

HAWAI'I CIVIL RIGHTS COMMISSION

2005-2006 Annual Report

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Mission Statement

The mission of the Hawai'i 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 Hawai'i has a strong commitment to the protection of civil rights. Article I, Section 5 of the Hawai'i 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 Hawai'i 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 sixteen 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.

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.

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 lawsuits 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 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

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 have 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 work share 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 2005-2006, HCRC Commissioners and staff continued to focus their efforts on improvements in enforcement and public education activities.

Investigation and charge processing. During FY 2005-2006 the HCRC continued to implement plans to improve efficiency without sacrificing effective law enforcement. Initially, the HCRC worked towards two enforcement targets adopted in FY 2004-2005: 1) completing the investigation of all cases filed before 2003 by June 30, 2005; and 2) completing the investigation of all cases filed before 2004 by December 31, 2005. A third target was adopted, providing for 80% of all complaints filed in 2004 to be closed (investigation completed) within 18 months, and 90% within 24 months. This third target was subsequently modified to set a goal of closing (investigation completed) 100% of all complaints filed in 2004 by September 30, 2006. These targets were an incremental approach towards completing all investigations first within three years, then within two years of the filing of a complaint.

Mediation. The HCRC's voluntary mediation program completed its seventh year of operation, working with the Mediation Centers of Hawai'i and community mediation centers on Oahu, Hawai'i, Maui, and Kauai. 16 cases settled in mediation for monetary relief exceeding \$159,000.

Public Education. The HCRC continued to prevent and eliminate discrimination through public education. HCRC staff made numerous presentations on civil rights and discrimination to labor, business, professional, civil rights, and other community organizations. Public education included fair housing training on Kauai, Maui, Hawai'i, and Oahu. In March 2006, the HCRC held its annual public training in Honolulu at the Hawai'i Convention Center, for the first time incorporating an advanced training in addition to its regularly offered basic training. At that training, the HCRC gave an advance screening of its newly produced pregnancy discrimination video, the first in a series of training videos.

Litigation. During FY 2005-2006, HCRC enforcement attorneys continued to conciliate and litigate cause cases, in which a determination was made that there is reasonable cause to believe that unlawful discrimination has occurred.

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 Hawai'i law.

Objectives and Goals for 2006-2007

Case Inventory and Processing: The HCRC will implement a pilot project to complete investigation of 95% of all complaints within 24 months of filing. Progress will be made through implementing several performance targets, working incrementally toward the goal of completing all investigations within 18 months.

Voluntary Mediation Program: The HCRC will continue to improve and expand its voluntary mediation program to encourage and offer mediation in more cases. A full time attorney mediation coordinator position will be established to facilitate growth of the program.

Public Awareness: The HCRC plans to focus on public education activities during the upcoming year. The HCRC will continue to work with federal, state, business, labor, and community partners to expand outreach and public education statewide, especially on the neighbor islands, and will explore more public-private partnerships to develop user-friendly public education resources. The HCRC hopes to produce a training video on disability discrimination and reasonable accommodations, the second in a series that was initiated with the production of a pregnancy discrimination video in FY 2005-2006.

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

¹1989 House Journal, Standing Committee Report 372.

²*Id.*

³ Aged case reduction is a priority for the HCRC, as well as for the U.S. Department of Housing and Urban Development (HUD) and the U.S. Equal Employment Opportunity Commission (EEOC), the federal agencies that contract with the HCRC to process complaints dual-filed under state and federal law.

Mediation Program

HCRC's voluntary mediation program successfully completed its seventh full fiscal year on June 30, 2006. 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 parties (usually a team of two co-mediators) help the involved individuals discuss, clarify, and settle complaints.

Mediators are unbiased and do not rule on the merits of the complaint. Rather, 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 simple 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 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 mediators are trained and updated in civil rights laws by HCRC staff on a regular basis. An HCRC mediation coordinator facilitates the process by explaining mediation and its benefits to the parties. There are mediation centers on Oahu, Maui, Hawai'i, and Kauai. The centers charge nominal fees for the sessions, which can be waived or reduced where there is a situation of financial hardship. Private mediation is also available, at a higher cost, if the parties choose.

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 rigid.

During FY 2005-2006, there were 16 cases that resulted in mediated settlements. The total monetary value of mediated agreements was \$159,000, which included early-stage mediations and cases mediated after a cause determination. Although monetary settlements were achieved in most agreements, all mediated agreements involved some form of non-monetary affirmative relief. Typical examples of non-monetary relief in this year and prior years include:

- 1) frank discussion of disputes, which often lay the groundwork for eventual settlement or restoration of the prior employment relationship;
- 2) restoration of employee benefits;
- 3) formal or informal apology (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) clarifications 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. HCRC Commissioners and staff have engaged in a number of public education efforts, working with civil rights, business, labor, professional, and non-profit organizations on new and continuing initiatives.

On March 16, 2006, the HCRC conducted its annual general public training at the Hawai'i Convention Center. A diverse crowd of over 250 persons attended, including human resources personnel, attorneys, the general public, labor, business, and non-profit organizations. The public is encouraged to reserve seats for future annual trainings by contacting the HCRC office and completing a "Request for Speaking Engagement" form, which includes a reservation section. HCRC also conducted advanced training in addition to its basic training, which included a session on alternative dispute resolution to over 120 attendees.

HCRC staff conducted presentations and outreach activities for the following organizations and events:

- Joint EEOC-HCRC outreach in Hilo and Kauai
- Community Homebuyers Fairs
- Annual Dr. Martin Luther King, Jr. Holiday Parade
- Dr. Martin Luther King, Jr. Gala Dinner Dance
- William S. Richardson School of Law
- Pride Festival
- Society of Human Resource Managers Hawai'i State Conference
- Annual training & update for mediators in civil rights law

Since incorporating the HCRC website into the DLIR website in 2004, the agency is reaching more members of the public than ever. According to DLIR statistics, the HCRC website generated more than 941,000 hits in the 9-month period from September 2005 through May 2006.

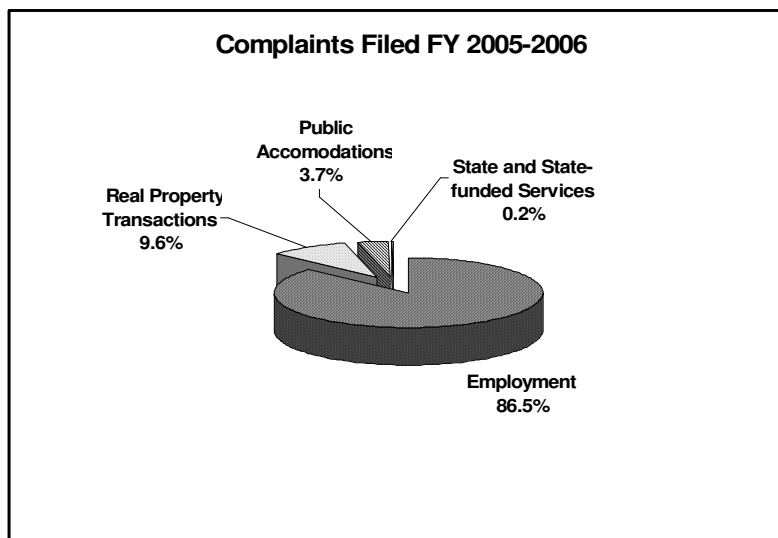
Caseload Statistics

In September 2004, the HCRC began an ambitious 15-month plan to improve its investigative process by improving efficiency without sacrificing effective law enforcement. The key components of this plan were: 1) bringing cases forward for litigation and 2) targeting older cases so by the beginning of 2006 no cases in investigation will be older than 24 months. In implementing this plan, there were several impacts on statistics expected. First, because of a focus on completing investigation on older cases, the average processing time would increase sharply in the first year, but stabilize and decrease in future years. Second, cause recommendations would increase, as historical data has shown cause cases tend to be older. Third, overall caseload inventory would reduce as the older cases are closed. The statistics for this year are consistent with these expectations and the HCRC is on track to meet its investigative goals.

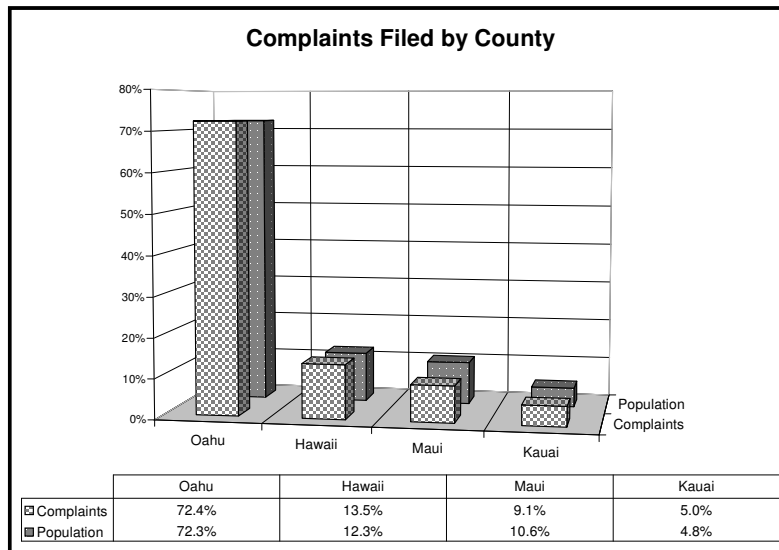
Intake

During FY 2005-2006, the HCRC received nearly 12,000 telephone and walk-in inquiries (11,944). 679 intakes were completed by HCRC investigators during FY 2005-2006. 595 complaints of discrimination were filed with the HCRC, or an average of 50 cases a month.

Of the 595 complaints that were filed with the HCRC, 341 complaints originated with HCRC investigators (averaging 28 per month), and another 254 cases originated with the federal Equal Employment Opportunity Commission (“EEOC”) or Department of Housing and Urban Development (“HUD”) for investigation. These 254 cases are dual-filed under state law with the HCRC. The 595 cases included 515 employment cases, 22 public accommodations cases, 57 housing cases, and 1 case involving state and state-funded services. 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 basis or bases; or c) a complainant's decision not to pursue the complaint.

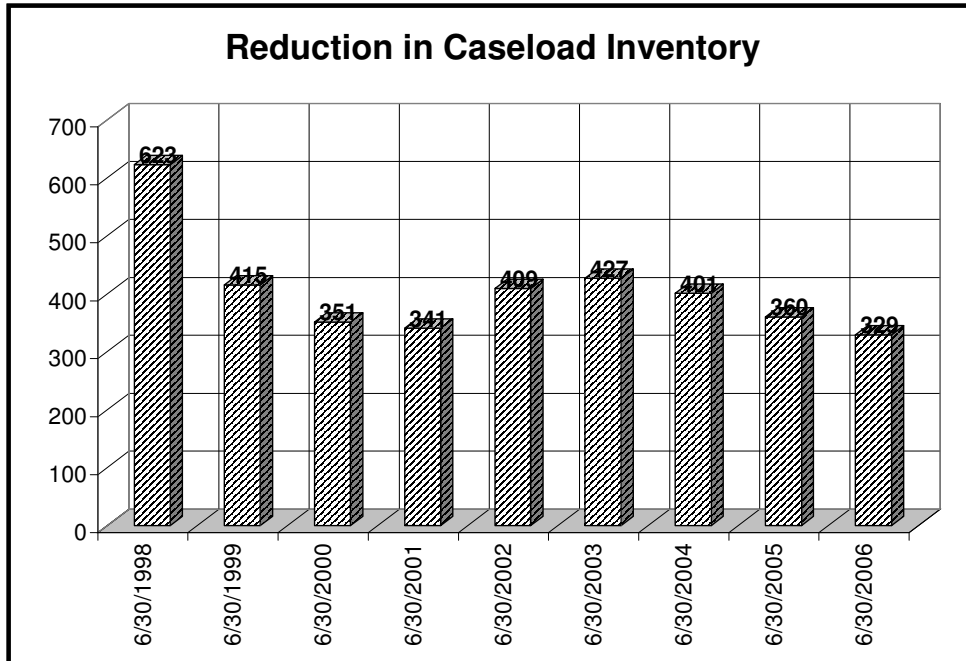


The 595 charges accepted by the HCRC consisted of 431 Oahu complaints, 80 Hawai'i County complaints, 54 Maui County complaints, and 30 Kauai County complaints. The number of complaints filed from each county was consistent with its proportion of resident population in the state.



Closures⁴

HCRC investigators and attorneys closed 375 cases during FY 2005-2006, down from 385 cases in FY 2004-2005. In addition to the 375 closures during the fiscal year, HCRC investigations resulted in cause determinations in 36 cases. As of June 30, 2006, there were 329 cases pending with HCRC investigators.



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 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, 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 2005-2006, HCRC investigations resulted in 36 cause determinations, and 53 cases were closed on the basis of pre-determination settlement or resolution between parties. 228 cases were closed on the basis of no-cause determinations upon completion of investigation. The ratio of cause determination and predetermination settlement/resolution (89) to those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties (317) for this fiscal year is 28%.

The average period for case closure by investigators was 381 days, as compared to 514 days for FY 2004-2005 and 348 days for FY 2003-2004. 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	35	11.51%	9.33%
Pre-Determination Settlements	18	5.92%	4.80%
Cases Settled or Otherwise Resolved After a Cause Determination	23	7.57%	6.13%
No Cause Determinations	<u>228</u>	<u>75.00%</u>	<u>60.81%</u>
Subtotal	304	100.0%	81.07%
Non-merit Closures			
Complainant Elected Court Action	31	43.67%	8.27%
No Jurisdiction	2	2.82%	0.53%
Complaint Withdrawn	17	23.94%	4.53%
Complainant Not Available	4	5.63%	1.07%
Complainant Failed to Cooperate	17	23.94%	4.53%
Other Agency Investigated	0	0.00%	0.00%
Administratively Closed	0	0.00%	0.00%
No Significant Relief Available	<u>0</u>	<u>0.00%</u>	<u>0.00%</u>
Subtotal	71	100.0%	18.93%
Total Number of Closures	375		100%

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 the EEOC. A case is filed with both agencies where there is concurrent jurisdiction, but only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 515 employment cases were accepted by the HCRC. HCRC was the intake agency for 274 of these cases, and HCRC dual-filed another 241 cases originating with the EEOC. Of the HCRC-originated cases, 77% were also filed with the EEOC.

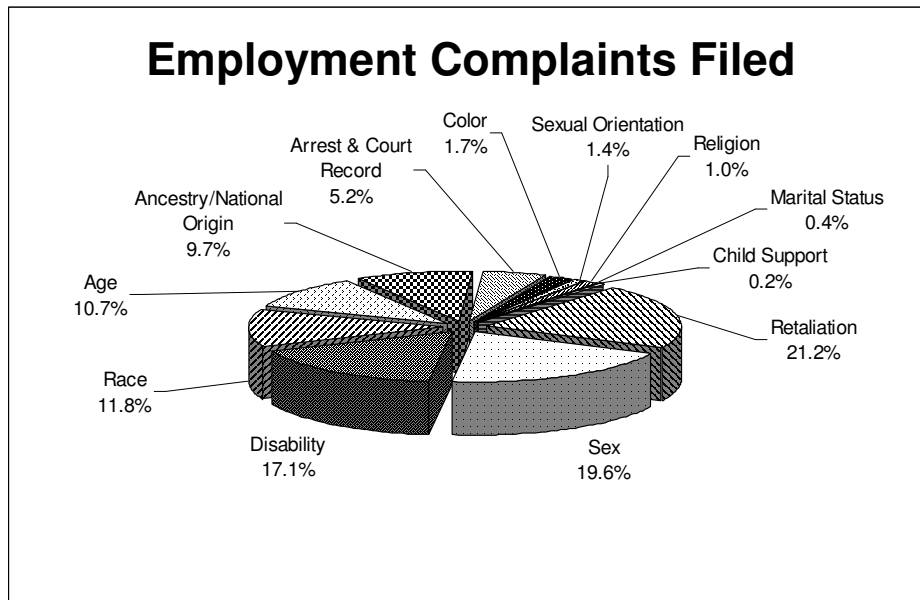
Of the 515 employment cases accepted in FY 2005-2006, retaliation was the basis cited most often, with 109 cases, representing 21.2% of accepted employment cases. Sex was the basis cited next most often, with 101 cases, accounting for 19.6% of all

employment discrimination cases. Within the sex category, 37 cases alleged sexual harassment (36.6% of all sex cases) and 30 cases were based on pregnancy (29.7% of all sex cases).

Disability was the third most common basis with 88 cases, representing 17.1% of all employment cases, followed by race discrimination with 61 cases (11.8%), and age discrimination with 55 cases (10.7%).

There were 50 cases based on ancestry/national origin discrimination (9.7%); 27 cases based on arrest & court record (5.2%); 9 cases based on color (1.7%); 7 cases based on sexual orientation (1.4%); 5 cases based on religion (1.0%); 2 cases based on marital status (0.4%); and 1 case based on child support obligations (0.2%). There were no cases based on National Guard participation.

The case closure period averaged 422 days for the 291 employment cases that were closed (or caused) by HCRC investigators during FY 2005-2006.



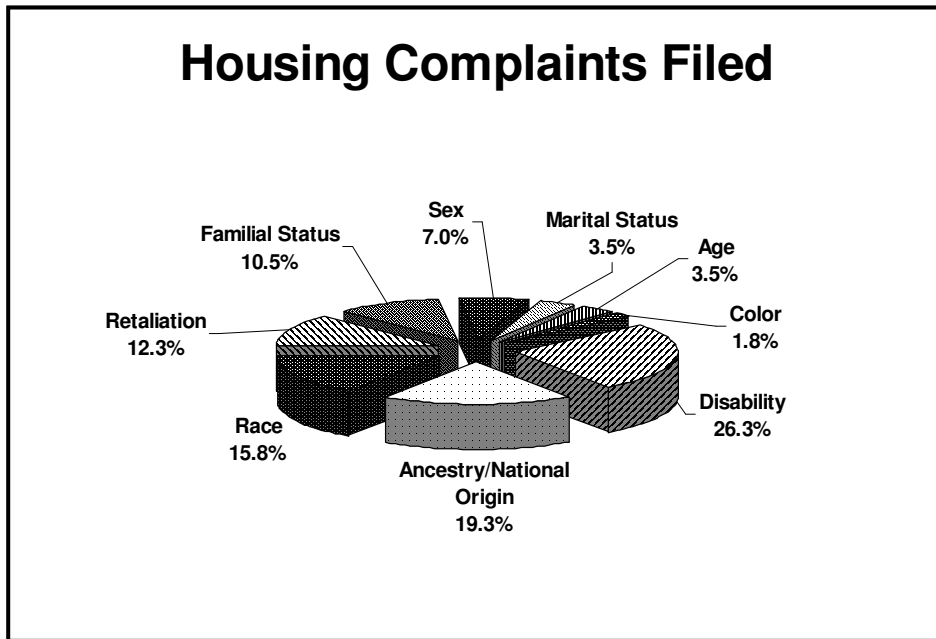
Housing Cases

H.R.S. Chapter 515 is Hawai'i's fair housing law. It prohibits discriminatory housing practices based on race, sex, sexual orientation, 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 U.S. Department of Housing & Urban Development (HUD). HUD refers most of the complaints it receives regarding unlawful discrimination in real estate transactions in Hawai'i to the HCRC for investigation.

During FY 2005-2006, the HCRC accepted 57 cases of housing discrimination. There were 15 cases based on disability status (26.3%); followed by 11 cases based on ancestry/national origin (19.3%); 9 cases based on race (15.8%); 7 cases alleging retaliatory conduct (12.3%); 6 cases based on familial status (10.5%); 4 cases based on

sex (7.0%); 2 cases based on age (3.5%); 2 cases based on marital status (3.5%); 1 case based on color (1.8%). There were no cases based on religion. Housing case closures averaged 142 days for the 66 cases closed (or caused) during FY 2005-2006.

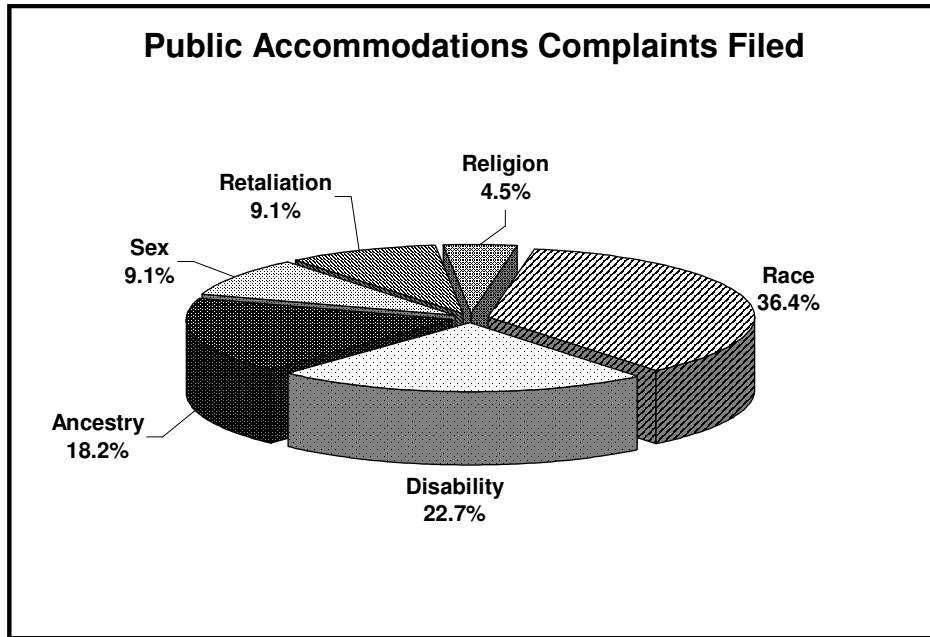


Public Accommodation Cases

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, 22 new cases of public accommodations discrimination were accepted. There were 8 cases alleging race discrimination (36.4%); 5 cases based on disability discrimination (22.7%); 4 cases based on ancestry (18.2%); 2 cases based on sex discrimination (9.1%); 2 cases based on retaliation (9.1%); and 1 case based on religion (4.5%). There were no cases based on color.

Public accommodations case closures averaged 481 days for the 29 cases closed (or caused) during FY 2005-2006.



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).

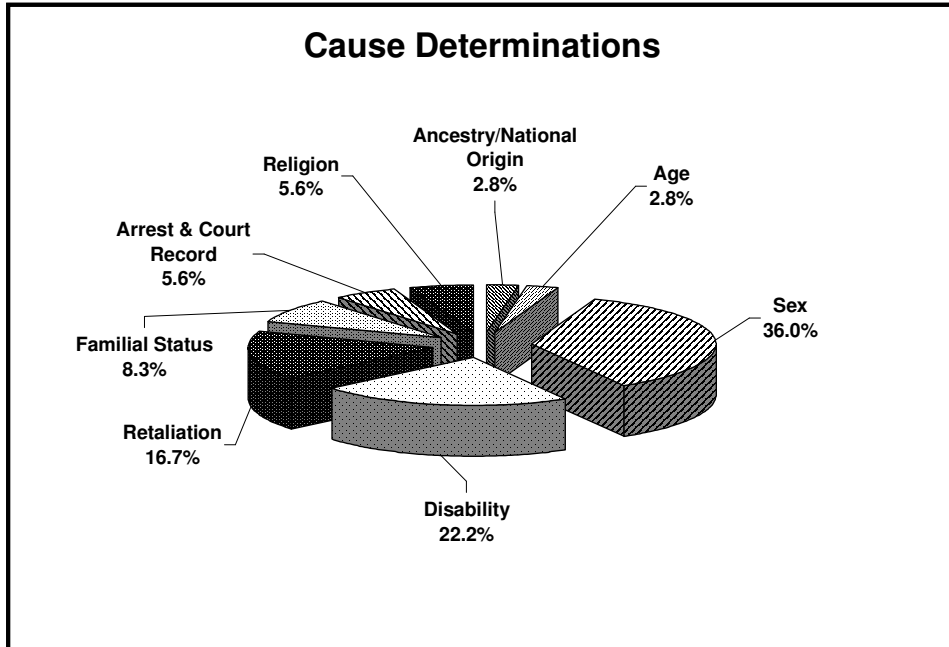
During the fiscal year, there was 1 case filed under § 368-1.5. 2 cases were closed during FY 2005-2006. Access to state and state-funded services case closures averaged 668 days for the 2 cases closed (or caused) during FY 2005-2006.

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 2005-2006, 36 recommendations for cause determinations were brought forward for legal action. Of these cases, 24 (66.6%) were employment cases, 10 (27.8%) were housing cases, and 1 (2.8%) was a public accommodations case and 1 was an access to state-funded services case.

Of the 36 investigations where the result was a cause recommendation, 13 involved discrimination on the basis of sex (36.0%), 8 investigations involved discrimination due to disability (22.2%), 6 involved retaliation (16.7%), 3 investigations involved familial status (8.3%), 2 involved discrimination due to arrest and court record (5.6%), 2 investigations involved religion (5.6%), 1 investigation involved ancestry/national origin (2.8%), 1 investigation involved age (2.8%). There were no cases involving race, color, or sexual orientation.

During FY 2005-2006, enforcement attorneys closed 23 cases, and 21 of these cases (91.3%) were negotiated settlements.



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 2005-2006 the total monetary relief obtained through settlements reached new highs. In the 21 settlements obtained by HCRC attorneys in cases with a finding of reasonable cause, the monetary relief obtained for parties through conciliation, including cases resolved through mediation, totaled \$305,563.33. In the 53 cases settled prior to a reasonable cause finding, monetary relief approached \$200,000.00. This figure includes both pre-determination settlements obtained through HCRC investigators (\$68,247.00) and settlements obtained through the HCRC mediation program (\$112,670.00).

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 2005-2006, there were complainants who 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 2005-2006, a significant number of employers, housing providers, and public facilities voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following descriptions are illustrative of the HCRC cases that were resolved through conciliation or mediation and the relief that was obtained during FY 2005-2006:

- In a case involving refusal to rent housing because of familial status, the complaint was settled for payment of \$15,000 and affirmative relief, including training and posting of non-discrimination policies.
- In a case alleging harassment against the complainant based on sexual orientation, the complaint was resolved for payment of \$25,000, adoption of non-discrimination employment policies, and training for the employer's staff on such policies.
- In a case alleging sexual harassment, settlement included payment in the sum of \$10,000, adoption of non-discrimination employment policies and training for the employer's staff on such policies.
- In a case alleging discrimination based on pregnancy, settlement of the complaint resulted in the Complainant receiving over \$45,000. Affirmative relief also included posting of the employer's written non-discrimination policy and training.

- A housing case alleging refusal to rent resulted in a settlement of \$7,000 to the complainants.

HCRC Warning Letters

In an effort to prevent future or recurring problems, the HCRC provides respondents with “warning letters” advising them of unlawful or potentially unlawful practices that the 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 evidence of 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 policy and application form changes, as well as discrimination.

Case Decisions

Contested Case Hearings

During fiscal year 2005-2006, five cases (one involving sexual harassment and four involving sex discrimination) were docketed for hearing. All were settled.

Litigation and Court Rulings

Pied / Monocular Pilot Case

In an unpublished summary disposition order in the case of Aloha IslandAir, Inc. v. Hoshijo, No. 24561 (January 26, 2006), the Hawaii Supreme Court vacated the circuit court decision which had reversed the HCRC final decision. The HCRC decision held that Bruce Pied, a monocular pilot with an FAA commercial license and vision waiver, had been denied employment by Aloha IslandAir because of his disability and awarded him damages and ordered affirmative relief, including being hired as a pilot. Mr. Pied had been a commercial pilot for another airline that flew the same type of airplane used by IslandAir. The circuit court reversed on the grounds that Mr. Pied was not disabled even though he could see with only one eye because he could compensate for his loss of vision by estimating distance and thus was not substantially limited in his ability to see.⁵

The Supreme Court ruled that circuit court decision was erroneous because it should have granted IslandAir’s request for a jury trial under the case of SCI Management Corp. v. Sims, 101 Hawai’i 438, 71 P.3d 389 (2003), since the HCRC had awarded Mr. Pied

⁵The HCRC administrative rules provide that mitigating measures, such as Mr. Pied’s ability to compensate for his loss of vision, should not be considered in determining if a person is disabled. (The HCRC administrative rules took effect after the case was filed.)

compensatory damages. The Pied case was remanded back to circuit court for a jury trial on all issues. On remand, the parties agreed to settle the case in a confidential settlement.

Female Only Makeup Requirements

In Jespersion v. Harrah's Operating Company, Inc., 392 F.3d 1076 (9th Cir. 2004), the HCRC filed an amicus brief in support of a petition for rehearing en banc on behalf of an employee who was terminated because she would not wear make up as required by company policy. The HCRC brief argued that the policy, which only required women to wear make up, was a form of sexual stereotyping, a type of sex discrimination under the U.S. Supreme Court case of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

The Ninth Circuit granted the petition and reheard the case. In the en banc decision, 444 F.3d 1104 (9th Cir. 2006), the Court ruled that a company's appearance or grooming standards, including female only make up requirements, could be the subject of a sex discrimination claim for sexual stereotyping, but, in this particular case, there was insufficient evidence to support the claim. Plaintiff's only evidence was her subjective reaction to the make up requirement. No other expert testimony was submitted to support the claim. Thus, while the ultimate result was unfavorable for the employee, grooming standards applied to one sex can be challenged as discriminatory sexual stereotyping, but in order to prevail there must be evidence to prove that the grooming standards are unreasonable.

Native Hawaiian Rights

In Doe v. Kamehameha Schools, the HCRC submitted an amicus brief supporting the Kamehameha School's petition for rehearing en banc before the Ninth Circuit Court of Appeals. The HCRC brief argued that restorative programs for Native Hawaiians, including the Kamehameha Schools admissions policy, are based on the political status of Native Hawaiians as an indigenous sovereign people and do not implicate nor violate federal or state civil rights laws. The Ninth Circuit granted the petition and heard oral argument in the case, which remained pending at the end of FY 2006.

Legislation

The 2006 Legislature passed five bills related to civil rights. HB 1233 amended the public accommodations law to add the phrase "gender identity or expression" to the definition of "sex." This means that a place of public accommodations cannot deny goods or services to a person who does not conform to stereotypes based upon the person's gender identity or expression. The bill was enacted into law as Act 76.

HB 2778 created a Language Access Advisory Council and the position of an Executive Director in the Office of Language Access, so people with limited English proficiency may have access to services provided by the State and covered entities. Under this act, state and state-funded programs must provide oral and written language assistance to persons with limited English proficiency. This will enable the State to comply with federal law, which prohibits state and county government discrimination on the basis of national origin. The Governor signed the bill as Act 290.

HB 2367 and SB 2343 were two bills allowing inquiries into criminal history records to protect vulnerable populations. HB 2367 enabled contract providers for the Office of Youth Services to check the criminal backgrounds of employees, prospective employees, and volunteers who work in close proximity to youth. SB 2343 authorized the Department of Health and the Department of Human Services to conduct criminal background checks of persons providing care or having access to residents in health care facilities, care homes, assisted living facilities, adult day health centers, and hospitals. Both bills were signed by the Governor and became Act 131 and Act 220, respectively.

The Legislature added three positions in the State Budget for the HCRC. The positions were for an attorney-mediation coordinator, legal assistant, and investigator. These positions will enable the HCRC to increase its mediation efforts, and more effectively investigate, conciliate, and litigate cases.

Rulemaking

On April 18, 2006, the Commissioners granted a petition for rule relief filed by the Hawaii Employers Council (HEC) for the express purpose of accepting public input on proposed changes to administrative rules regarding harassment. The proposed changes would delete language that holds employers automatically liable for sexual harassment and ancestry-based harassment by agents or supervisors, and would delete language that states, failure to give notice of co-employee harassment may not be an affirmative defense. The Commissioners will engage in rulemaking in FY 2006-2007.

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, 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. 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. 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 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 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.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-judicial or non-meritorious complaints, or with complaints that can be closed or settled in the HCRC's administrative process. In fact, the great majority of complaints filed with the 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 civil rights laws, and give guidance to employers, landlords, and businesses on how to prevent and eliminate discrimination.

¹ "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, sexual orientation, 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 (which includes gender identity and expression), sexual orientation, color, religion, marital status, familial status, ancestry, disability, age or HIV (human immunodeficiency virus) infection.

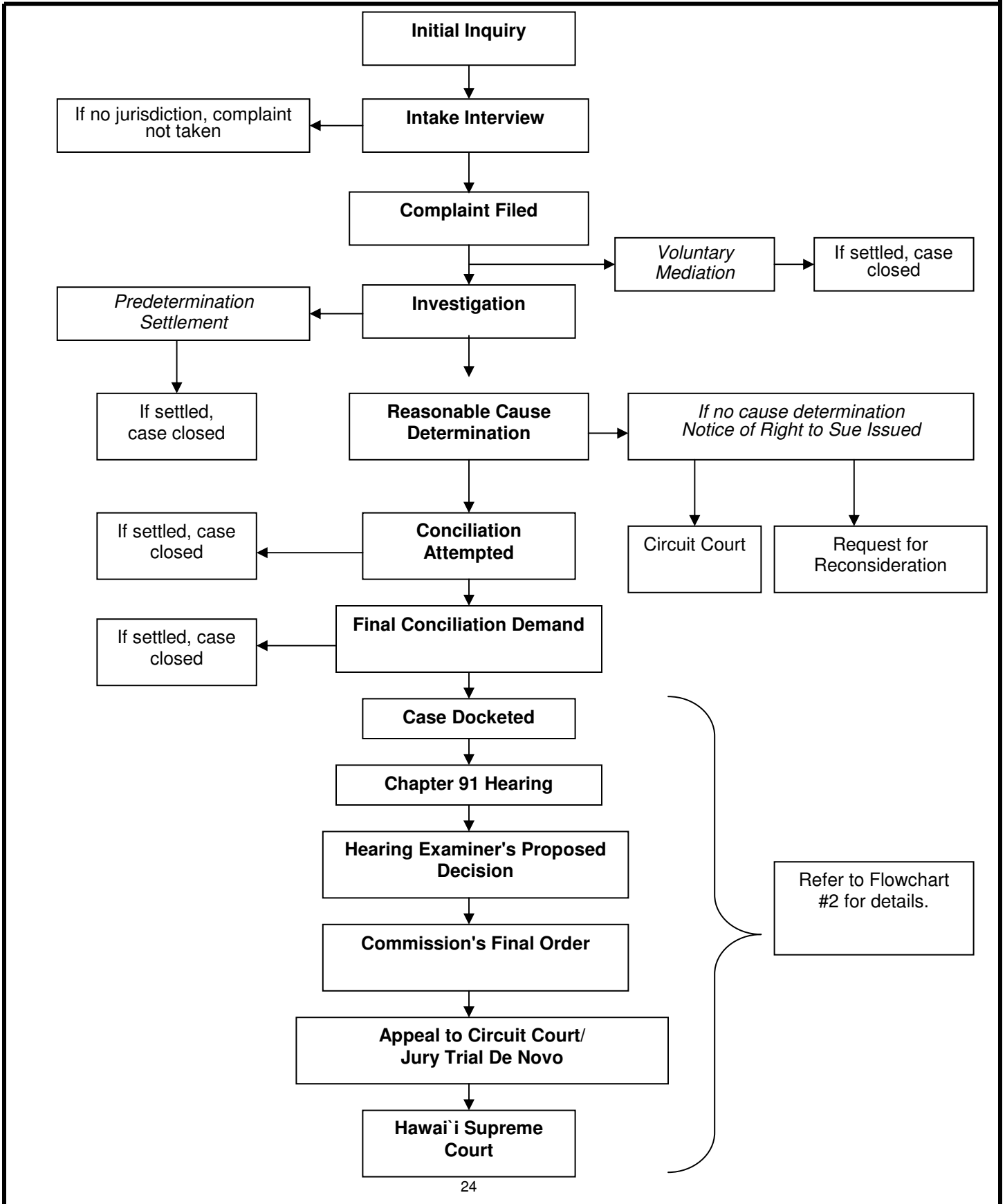
³ Complaints filed with HCRC usually involve a discrete act – such as termination, eviction, demotion, etc. – or involve acts that are ongoing and constitute a continuing violation. An example of a "continuing violation" is sexual harassment that began more than 180 days before the complaint is filed, 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 2005-2006, of all complaints closed (375), 18.93% (71) were closed on the basis of the complainant electing court action or other administrative closure. The remaining cases (304) were closed on the basis of a completed investigation or a pre-determination settlement: in 75.00% (228) the Executive Director found no cause and dismissed the complaint; in 7.57% (23) the case was resolved through settlement or litigation by HCRC enforcement attorney after the issuance of a notice of cause; and 17.43% (53) were settled prior to a cause determination.

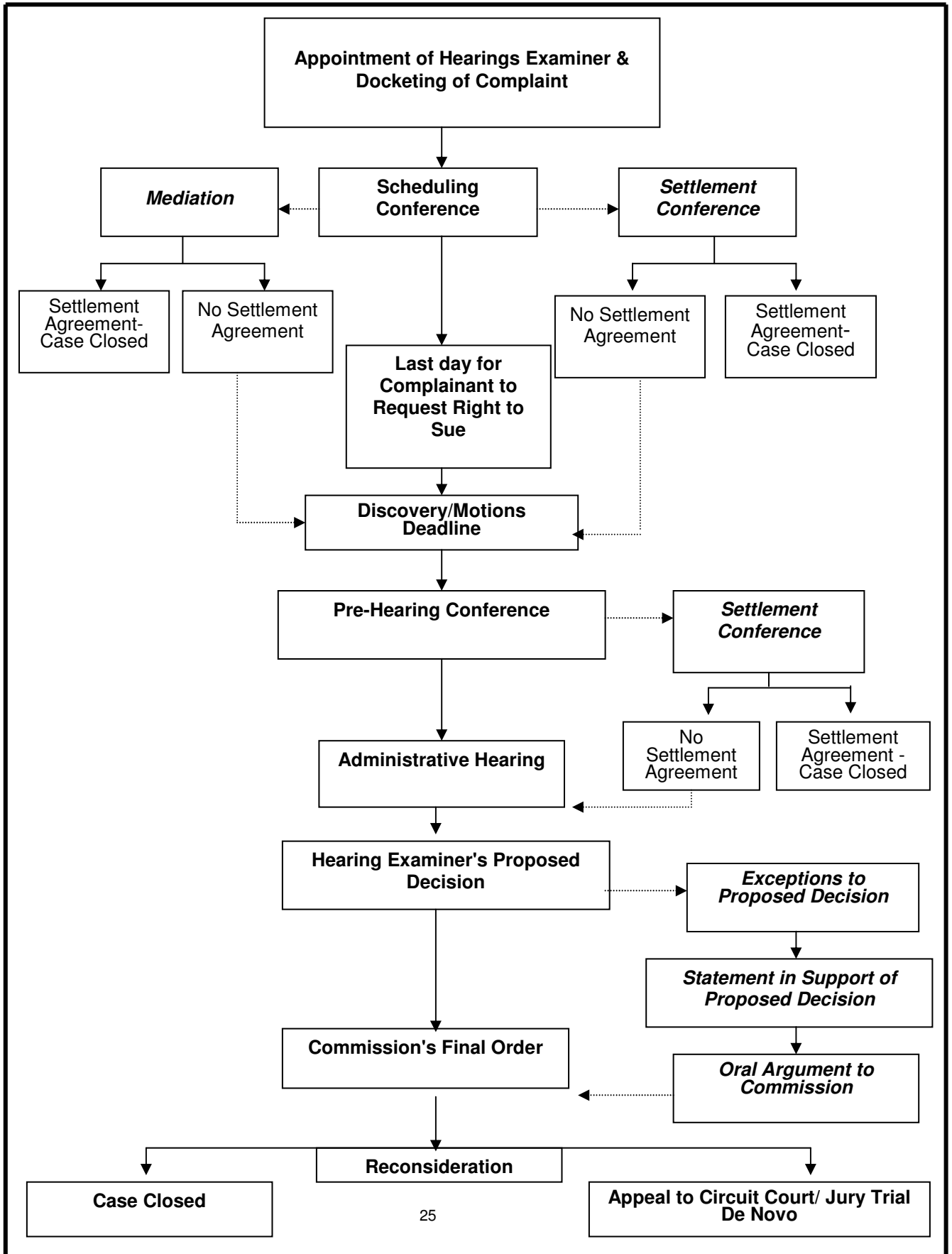
⁵ The HCRC administrative procedure and circuit court appeal is illustrated in Flowchart # 1. In *SCI Management Corporation, et. al. v. Darrylynn Sims, et. al.*, No. 24485, June 18, 2003, the Hawai'i Supreme Court held that "a respondent who appeals a final order of the HCRC, pursuant to HRS § 368-16, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the HCRC."

⁶ HCRC case dispositions are illustrated in Flowchart # 2.

HCRC Procedural Flowchart #1



HCRC Contested Case Flowchart #2



HCRC Commissioners

Coral Wong Pietsch Chair, (Term 2003-2007)

Coral Wong Pietsch is the Senior Civilian Attorney for the U.S. Army Pacific. In this position she oversees the personnel and labor law practice at Headquarters, U.S. Army Pacific Command, as well as the ethics program and the environmental law program. She is also responsible for providing advice and guidance on international law issues in the U.S. Army Pacific Command. Ms. Pietsch is a retired Brigadier General and was the first female general in the 231-year history of the U.S. Army Judge Advocate General Corps. She is also the first Asian American female to reach the rank of Brigadier General in the Army. From 1986 to 1991, she served as Labor Counselor for the U.S. Army Support Command Hawai'i and was responsible for providing training to managers and supervisors on Title VII, the Rehabilitation Act, and sexual harassment.

Lisa A. Wong Commissioner, (Term 2003-2007)

Lisa Wong was born in Honolulu, Hawai'i, and received her Bachelor of Business Administration, Personnel and Industrial Relations, from the University of Hawai'i. She founded the University of Hawai'i Society of Human Resources Student Chapter. Ms. Wong has been a human resources professional for 34 years, responsible for employee relations, equal employment opportunity programs, affirmative action programs, management and supervisory training, and diversity and compliance programs. She is currently the Human Resources Manager for the Hawai'i Convention Center. She previously served as human resources manager for the Hawai'i division of Affiliated Computer Services, Inc.

Ms. Wong is also Chair of the Society of Human Resources Management Annual State Conference, which provides training to human resources professionals, executives, managers, supervisors and entrepreneurs in such areas as discrimination, sexual harassment, diversity, and dispute resolution. She has been active in numerous organizations and volunteer projects, including the Associated Chinese University Women, Honolulu Chinese Jaycees, Aloha United Way, Junior Achievement, Hawai'i Medical Fellowship Foundation, Hawai'i Bone Marrow Registry, and the Chinese Chamber of Commerce.

Sara Banks Commissioner, (Term 2004-2008)

Raised on the island of O`ahu, Sara Banks is a graduate of Kailua High school. She has an undergraduate degree in broadcast communication from San Francisco State University. Ms. Banks remained in the Bay area working in educational media before achieving a Masters of Fine Arts in Film at UCLA. After returning to Hawai'i, Ms. Banks lived on Kaua'i and managed a restaurant at the Kauai Hilton. She transferred to the Hilton Hawaiian Village and was in charge of the training department, overseeing the training for 1,800 union employees and more than 300 managers. She then worked for three years as a volunteer coordinator for the Life Foundation, the AIDS service

organization for O`ahu. She left the Life Foundation to become part owner of Wahine Builders, working both in the construction and personnel aspects of this company. Ms. Banks designed and implemented a pre-apprentice construction training program for incarcerated women.

Throughout her management and personnel career, Ms. Banks has pursued her passion for film and video. Since the early seventies, she has produced news magazine shows for public access, documentaries, PSA's and training videos for Hawaii's businesses. She currently works for the Center on Disability Studies under the College of Education at the University of Hawai`i producing a series of videos for a state-wide sixth grade science curriculum which weaves hard science with Native Hawaiian values, culture and accomplishments.

Leslie Alan Ueoka
Commissioner, (Term 2005-2008)

Les Ueoka is Assistant General Counsel for Hawaiian Telcom. Prior to that, he was in private practice. He is a trustee for the 442nd Regimental Combat Team Foundation and a member of the Sons and Daughters Chapter of the 442nd Veterans Club. He also serves on the Oahu Metro Board of the American Heart Association of Hawai`i.

Born and raised in Honolulu, Hawai`i, Mr. Ueoka graduated from Iolani School and received his BA degree from Northwestern University in Evanston, Illinois. He earned a Juris Doctor degree from Washington University in St. Louis, Missouri.

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 Assistant
 - Investigator-Supervisors V-VI (3)
 - Investigator III-IV (10)
 - Secretary III
 - Legal Stenographer I
 - Clerk Typists (4)

- Adjudication Staff:
 - Chief Counsel
 - Hearings Examiner
 - Secretary II

**Hawai'i Civil Rights Commission Annual Report
July 1, 2005 – June 30, 2006
Executive Summary**

Overview

The HCRC enforces 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.

The HCRC is committed to, and has procedural safeguards to ensure fairness to both complainants and respondents. It 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 hears and issues final determinations on complaints filed with the HCRC.

FY 2005-2006 Report

Investigation and Charge Processing. During FY 2005-2006, 595 discrimination complaints were filed with the HCRC; 341 through HCRC's intake and 254 cases originating with the federal Equal Employment Opportunity Commission (EEOC) or Department of Housing and Urban Development (HUD) and dual-filed under state law with the HCRC. The 595 complaints included: 515 (86.5%) employment cases, 22 (3.7%) public accommodations cases, 57 (9.6%) housing cases, and 1 (0.2%) case involving state-funded services. The number of complaints from each county was proportional to its resident population of the state.

Of the 515 employment complaints filed, retaliation was cited most often, in 109 (21.2%) cases, followed by 101 (19.6%) sex cases. Of those sex discrimination complaints, 37 (36.6% of all sex cases) alleged sexual harassment and 30 (29.7% of all sex cases) were based on pregnancy. Disability was the third most common basis, cited in 88 (10.7%) complaints, followed by race (61 / 11.8%), age (55 / 10.7%), ancestry/national origin (50 / 9.7%), arrest and court record (27 / 5.2%), color (9 / 1.7%), sexual orientation (7 / 1.4%), religion (5 / 1.0%), marital status (2 / 0.4%), and child support obligations (1 / 0.2%). There were no complaints based on National Guard participation.

HCRC investigators and attorneys closed 375 cases during FY 2005-2006, leaving 329 cases pending in investigation at the end of the year. During FY 2005-2006, HCRC investigations resulted in 36 cause determinations; 53 cases closed on the basis of a pre-determination settlement or resolution between the parties; and 228 cases closed on the basis of no-cause determinations upon completion of investigation.

During FY 2005-2006, the HCRC continued to improve its efficiency by implementing enforcement targets designed to reduce the time to complete investigations. These targets were an incremental approach towards completing all investigations first within three years, then within two years of the filing of a complaint.

Mediation. The HCRC's voluntary mediation program completed its seventh year of operation, working with the Mediation Centers of Hawai'i and community mediation centers on Oahu, Hawai'i, Maui, and Kauai. Sixteen cases settled by mediation for monetary relief exceeding \$159,000.

Public Education. During FY 2005-2006, the HCRC made prevention and elimination of discrimination through public education a high priority. The HCRC staff made numerous presentations to labor, business, professional, civil rights, and other community organizations. This included fair housing training on Kauai, Maui, Hawai'i, and Oahu. In March 2006, the HCRC held its annual public training in Honolulu at the Hawai'i Convention Center, incorporating a new advanced training in addition to its regularly offered basic training. At that training, the HCRC also screened its new pregnancy discrimination video, the first in a planned series of training videos.

Settlements, Conciliation, Litigation. During FY 2005-2006, the HCRC settled 53 cases prior to a reasonable cause finding, obtaining nearly \$200,000 in monetary relief. In the 21 settlements obtained in conciliation after a finding of reasonable cause to believe that unlawful discrimination has occurred, monetary relief exceeded \$305,563. HCRC also obtained affirmative relief, which served four purposes: enforcement of civil rights laws, ending discriminatory conduct, preventing future harm to complainants, and assisting respondents in avoiding future violations. The HCRC enforcement attorneys docketed cases for administrative hearing when conciliation efforts failed after a finding of reasonable cause.

Contested Cases, Court Decisions, Legislation. During fiscal year 2005-2006, five cases (one involving sexual harassment and four involving sex discrimination) were docketed for hearing and all were settled. In an unpublished summary disposition order, the Hawaii Supreme Court, in the case of Aloha IslandAir, Inc. v. Hoshijo, No. 24561 (January 26, 2006), vacated the circuit court decision which had reversed the HCRC final decision. The HCRC decision held that Bruce Pied, a monocular pilot with an FAA commercial license and vision waiver, had been denied employment because of his disability and awarded him damages and ordered affirmative relief, including being hired as a pilot. The Supreme Court ruled that the circuit court decision was erroneous because it should have granted IslandAir's request for a jury trial under the case of SCI Management Corp. v. Sims, 101 Haw. 438 (2003). The case was remanded back to the circuit court for a jury trial on all issues. On remand, the parties agreed to settle the case in a confidential settlement.

The 2006 Legislature passed five bills related to civil rights. HB 1233 amended the public accommodations law to add the phrase "gender identity or expression" to the definition of "sex". HB 2778 created a Language Access Advisory Council and the position of Language Access Director so that people with limited English proficiency may have access to services provided by the State and covered entities. HB 2367 allowed contract providers for the Office of Youth Services to check the criminal backgrounds of employees, prospective employees, and volunteers who work in close proximity to youth. SB 2343 authorized the Department of Health and the Department of Human Services to conduct criminal background checks of persons providing care or having access to residents in health care facilities, care homes, assisted living facilities, adult day health centers, and hospitals. Finally, the Legislature added three positions for an attorney-mediation coordinator, legal assistant, and investigator in the State Budget for the HCRC.