologies;
- 6) deletion of inappropriate negative comments in employee records;
- 7) reasonable accommodations for the disabled;
- 8) clarifications of communications between employer and employee; and
- 9) thorough and frank discussion of issues, under mediator supervision, which lead to later settlement.

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 have maintained a number of public education efforts, working with civil rights, business, labor, professional organizations, on new and continuing initiatives.

FY 2001-2002 highlights included:

- In conjunction with other Martin Luther King, Jr. Day activities, HCRC sponsored a first annual art contest for grades 4-6 with a theme of "What can we do in our daily lives to promote civil rights and diversity in our community?" The three winning student artists were honored in a ceremony hosted by Lt. Governor Mazie Hirono.
- By June 30, 2002, the HCRC website (www.state.hi.us/hcrc) received almost 9,000 hits per month, a new record. These hits were in addition to over 3,300 telephone and walk-in inquiries during the year plus approximately 250 email inquiries. The website was continually enhanced and updated during the year.¹
- The HCRC continued to provide speakers and trainers for conferences, workshops, schools, employers, labor organizations, businesses, landlord and tenant organizations, government agencies, and non-profit and other community groups on rights and responsibilities under anti-discrimination laws and other diversity issues.
- The HCRC continued to work with the U.S. Department of Housing and Urban Development, the state and counties, and community fair housing organizations to co-sponsor fair housing training on all islands.
- The HCRC and EEOC co-sponsored a Joint Big Island Outreach to small business and labor organizations on civil rights laws in Kona and Hilo. The HCRC also participated in public lectures and seminars on hate language, racial segregation, structural inequalities, and the 2000 census, at the William S. Richardson School of Law and the East-West Center; and a series of

community homebuyers fairs and fair housing landlord tenant workshops.

- HCRC co-sponsored and participated in a number of Martin Luther King, Jr., commemorative events, including a Proclamation Ceremony hosted by Governor Cayetano, joint seminars on hate language and other issues, and the annual King Day Parade in January.
- HCRC continued its annual trainings on civil rights for approximately 100 mediators of the Mediation Centers of Hawaii in Honolulu and Maui.

SPECIAL ADVISORY COMMITTEE ON DIVERSITY

The HCRC Special Advisory Committee on Diversity was established in 1999 in recognition that discrimination cannot be eliminated through law enforcement efforts alone. During FY 2001-2002, the Diversity Committee developed and distributed a flyer on diversity and fairness in education to all public school teachers and co-sponsored a civil rights art contest in Oahu public schools.

The flyer included a message encouraging teachers to discuss diversity issues in their classes to eliminate prejudice as part of a commitment to quality education:

Schools and classrooms are a logical place for us to help to heal the disease of racism and prejudice -- offering the best opportunity to come to grips with the prejudices that can divide us. We need to address the destructive impact prejudice, bullying, and teasing have on our ability to provide safe schools and a healthy learning environment.

Our challenge is not merely to teach tolerance -- with rules of conduct to prevent negative incidents -- but to teach healthy attitudes towards people of different cultures and backgrounds, and an understanding of our common humanity. In order to do this, the schools must provide a safe place to discuss and deal with our own biases and prejudices because no one is completely free of prejudice.

The message urged teachers to facilitate discussion “about the problem we are seeing among our children, and how we can all work together -- parents, teachers, community members -- to develop healthy and respectful attitudes among all of us, but especially to help our children learn new and healthier ways

of treating one another.”

The Committee on Diversity with co-sponsors, the Honolulu Chapter of the Japanese American Citizens League (JACL), and the Student Excellence Equity and Diversity (SEED) program at the University of Hawai'i at Manoa, also held a poster contest for Oahu public school students in grades 3, 4, and 5 on the topic of “What can we do in our daily lives to promote civil rights and diversity in our society?”

Held in conjunction with Martin Luther King, Jr., Day, the contest encouraged children to reflect upon Dr. King's life and work, the civil rights movement, and to think about what they can do in their daily lives to promote civil rights and diversity. In addition to drawing pictures to illustrate their ideas, students were required to write one or two lines explaining their ideas at the bottom of their picture.

The contest winners were:

- Rachel Tamura -- "Everyone is So Special" 4th Grade; Mililani Uka Elementary School; Teacher: Ms. Edna Takaki
- Kamuela Kalilikane -- "My Colorful World" 5th Grade; Pohakea Elementary School; Teacher: Ms. Arlene Nishimura
- Megan Kira -- "We Could Create a Better and More Loving World" 6th Grade; Pearl City Highlands Elementary School; Teacher: Mr. Karl Higa

Each winning student received \$50 and \$100 for their class. The students were awarded their prizes in a ceremony at the Lt. Governor's office, and received koa bowls from Lt. Governor Mazie Hirono and congratulatory messages from the State Senate and House of Representatives.

¹The HCRC again thanks Dr. William Puette, Executive Director of the Center for Labor Education and Research ("CLEAR") at the University of Hawaii - West Oahu, for his continuing service as voluntary webmaster.

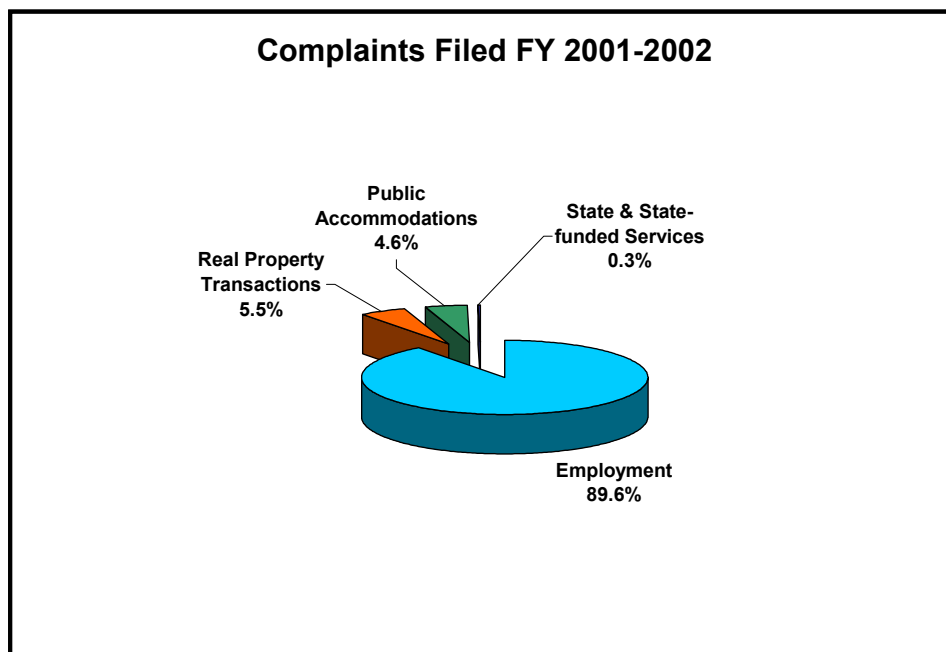
Caseload Statistics

INTAKE

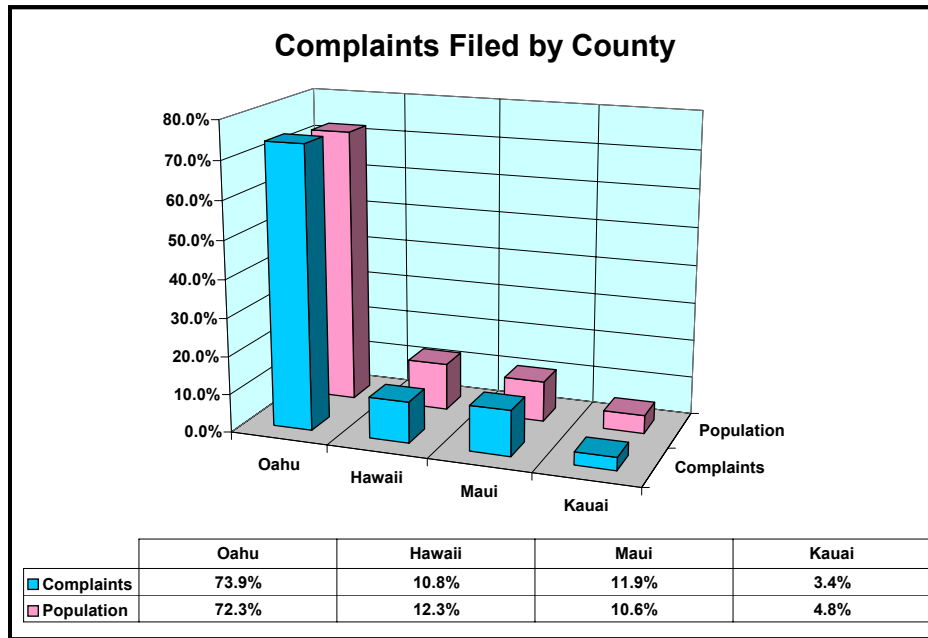
During FY 2001-2002, the HCRC received approximately 5,040 telephone and walk-in inquiries, and 966 intakes were completed by HCRC investigators.

674 charges of discrimination were filed with HCRC, or an average of 56 cases a month. These consisted of 475 complaints originating with HCRC investigators (averaging 40 per month), and another 199 more cases originating with and to be investigated by the federal Equal Employment Opportunity Commission (“EEOC”), and dual-filed under state law with HCRC.

The 674 cases included 604 employment cases, 31 public accommodations cases, 37 housing cases, and 2 cases involving state and state-funded services. The other inquiries and intake interviews did not lead to filed charges primarily due to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected basis or bases; or c) a complainant's decision not to pursue the complaint.



The 674 charges accepted by HCRC consisted of 498 Oahu complaints, 73 Hawai'i County complaints, 80 Maui County complaints, and 23 Kauai County complaints. The number of complaints filed from each county was consistent with its portion of resident population.



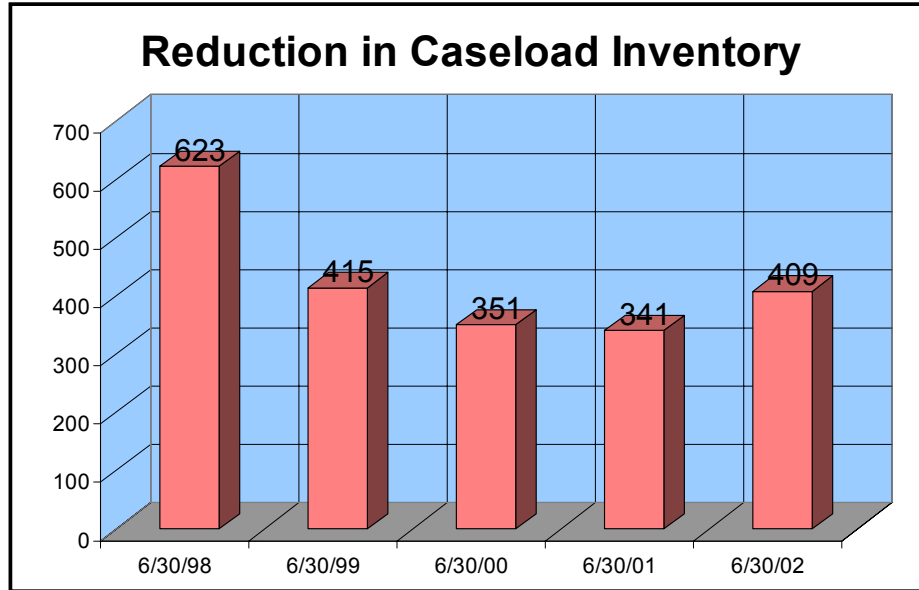
CLOSURES

HCRC investigators and attorneys closed 411 cases during FY 2001-2002, for an average closure rate of 34.25 cases per month. In addition to the 411 closures during the fiscal year, HCRC investigations resulted in cause determinations in another 29 cases.

As of June 30, 2002, there were 409 cases pending with HCRC investigators. Four years before, HCRC investigators had operated with a case inventory of more than 600 cases, which included a substantial backlog of unresolved older cases. Through its prioritized charge processing system and specialization in investigation, HCRC had reduced this inventory substantially in FY 1998-1999 and FY 1999-2000 and has since maintained this reduced inventory.

Maintaining this reduced case inventory brings the HCRC closer to the optimum caseload of 30 cases per investigator, as recommended by the Legislative Auditor in

“A Study on Implementation of the Civil Rights Commission for the State of Hawai‘i” (Report No. 88-9, January 1989). In order to maintain the case inventory at this level, however, HCRC must continue to close about 450 cases each fiscal year.



The average period for case closure by investigators was 351 days, as compared to 336 days for FY 2000-2001 and 303 days in FY 1999-2000. The increase in the period for closure during the past two fiscal years has been due to the higher complexity of the cases resolved. In the future the HCRC will strive to maintain an average closure period of 11 months or less.

A review of this fiscal year shows the following reasons for closures:

	No. of Cases	% of Subtotal	% of Total Closures
Merit Closures			
Resolved by Parties	39	11.37%	9.49%
Pre-Determination Settlements	11	3.21%	2.67%
Cases Settled or Otherwise Resolved After a Cause Determination	27	7.87%	6.57%
No Cause Determinations	<u>266</u>	<u>77.55%</u>	<u>64.72%</u>
Subtotal	343	100.0%	83.45%
Non-merit Closures			

Complainant Elected Court Action	50	73.54%	12.16%
No Jurisdiction	3	4.41%	0.73%
Complaint Withdrawn	5	7.35%	1.22%
Complainant Not Available	3	4.41%	0.73%
Complainant Failed to Cooperate	5	7.35%	1.22%
No Significant Relief Available	<u>2</u>	<u>2.94%</u>	<u>0.49%</u>
Subtotal	68	100.0%	16.55%
Total Number of Closures	411		100%

ANALYSIS AND EXPLANATION OF CLOSURE DATA

This closure data does not reflect the number of completed investigations which resulted in cause recommendations and determinations. The reason for this is that cases are not closed upon issuance of a notice of cause, but are then 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 as a percentage of cases that are investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties, cause recommendations and settlements/resolutions constitute between 15-25% of the total.

During FY 2001-2002, HCRC investigations resulted in 29 cause recommendations, and 50 cases were closed on the basis of pre-determination settlement or resolution between parties. 266 cases were closed on the basis of no cause determinations upon completion of investigation. The ratio of cause cases and predetermination settlement/resolution (79) to no cause cases (266) for this fiscal year is 29%.

EMPLOYMENT CASES

H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, assignment of income for child support obligations, National Guard participation, or breast feeding/expressing milk. Examples of such practices are outlined in H.R.S. § 378-2.

The HCRC has a work share agreement with EEOC. Where there is concurrent jurisdiction, a case is filed with both agencies, but only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total 604 employment cases were accepted by the HCRC. HCRC was the intake agency for 405 of these cases, and HCRC

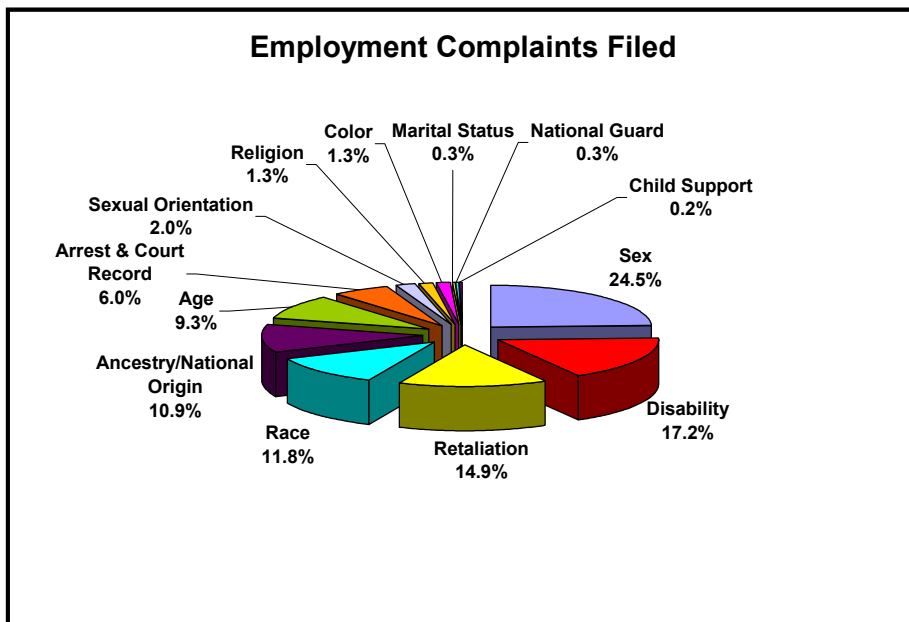
dual-filed another 199 cases originating with EEOC. Of the HCRC-originated cases, 79.7% were also filed with EEOC.

Of the 604 employment cases accepted in FY 2001-2002, sex was the basis cited most often, with 148 cases, accounting for 24.5% of all employment discrimination cases. Within the sex category, 54 cases alleged sexual harassment (36% of all sex cases) and 36 cases were based on pregnancy (24% of all sex cases).

Disability was the second most common basis with 104 cases, representing 17.2% of all employment cases. Retaliatory conduct was next with 90 cases, representing 14.9% of accepted employment cases, followed by race discrimination with 71 cases (11.8%).

There were 66 cases of ancestry/national origin discrimination (10.9%); 56 cases based on age (9.3%); 36 cases based on arrest & court record (6.0%); 12 cases based on sexual orientation (2.0%); 8 cases based on color (1.3%); and 8 cases based on religion (1.3%). There were 2 cases each based on marital status and National Guard participation (0.3% each) and 1 case based on child support obligations (0.2%).

The case closure period averaged 366 days for the 340 employment cases that were closed (or caused) by HCRC investigators during FY 2001-2002.



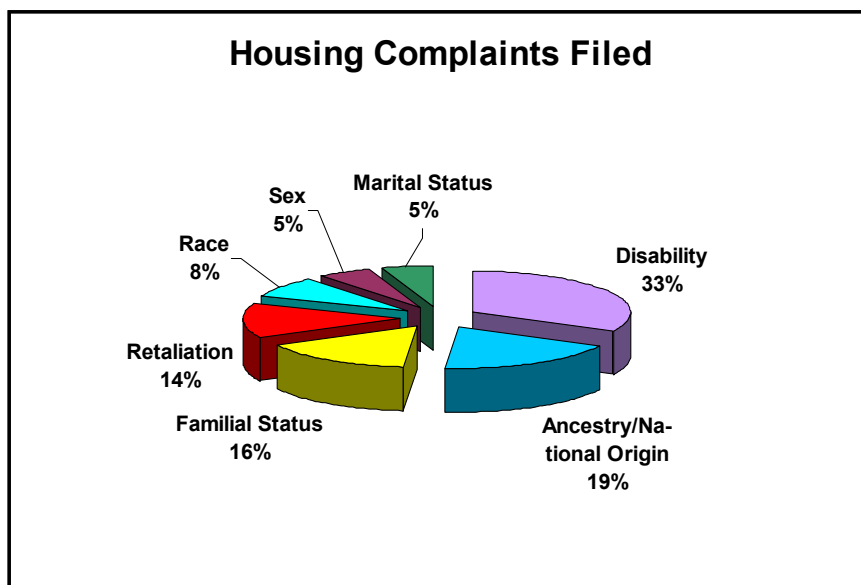
HOUSING CASES

H.R.S. Chapter 515 is Hawai'i's fair housing law. It prohibits discriminatory housing practices based on race, sex, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection. Examples of such unlawful practices are listed in H.R.S. § 515-3 and include actions such as refusing to rent, sell, or grant loans to an individual because of one or more of the above protected bases.

The HCRC has a work share agreement with the federal Department of Housing & Urban Development (HUD). HUD refers most of the complaints it receives regarding unlawful discrimination in real estate transaction in Hawai'i to the HCRC for investigation.

During FY 2001-2002, the HCRC accepted 37 cases of housing discrimination. There were 12 cases based on disability status (32.4%); followed by 7 cases based on ancestry/national origin (18.9%); 6 cases based on familial status (16.2%); 5 cases alleging retaliatory conduct (13.5%); 3 cases based on race (8.1%); 2 cases based on sex (5.4%); and 2 alleging marital status discrimination (5.4%).

Housing case closures averaged 322 days for the 45 cases closed (or caused) during FY 2001-2002.

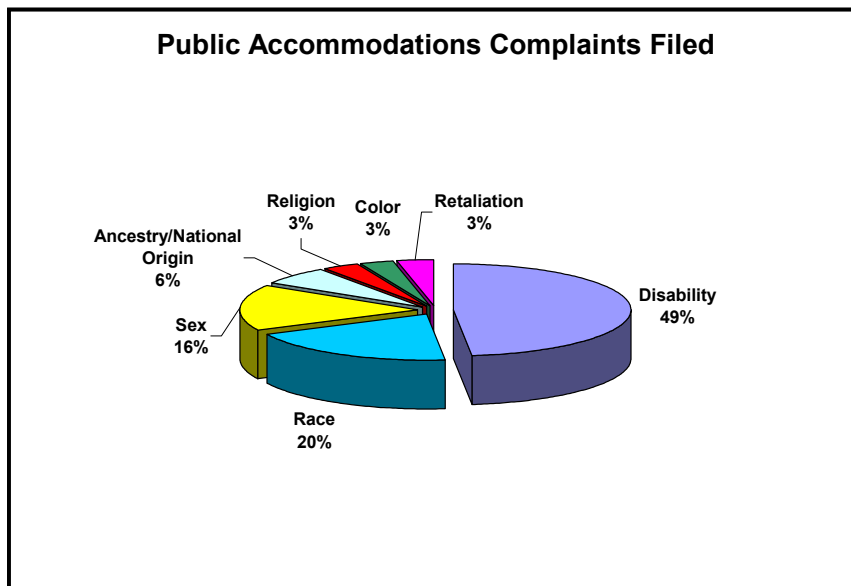


PUBLIC ACCOMMODATIONS CASES

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, 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, 31 new cases of public accommodations discrimination were accepted. There were 15 cases based on disability discrimination, accounting for 48.4% of the all accommodations cases; 6 cases alleging race discrimination (19.4%); 5 cases based on sex discrimination (16.1%); 2 cases based on ancestry (6.5%); and 1 case each based on religion, color, and retaliatory conduct (3.2% each).

Public accommodations case closures averaged 227 days for the 25 cases closed (or caused) during FY 2001-2002.



ACCESS TO STATE & 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).

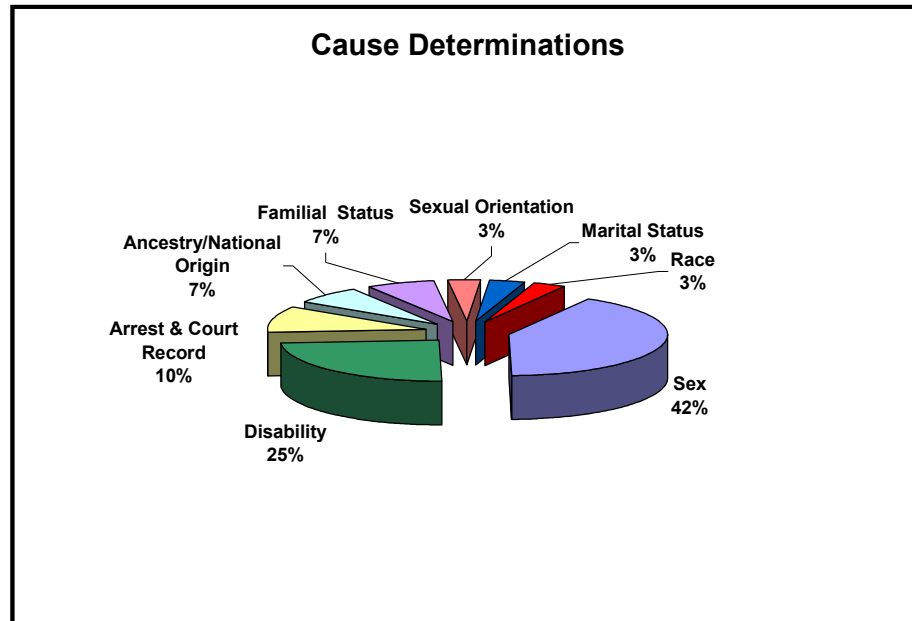
During the fiscal year, there were 2 cases filed under § 368-1.5. Three cases were closed during FY 2001-2002, averaging 108 days for closure.

CAUSE CASES

When the 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 2001-2002, the enforcement attorneys received 29 recommendations for cause determinations. Of these, 19 (65%) were employment cases, 8 (28%) were housing cases, and 2 (7%) was a public accommodation case.

Of the 29 investigations resulting in a cause recommendation, 12 or 42% involved discrimination on the basis of sex, 7 or 25% involved discrimination due to disability, and 3 or 10% involved discrimination due to arrest and court record. There were 2 each (7%) involving familial status discrimination and ancestry/national origin discrimination, and 1 each (3%) involving discrimination due to sexual orientation, marital status, and race.

During FY 2001-2002, enforcement attorneys closed 27 cases, and all but one of these (96%) was a negotiated settlement.



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 2001-2002 the total monetary relief obtained through settlements totaled more than \$493,773.00. In the 26 settlements obtained by HCRC attorneys in cases with a finding of reasonable cause, the monetary relief obtained for parties through conciliation exceeded \$286,250.00. In the 50 cases settled prior to an investigative finding, monetary relief totaled more than \$207,523.00. This figure includes both pre-determination settlements obtained through HCRC investigators (\$45,650.25) and investigative settlements obtained through the HCRC Mediation program (\$161, 873.00).

In addition to monetary relief, significant affirmative relief was also 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 include various types of affirmative relief, including developing and implementing anti-discrimination policies, employee and supervisor training on anti-discrimination policies, posting policies, and publishing notices informing the public of HCRC's role in enforcing state anti-discrimination laws.

In some instances, non-monetary relief can be an important element of a settlement. For example, in FY 2001-2002 several complainants received letters 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 are resolved when an employer, housing provider, or public accommodation corrects an unlawful

discriminatory policy or practice after notice of the violation. During FY 2001-2002, a significant number of employers, housing providers, and public accommodations voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following descriptions are illustrative of the HCRC cases that were conciliated and the relief that was obtained during FY 2001-2002:

- An applicant for a position with a national company was allegedly subjected to pre-employment application inquiries into his arrest and court record. The case was settled for payment of \$1,000 to the complainant, revision of the application to eliminate all questions relating to arrest and court record, adoption of anti-discrimination employment policies in compliance with Chapter 378, and training for the employer's Hawai'i-based managers in compliance with such non-discrimination policies.
- A dental technician alleged that she was terminated because of her sex (pregnant female) and marital status (unmarried). Settlement included payment in the sum of \$15,000 to the Complainant. Respondent also agreed

to adopt pregnancy and leave policies and procedures, and to train its employees in its non-discrimination policies.

- A case alleging employment discrimination based on disability was settled for a \$12,000 payment to the employee and for the employer's re-affirmation of and training regarding the company's anti-discrimination policy.
- Complainants, a husband and wife, were owners of a condo unit on Maui. The husband had a disability and required a reasonable accommodation for parking. Allegedly, the housing providers failed to provide the necessary accommodation and engaged in a series of retaliatory acts, including enforcement of house rules that did not exist. The case settled with a payment of \$40,000 to the Complainants and adoption and implementation of a non-discrimination policy by the housing providers.
- A nursing home on the Big Island allegedly terminated a pregnant employee. The case was settled for \$24,000. The employer also agreed to adopt a non-discrimination policy and to train its workers on how the policy should be applied.
- Complainant was allegedly subjected to inappropriate comments about her ancestry when she visited a car company to purchase an automobile. In settlement, Respondents paid Complainant \$6,250 and agreed to re-affirm its policy of non-discrimination, as well as provide copies of the policy to all employees.
- A case alleging same-sex harassment in employment was settled through mediation for \$12,000, a reference letter, and adoption of an anti-discrimination policy.
- An employment discrimination case against a local taxi cab company in which an employee alleged discrimination and harassment based on ancestry and national origin was settled for \$5,000 payment to the employee and adoption of anti-discrimination policy and training on the policy.
- A housing discrimination case in which complainant alleged steering and

failure to be shown an apartment by a landlord based on complainant's familial status as a single father with two young children was settled for \$5,000 to the complainant and affirmative relief -- which included adoption of a non-discrimination policy and the landlord receiving training on fair housing laws.

- An employment discrimination case in which an employee alleged verbal and physical harassment by his supervisor based on his ancestry/national origin was settled for \$17,500 and reaffirmation of the employer's anti-harassment policy and training of all employees and management on the policy.
- A case alleging discrimination in public accommodation based on disability was settled for \$3,000 and reaffirmation of the company's non-discrimination policy and training on the policy.
- A housing discrimination case in which complainant alleged she was evicted due to her pregnancy and familial status was settled for \$1,000. No affirmative relief was required since the landlord no longer owns or operates any real property in the state.
- An employment discrimination case based on religion in which the employee alleged that his employer terminated him when he requested to be accommodated in his work schedule so that he may attend religious services was settled for \$12,500 payment to the employee and adoption of a non-discrimination and right of accommodation policy, posting of the policy and training of all management on the policy.
- A housing discrimination case based on familial status was settled for \$2,500 and the landlord was required to adopt a non-discrimination policy and the agent attended training on fair housing law.
- An employment discrimination case involving allegations of an employer's wrongful revocation of a conditional offer of employment based on arrest and court record was settled for \$25,000 payment to the complainant, reinstatement of the complainant to the list of eligible candidates for

employment, reaffirmation of the employer's non-discrimination policy, and re-training of human resources personnel on the policy.

- An employment discrimination case wherein an employee alleged that he was verbally abused and harassed by his supervisor based on his ancestry and national origin was settled for approximately \$24,000 payment to complainant for general damages and adoption of non-discrimination policy and training on the policy for all employees.
- An employment discrimination case involved allegations of sexual harassment by a supervisor. The employer and the alleged harasser agreed to make payment of \$30,000 to the complainant for general damages. The employer agreed to reaffirm and retrain all employees on the policy and applicable law regarding sexual harassment and sex discrimination. The individual respondent also agreed to attend anti-harassment training at his own expense and submit a letter of apology to the complainant.
- An employment discrimination case involved allegations that a nurse was fired because she married a physician working for the same employer, in violation of the prohibition against discrimination on the basis of marital status. The employer agreed to pay the complainant \$10,000.
- An employment discrimination case involved allegations that the complainant was terminated because she required pregnancy-related medical leave. The employer agreed to pay the complainant \$30,000, to adopt a nondiscrimination policy that included provisions regarding pregnancy-related disability leave, and to provide training to all Hawai'i managers.

HCRC Warning Letters

In addition to affirmative relief obtained as part of a settlement, HCRC routinely provides respondents with "warning letters" advising them of unlawful or potentially unlawful practices that HCRC discovers during the course of its investigation of other claims against the respondent. In those instances in which the HCRC investigation does not result in a recommendation of reasonable cause on the claims filed but the HCRC investigator finds other unlawful practices, such as a discriminatory written policy or employment application, or conduct in the workplace that could

rise to the level of unlawful harassment if repeated, HCRC will advise the respondent of the potential violations and give the respondent information about how it can correct the possible violation of the law.

Warning letters have resulted in voluntarily-made policy and application form changes, as well as discrimination prevention training for employees and managers.

Case Decisions

CONTESTED CASE HEARINGS

During FY 2001-2002, three cases were docketed for hearing and one Petition for Declaratory Relief was filed. Two of the docketed cases were settled and one was pending at the end of the fiscal year.

On June 28, the Commission issued a final decision granting the Executive Director's Petition for Declaratory Relief in DR 02-0015. The petition addressed complaints by male-to-female transsexual or transgendered employees, who allegedly dressed as females or exhibited feminine behavior or characteristics at work, and were subjected to adverse actions by their employers because they did not dress or behave like men. The Executive Director petitioned for a declaration that the HCRC had jurisdiction to accept and investigate these cases as sex discrimination complaints.

In granting the petition, the Commission declared that the HCRC Executive Director has jurisdiction to investigate such claims under H.R.S. Chapter 378, Part I. This decision was based on a recognition that "sex" and "gender" have been used interchangeably in Hawaii caselaw, and that gender stereotyping is a form of sex discrimination, citing federal and other states' interpretations of sex discrimination statutes. The employer has appealed the Commission decision to the First Circuit Court, and the appeal is pending.

CIRCUIT COURT

In *SCI Management L.P., Hawaiian Memorial Park Cemetery, Hawaiian Memorial Life Plan, LTD. dba Borthwick Motuaries; and Derek Kim v. Darryllynne*

Sims et al., Civil No. 01-1-0776-03 (1st Cir.), plaintiffs raised a constitutional challenge to the HCRC statute that allows a complainant to request a notice of right to sue and file a lawsuit in state circuit court, but provides no similar procedure to respondents. Plaintiffs claimed that the right to sue provision of H.R.S. §368-12 violated their right to equal protection by denying access to a jury trial. The Circuit Court held that the statute was unconstitutional, and the HCRC appealed to the Hawaii Supreme Court.

On appeal, the HCRC argued that where “public rights” are concerned, the legislature may assign adjudication to an administrative forum, and that in the HCRC administrative process neither complainant nor respondent has a right to a jury trial. The HCRC vindicates a public interest in enforcing a comprehensive statutory civil rights scheme designed to address the social and legal problem of discrimination, even when it pursues victim-specific relief. Based on these points, the HCRC argued that the right to sue provision of the statute does not violate equal protection under the applicable standard of review. The case has been briefed and argued on appeal and is pending before the Court.

In Aloha IslandAir v. Hawaii Civil Rights Commission and Pied, Civil No. 00-1-3779-12(1st Cir.), the Circuit Court reversed the Commission’s Final Decision which found that IslandAir had unlawfully discriminated against Bruce Pied on the basis of his disability. Pied, a commercial pilot, has vision in one eye due to a virus infection. Despite his visual limitation, the Federal Aviation Administration granted him a license to fly commercial aircraft, including large passenger jets. The Circuit Court found that Pied was not disabled because he can mitigate the effects of his disability. The Court did not give deference to the Commission decision and its administrative rules, which do not consider mitigating measures in determining whether a person is disabled. The HCRC appealed the case to the Hawai`i Supreme Court.

On appeal, the HCRC argued that federal disability law standards should not be used to interpret state law, citing Hawai`i’s stronger civil rights protections. The case has been briefed and is pending before the Court.

Legislation

Act 217, Session Laws of Hawai'i 2002, clarifies that an employment decision based on an individual's genetic information or that of a family member, is one based on that individual being regarded as having an impairment which substantially limits a major life activity. Accordingly, such use of genetic information is a form of disability discrimination. Enactment of this legislation addresses a growing concern over advances in genetic testing and the use of genetic test results.

Act 259, Session Laws of Hawai'i 2002, protects the owners of guide dogs, signal dogs, and service animals, by providing criminal penalties for interfering with a person's use of guide dogs, signal dogs, and service animals.

Appendix

OVERVIEW

The Hawaii 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, 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 laws under HCRC jurisdiction.

The HCRC exercises jurisdiction over Hawaii'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. 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. The HCRC has a staff of twenty-nine (29) persons who are divided into separate enforcement and adjudication sections.

ADMINISTRATIVE PROCEDURE

Before the HCRC accepts a complaint of discrimination, a complaining person must allege that:

- 1) She or he has been subjected to unlawful discrimination¹ because of a "protected basis,"² and,
- 2) The unlawful discrimination occurred within the previous 180 days.³

After a complaint is filed with HCRC, in appropriate cases 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. As objective fact-finders, HCRC investigators favor neither party, and gather evidence to allow the Executive Director to make a determination in each case. As appropriate, the HCRC investigator collects, reviews, and analyzes documents, and contacts and interviews witnesses. Some witnesses questioned 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 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.⁴ If conciliation is unsuccessful, the complaint is docketed for a contested case hearing. An HCRC enforcement attorney presents the case in support of the complainant 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 its 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.⁵

The HCRC enforcement and administrative 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 HCRC's administrative process. In fact, the great majority of complaints filed with HCRC are resolved or disposed of without resort to the courts.⁶

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 by civil rights laws, and give guidance to employers, landlords, and businesses on how to prevent and eliminate discrimination.

"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 women, or men, or any other protected basis.

² “Protected basis” is the criteria that it is unlawful for a respondent to discriminate upon. Protected bases vary depending on the statute involved:

- a. State Funded Services (Chapter 368, H.R.S.) The only protected basis is disability.
- b. Employment (Chapter 378, Part I, H.R.S.) The protected bases that an employer, employment agency, or labor organization may not discriminate on are: race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record.
- c. Public Accommodations (Chapter 489, H.R.S.) The protected bases that a public accommodation may not discriminate on are: race, sex, color, religion, ancestry, or disability.
- d. Housing (Chapter 515, H.R.S.) The protected bases that an owner, a real estate broker or any person engaging in a real estate transaction, may not discriminate on are: race, sex, color, religion, marital status, familial status, ancestry, disability, age or HIV (human immunodeficiency virus) infection.

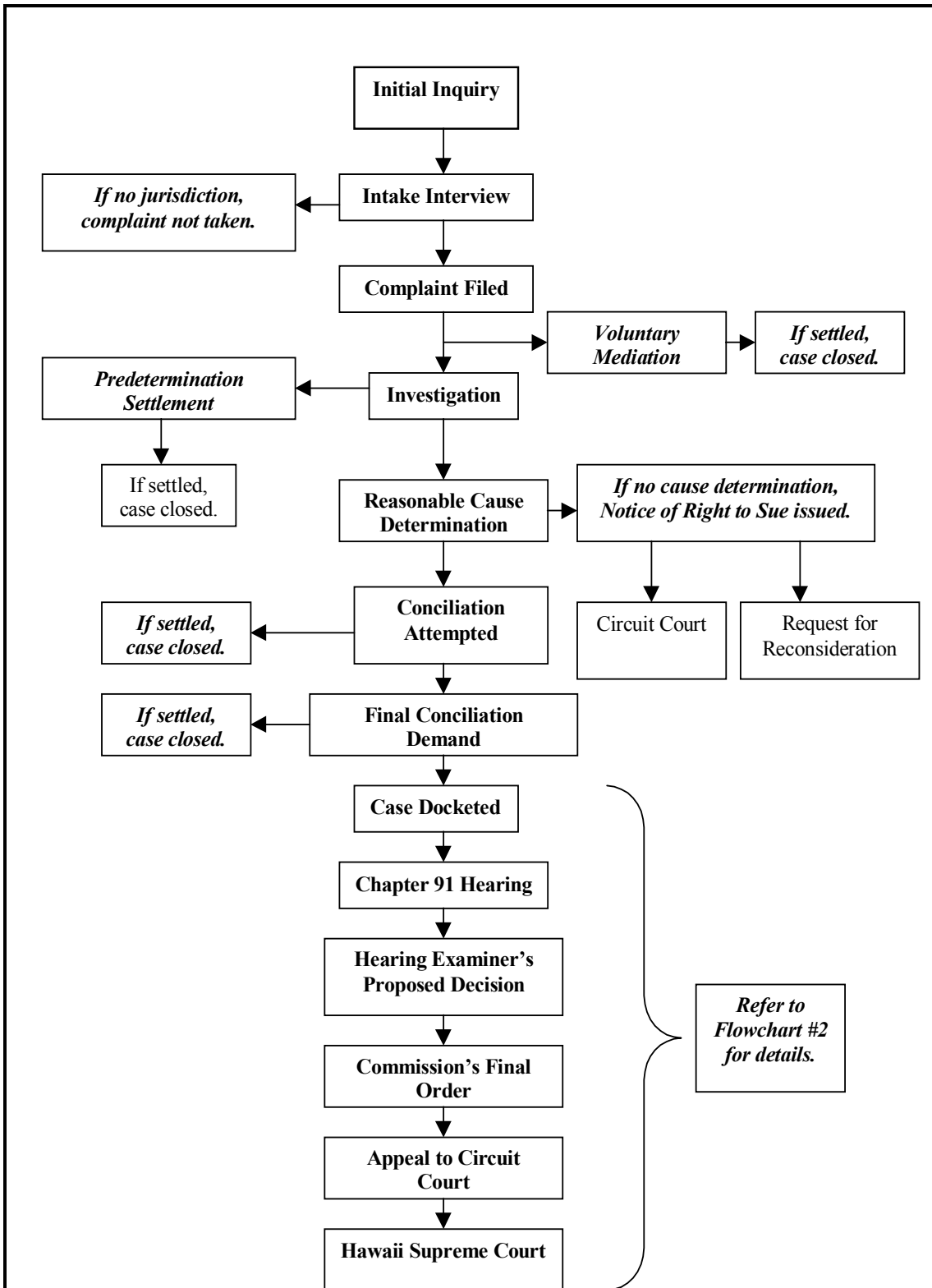
³ Complaints filed with HCRC usually involve a discrete act – such as termination, eviction, demotion, etc. – or involve acts that are ongoing and constitute a continuing violation. An example of a “continuing violation” is sexual harassment that began more than 180 days before the complaint is filed, 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.

⁴ During FY 2001-2002, of all complaints closed (411), 16.55% (68) were closed on the basis of the complainant electing court action or other administrative closure. The remaining cases (343) were closed on the basis of a completed investigation or a pre-determination settlement: in 64.72% (266) the Executive Director found no cause and dismissed the complaint; in 6.57% (27) the case was resolved through settlement or litigation by HCRC enforcement attorney after the issuance of a notice of cause; and 12.16% (50) were settled prior to a cause determination.

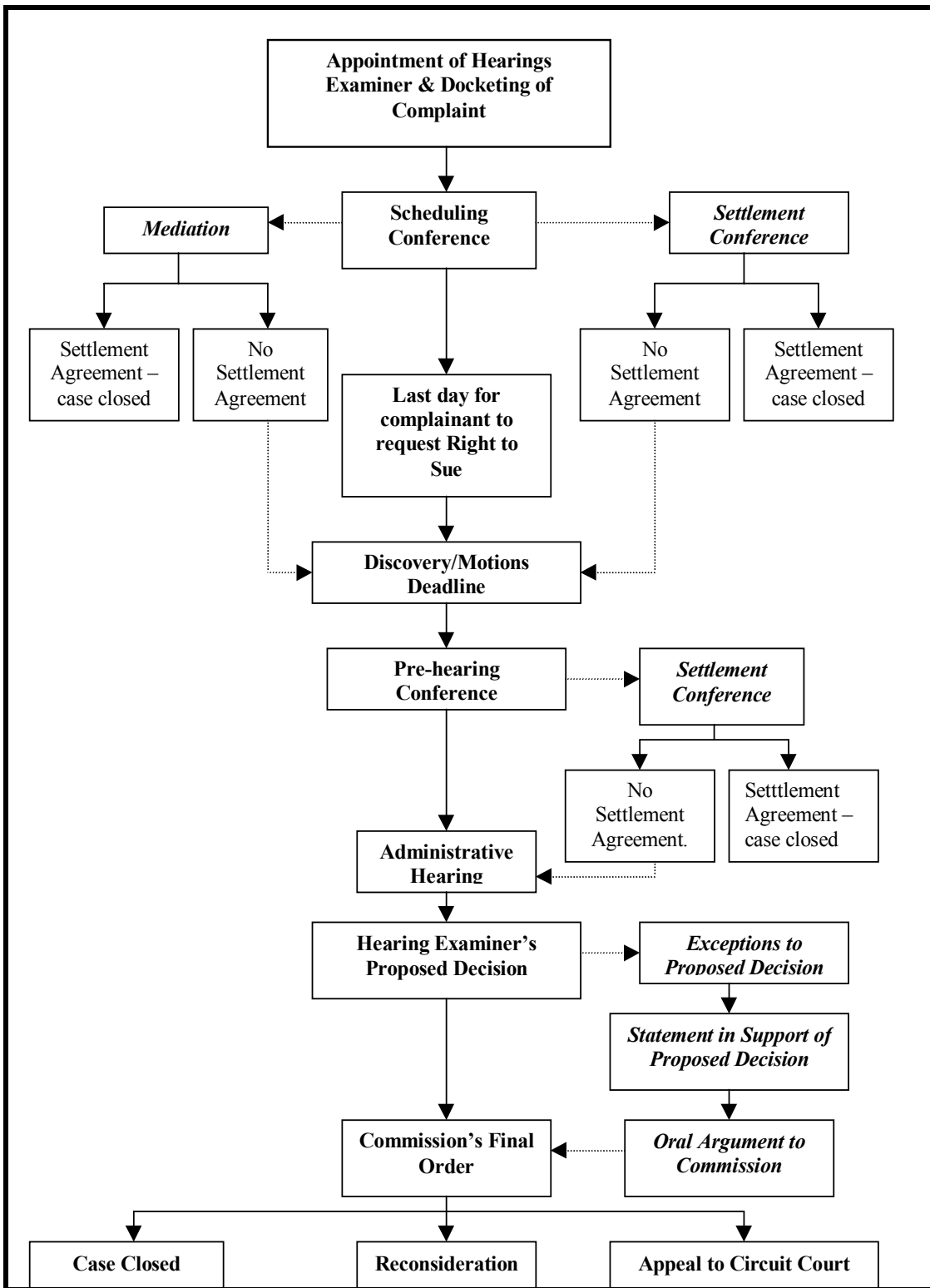
⁵ The HCRC administrative procedure and circuit court appeal is illustrated in Flowchart # 1.

⁶ HCRC case dispositions are illustrated in Flowchart # 2 .

HCRC Procedural Flowchart # 1



HCRC Contested Case Flowchart # 2



HCRC COMMISSIONERS

HARRY YEE

Chair (term 1997-2001, 2001-2005)

Mr. Yee is an attorney in private practice in Honolulu. He is President of the Federal Bar Association, Hawai'i Chapter and is on the board of the National Asian Pacific American Bar Association. Mr. Yee has served as an Assistant Attorney General with the Civil Rights Division of the Massachusetts Office of the Attorney General and managing attorney for Greater Boston Legal Services, Chinatown Office. He has also been a member of the Greater Boston Civil Rights Coalition and the George Lewis Ruffin Society, which promotes greater understanding between minority communities and the criminal justice system. Mr. Yee was appointed Chair of the Commission in December 1998. He was reappointed for another four-year term in 2001.

JACK LAW

Commissioner (terms 1994-1996, 1996-2000, 2000-2002)

Mr. Law arrived in Honolulu in 1966 to attend the University of Hawai'i. In 1973 he became a licensed real estate broker. Presently, Mr. Law is a businessman in the entertainment industry. His operations include Hula's Bar & Lei Stand, a gay club opened in 1974, and the Wave Waikiki, a rock-n-roll club opened in 1980. Mr. Law was one of the founding board members of the Life Foundation, the AIDS Foundation of Hawai'i, and served on its board for over 9 years. In 1990, Mr. Law began the Adam Baran Honolulu Gay Film Festival, which has evolved into the Honolulu Gay & Lesbian Cultural Foundation, a not-for-profit Hawai'i corporation, which sponsors the film festival, and the Gay & Lesbian Cultural Festival. Mr. Law's term expired on June 30, 2002.

FAYE KENNEDY

Commissioner (terms 1995-1997, 1997-2001, 2001-2003)

Ms. Kennedy is a former New York social worker and author. She is a past member of the Martin Luther King, Jr. Commission and the Commission on the Status of Women. She is also a member of the U.S. Civil Rights Commission's Hawai'i Advisory Committee and is currently listed in *Who's Who of American Women*. Appointed in 1995 to serve out the remaining term caused by a vacancy on the Commission, she was appointed to her first full term in 1997. Ms. Kennedy coordinates the Commission's participation in Martin Luther King, Jr., Holiday Commemoration events and activities. She was reappointed for another two-year term in 2001.

ALLICYN HIKIDA TAsAKA

Commissioner (terms 1996-2000, 2000-2004)

Ms. Tasaka is Communications Director for the Office of the Lieutenant Governor. During FY 2002-2003, Ms. Tasaka returned to her position as Executive Director of the Hawaii State Commission on the Status of Women. She is serving her second four-year term as a commissioner. Formerly she was the Executive Director and Chair of the Hawai'i State Commission on the Status of Women and was the first woman president of the Honolulu Chapter of the Japanese American Citizens League (JACL). She also has served as a director on the boards of the Hawai'i Women's Political Caucus, Winners At Work, Awareness Foundation, Business and Professional Women, and as a commissioner of the Department of Education's Gender Equity in Athletics Advisory Commission.

JUNE MOTOKAWA

Commissioner (terms 1998-1999, 1999-2003)

Ms. Motokawa is a special education teacher at Kaimuki Middle School and has been a teacher in Hawai'i public schools for 30 years. She is a past president of the Hawai'i State Teachers' Association and Civic Forum on Public Schools. She served on the Commission on the Handicapped in the 1980's and formerly served as Congresswoman Patsy T. Mink's Big Island liaison. Ms. Motokawa was appointed in October 1998 to serve the remainder of the late Commissioner Claudio R. Suyat's term. She was appointed to her second term in 1998. Ms. Motokawa chairs the HCRC Special Advisory Committee on Diversity.

HCRC STAFF

The HCRC staff consists of 29 individuals in the following positions:

- Executive Director
- Enforcement Staff:

Deputy Executive Director

Enforcement Attorneys (4)

Administrative Services Asst.

Investigator-Supervisors V (2)

Investigator III-IV (11)

Secretary III

Legal Stenographer I

Clerk Typists (4)

- Adjudication Staff:

Chief Counsel

Hearings Examiner

Secretary II

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Maui: 374-3141 Ext. 6-6836
Hawaii: 974-4000 Ext. 6-8636
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Website: www.state.hi.us/hcrc