

HAWAI'I CIVIL RIGHTS COMMISSION

2013-2014 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

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

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

Looking Forward and Addressing the Challenges Facing the HCRC: Restoring Lost Civil Rights Law Enforcement Capacity and Improving the HCRC Process

Since 2008, the Hawai'i Civil Rights Commission (HCRC) has lost 8 of 30 permanent positions. The loss of 3 of 11 (27%) permanent investigator positions has had a devastating impact on the HCRC's capacity to timely and effectively investigate discrimination, from intake through investigation and disposition of complaints. This lost capacity has not been restored; none of the 8 permanent positions lost due to the recession, budget cuts, and reduction in force (RIF) has been restored.

A comparison of the HCRC's investigation caseload data from 2007 (before the recession and the resulting reduction in force) and current caseload data reflects a direct and continuing impact on the efficacy of the HCRC as the state law enforcement agency responsible for investigation of complaints of discrimination in employment, housing, public accommodations, and state-funded services. The loss of experienced permanent staff due to RIF and abolishment of positions, hiring freezes and delays in hiring for remaining positions, compounded by loss of productivity due to furloughs and supplemental time off, has had a crippling impact on the HCRC's capacity to carry out its statutory mandate.

In July of 2007, the HCRC's investigation caseload was 247 cases. Of those, 2.6% were over 2 years old, from date of filing.

In September 2013, the investigation caseload was 436 cases, a 77% increase. Of those, 17% were over 2 years old, from date of filing.

In September 2014, as a result of concerted efforts to reduce investigation case inventory, the investigation caseload was 375 cases, still 52% more than the July 2007 level. Of those, 21.6% were over 2 years old, from date of filing.

The growth and aging of the investigation caseload, with fewer investigators, makes timely investigation difficult. Older cases are more difficult to investigate, conciliate, and litigate.

During FY 2015, the HCRC will continue to seek restoration of capacity, which would allow a re-focusing of efforts on strong enforcement, with a strategic emphasis on dedicating resources to priority cases. With or without a restoration of capacity and enforcement positions, the HCRC enforcement section will review its process and procedures, in order to explore and implement improvements that will allow better use of finite resources for effective and efficient investigation, conciliation, and litigation of discrimination complaints.

Fair and Effective Enforcement – History and Structure of the HCRC

The HCRC was organized in 1990 and officially opened its doors in January 1991. For twenty-four 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.

An Effective and Uniform Enforcement Scheme

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

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

¹ 1989 House Journal, Standing Committee Report 372.

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 divided into two separate and distinct sections: a) the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and b) the adjudication section which conducts hearings, issues orders and renders final determinations on 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, Chief Counsel, 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, Chief Counsel 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 in most (but not all) cases before filing a discrimination lawsuit in state court.³ Otherwise, the state courts will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement reduces court caseloads by eliminating claims which are non-jurisdictional, or non-meritorious, or complaints that are closed or settled through the HCRC administrative process. As a result, the great majorities 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

² Id.

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

and Urban Development (HUD), respectively. Pursuant to work share and cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law (“dual-filed” complaints). Both EEOC and HUD contracts require maintenance of state effort and dedication of state resources for investigation of dual-filed complaints.

While Hawai‘i and federal fair employment and fair housing laws are similar, they are not identical. Hawai‘i has more protected bases than federal law, and there are substantial differences in the definition of “employer” and the statute of limitations for filing charges of employment and housing discrimination. In addition to these jurisdictional differences, Hawai‘i law provides stronger protections against pregnancy discrimination and sexual harassment in employment.

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

Mediation Program

The HCRC's voluntary mediation program completed its fifteenth full year on June 30, 2014. The program enjoyed a productive year, despite operating without a permanent Mediation Coordinator to oversee the program. During FY 2014, the HCRC was able to temporarily fill the position on a limited basis through an 89 day appointment. The position has been re-described and the HCRC will seek to fill the newly re-described Civil Rights Program Specialist position on a permanent basis. Looking forward, this should allow and foster growth of the mediation program.

Complainants, respondents and the HCRC, with the strong support of the Commissioners, want prompt and fair resolutions to discrimination complaints. To help accomplish this goal, the HCRC developed its voluntary mediation program, a process in which neutral third persons (often a team of two co-mediators with at least one attorney-mediator) help the parties discuss, clarify and settle complaints.

The HCRC voluntary mediation program uses trained community mediators who are unbiased and do not rule on the merits of the complaint. The HCRC provides the mediators with the basic facts of each case needed to understand the dispute. The mediators then assist the parties to reach voluntary agreements. These agreements may include apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation saves time, money and

resources. It also eliminates the stress of litigation and allows the parties to explain their side of the case and to control the process of resolving the disputes in a non-adversarial manner.

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

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

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

During FY 2014, 32 cases were referred into mediation, and 29 mediations were completed (dispositions). Of the 29 dispositions, 17 resulted in mediated settlements (58.6%), and 12 cases resulted in no agreement (41.4%). All 17 of the mediated settlements were in employment cases.

The total disclosed monetary value of mediated agreements was \$130,500 with a wide variety of affirmative relief as well. (In 6 cases, the monetary consideration was subject to a confidentiality clause and not disclosed.) Mediation Center of the Pacific had 7 settlements; Kauai Economic Opportunity, Inc. had 2 settlements; Ku'ikahi Mediation Services (Hilo) and Mediation Services of Maui each had 1 settlement; and there were 6 settlements with private mediators.

The primary bases of discrimination of the 17 settlements were as follows: Disability -- 5; Sex -- 5 (including 2 pregnancy and 1 sexual harassment); Ancestry -- 3; Age -- 2; National Origin -- 1; Race -- 1. Many of the completed mediations also included charges on other protected bases. 15 mediated settlements were cases dual-filed with the EEOC.

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

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

Public Education & Outreach

In addition to enforcing anti-discrimination laws, the HCRC is committed to preventing and eliminating discrimination through public education. The HCRC Commissioners and staff maintained or assisted in a number of civil rights public education efforts, working with civil rights, business, labor, professional, and non-profit organizations, on new and continuing initiatives.

The HCRC conducted its annual training in October 2013 at the Blaisdell Exhibition Hall, for several hundred attendees. The theme of the training was “EEO Updates and Non-discriminatory Recruitment and Hiring in a Recovering Economy” and included an address on civil rights by former HCRC Commission Chair Amy Agbayani. The training featured panels on EEO basics, legal updates, and non-discriminatory recruitment and hiring. In addition, the winners of the E`Ola Pono Art & Video Competition, a statewide student contest co-sponsored by the HCRC, the UH Center on Disability Studies, Hawaiian Telcom, Helping Hands, the Hawai`i Convention Center, and the Jack Johnson Ohana Foundation, were presented by former Commissioner Sara Banks.

In Spring 2014, the HCRC engaged in two important public education efforts:

The HCRC and the Disability and Communication Access Board (“DCAB”) launched a joint public education effort to inform both health care providers and their patients who are deaf, hard of hearing, and deaf blind and use sign language, of their legal rights and responsibilities. Under state and federal law, health care providers have an obligation to provide auxiliary aids and services for patients who have disabilities, including qualified sign language interpreters when needed to provide effective communication. The HCRC and DCAB developed

and disseminated educational materials for health care providers and patients, highlighting legal rights and responsibilities and the consequences of unlawful denial of requests for sign language interpreters.

The HCRC and the state Department of Labor and Industrial Relations Wage Standards Division joined the state Office of Community Services, the Hawai'i State Commission on the Status of Women, and other service providers and community advocates in a community education campaign around the theme, "Domestic Workers Have Rights." In 2013, Hawai'i became the second state, after New York, to enact legislation protecting the rights of domestic workers. Prior to the enactment of Act 248 in 2013, domestic workers were excluded from the protections of our state fair employment law, as well as from basic minimum wage and overtime protections.

During FY 2014 the U.S. Department of Housing and Urban Development ("HUD") Office of Fair Housing and Equal Opportunity approved a HUD Partnership Initiative ("PI") proposal submitted by the HCRC. The HUD PI grant will fund a continuation of an earlier 2011-2013 HCRC partnership with the Medical-Legal Partnership for Children in Hawai'i ("MLPCH") which provided outreach and civil rights education for Compact of Free Association ("COFA") migrants, targeting Micronesian and Marshallese communities. During FY 2012 and 2013 that partnership produced nine workshops held on O'ahu and Maui, featuring MLPCH staff, HCRC staff, leaders in the Micronesian and Marshallese community, and representatives from state and federal civil rights agencies and legal services organizations. In addition to the civil rights education workshops, MLPCH produced a civil rights component into a newcomer rights video production. The partnership also produced the translation of outreach materials and vital documents from English to Chuukese. The HUD PI proposal approved in 2013 will build on the work under the earlier HUD PI grant to provide follow-up outreach to COFA migrant communities and facilitate the filing of complaints to address discrimination against the COFA community. This HUD PI project work is scheduled to be completed by the end of calendar year 2015.

During FY 2014 the HCRC continued to be an active participant in the fair housing committee, comprised of representatives from the housing departments of each county and the State, HUD Honolulu Field Office, Legal Aid Society of Hawai'i, Fair Housing Enforcement Program, Hawai'i Disability Rights Center, Hawaiian Homelands, and other housing-related private and public entities. The committee met to learn and discuss the latest fair housing cases, legal issues, and recent developments in Fair Housing from a Federal, State and local perspective, to corroborate on local fair housing issues and concerns, and to work together to promote fair housing throughout the islands. The committee continued to corroborate on an annual joint private-public awareness fair housing campaign involving public service announcements on television, radio and print media.

The HCRC also worked with HUD, state and county housing agencies, community fair housing organizations, non-profit and for-profit organizations, and

businesses to co-sponsor fair housing trainings on the Islands of Maui, Moloka'i, Kaua'i, Hawai'i, and O'ahu. Representative trainees in the housing area included the Board of Realtors, Property Managers Association, National Association of Residential Property Managers, Community Associations Institute (CAI) Hawai'i, Hawai'i Center for Independent Living (HCIL), landlords, tenants, homeless veterans, emergency shelter and transitional housing management/staff, case management staff, housing assistance/referral management/staff, and various property management companies and community associations. An estimated 900+ people took advantage of these informative and free trainings.

During FY 2014 the HCRC also conducted outreach and/or participated in the following:

- Joint outreach events with the U.S. Equal Employment Opportunity Commission
- Joint informal exchanges of information between HCRC and EEOC staffs
- William S. Richardson School of Law, University of Hawai'i, various classes, panels and programs
- ALU LIKE, Inc.
- Outreach training for the Society of Human Resource Management – Hawai'i Chapter
- Outreach training for the Business Leadership Network – East Hawai'i Chapter
- Outreach training and flyers on assistance animals as a reasonable accommodation in housing
- Hawai'i Paralegal Association
- Hawai'i Foodbank
- Aloha United Way
- March of Dimes
- Mediation Centers of Hawai'i
- Honolulu Pride Parade and Celebration
- Annual Martin Luther King, Jr. Holiday Parade and Festival
- Hawai'i Friends of Civil Rights Annual Dinner
- Statewide Fair Housing Month events
- Oahu WorkLinks Job Quest Job Fair
- Television appearances taped at the 'Olelo and Think Tech TV studios

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

Caseload Statistics

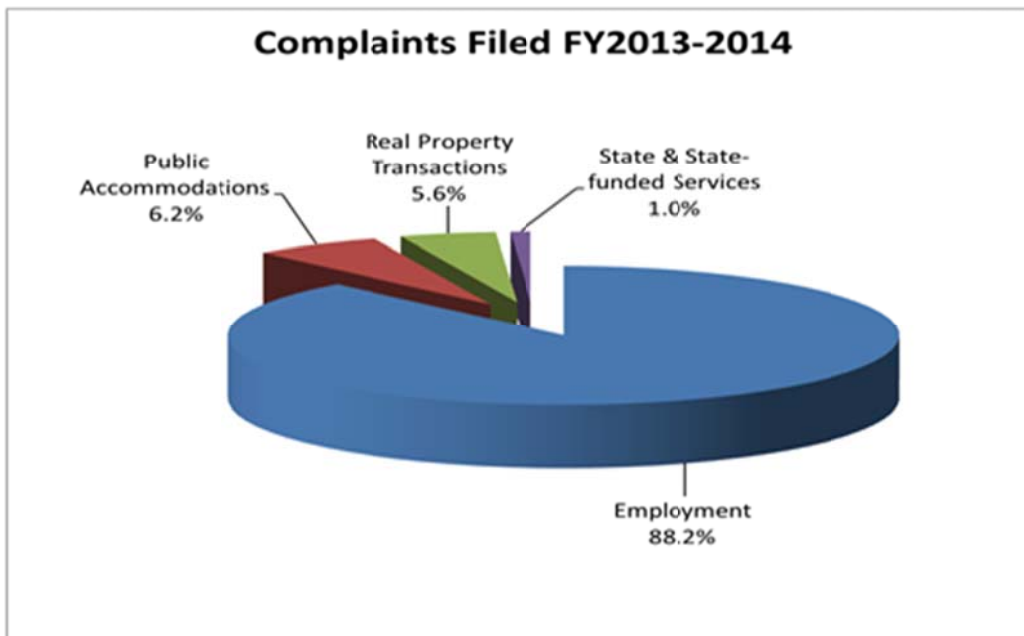
During FY 2014, the HCRC continued its emphasis on maintaining efficiency without sacrificing effective law enforcement.

Intake

During FY 2014, the HCRC received 3,518 telephone and walk-in inquiries. HCRC investigators completed 650 intakes, and 593 discrimination complaints were filed with the HCRC, an average of 49.4 complaints a month.

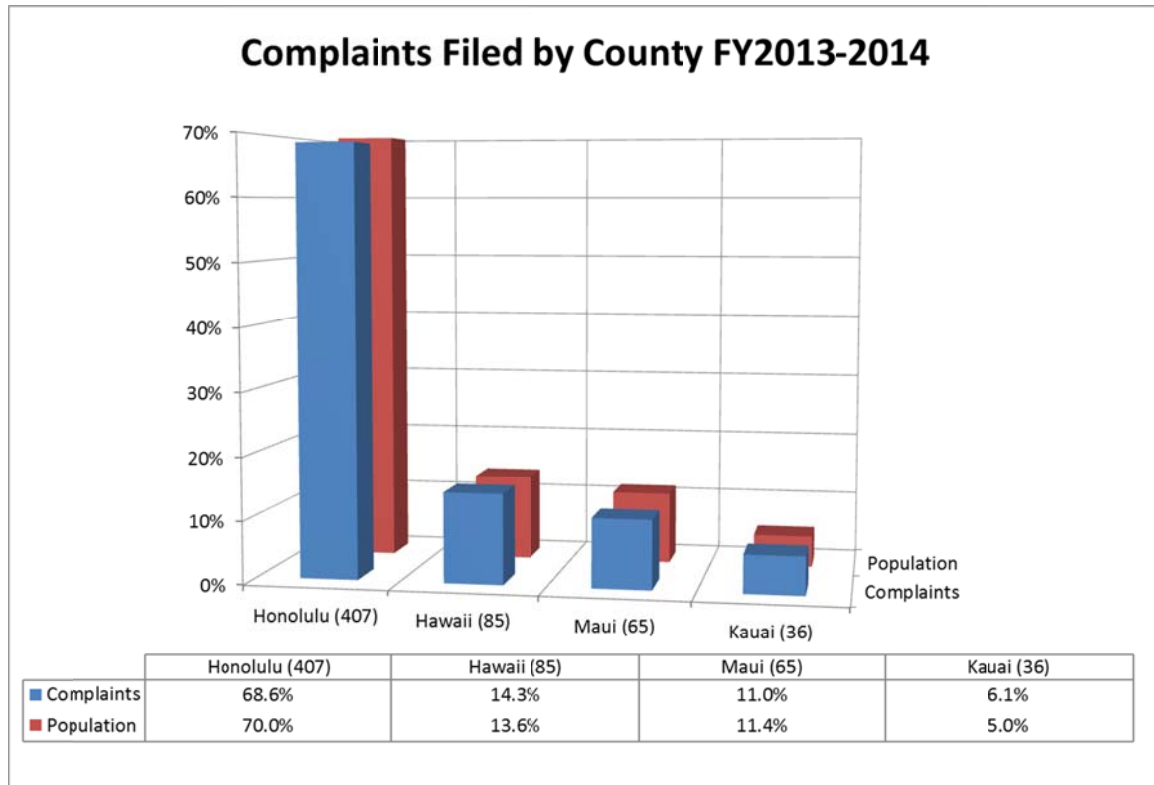
Of the 593 complaints that were filed with the HCRC, 303 complaints originated with HCRC investigators (averaging 25.3 per month), and another 290 cases originated with the federal EEOC or HUD. These 290 cases were dual-filed under state law with the HCRC.

The 593 cases included 523 employment cases, 37 public accommodations cases, 27 real property transactions (housing) cases, and 6 access to state and state-funded services complaints. The other inquiries and intake interviews did not lead to filed charges due primarily to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected bases; or c) the complainant's decision not to pursue the complaint.



The 593 charges accepted by the HCRC consisted of 407 Honolulu County complaints, 85 Hawai'i County complaints, 65 Maui County complaints, and 36 Kauai County complaints. The number of complaints filed from each county was

consistent with its proportion of resident population in the state (Honolulu County 70.0%; Hawai'i County 13.6%; Maui County 11.4%; and Kauai County 5.0%).



Closures⁴

HCRC investigators and attorneys closed 370 cases during FY 2014 (an increase of 15 cases from FY 2013), for an average closure rate of 30.8 cases per month, up from 29.6 cases per month in FY 2013. HCRC investigations

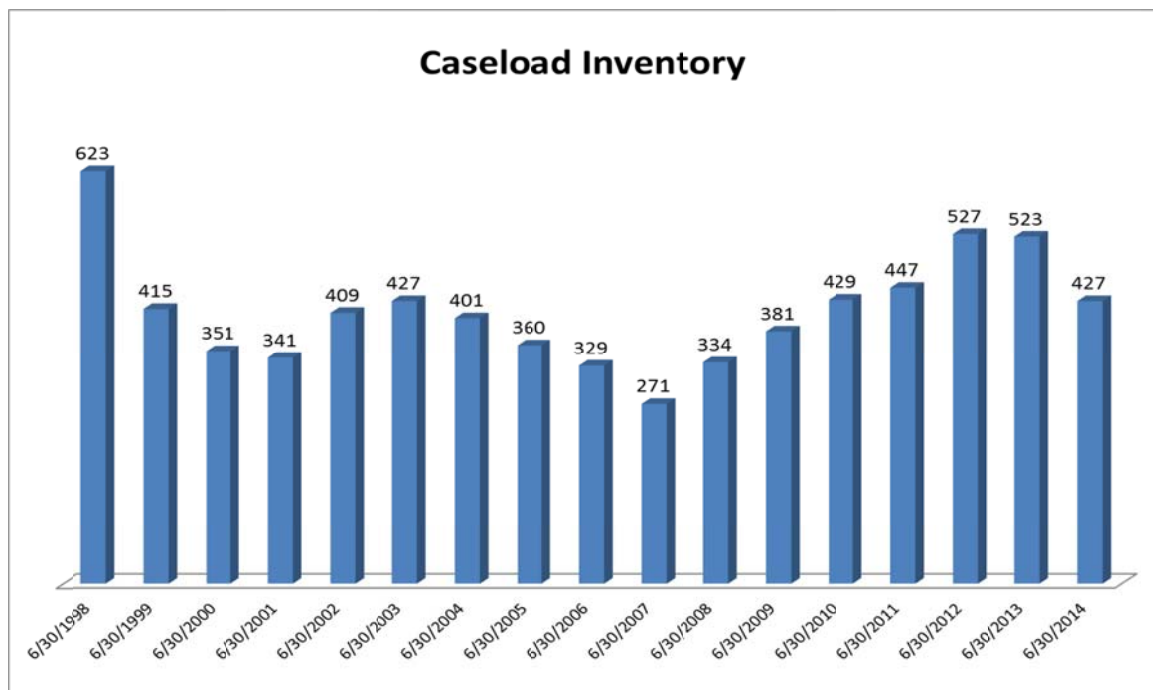
⁴ ANALYSIS AND EXPLANATION OF CLOSURE DATA

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

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

During FY 2014, HCRC investigations resulted in 12 cause determinations, and 49 cases were closed on the basis of pre-determination settlement or resolution between parties. 238 cases were closed on the basis of no-cause determinations upon completion of investigation. The ratio of cause determinations and predetermination settlements/resolutions (61) 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 (299) for this fiscal year is 20.4%.

resulted in cause determinations in 12 cases, up from 3 cause determinations in FY 2013. As of June 30, 2014, there were 427 cases pending with HCRC investigators; on June 30, 2013, there were 523 pending cases.



The average period for case closure by investigators was 520 days, as compared to 438 days for FY 2013, 351 days for FY 2012, and 363 days for FY 2011. A review of this fiscal year shows the following reasons for investigative closures:

	No. of Cases	% of Subtotal	% of Total Closures
Merit Closures			
Resolved by Parties	32	10.88%	8.65%
Pre-Determination Settlements	17	5.78%	4.59%
Cases Resolved by Attorneys	7	2.38%	1.89%
No Cause Determinations	<u>238</u>	<u>80.95%</u>	<u>64.32%</u>
Subtotal	294	100.0%	79.46%

	No. of Cases	% of Subtotal	% of Total Closures
Non-merit Closures			
Complainant Elected Court Action	27	35.53%	7.30%
No Jurisdiction	3	3.95%	0.81%
Complaint Withdrawn	9	11.84%	2.43%
Complainant Not Available	23	30.26%	6.22%
Complainant Failed to Cooperate	11	14.47%	2.97%
Failure to Accept Just Settlement	1	1.32%	0.27%
Administratively Closed	1	1.32%	0.27%
No Significant Relief Available	<u>1</u>	<u>1.32%</u>	<u>0.27%</u>
Subtotal	76	100.00%	20.54%
Total Number of Closures	370		100.00%

Employment Cases

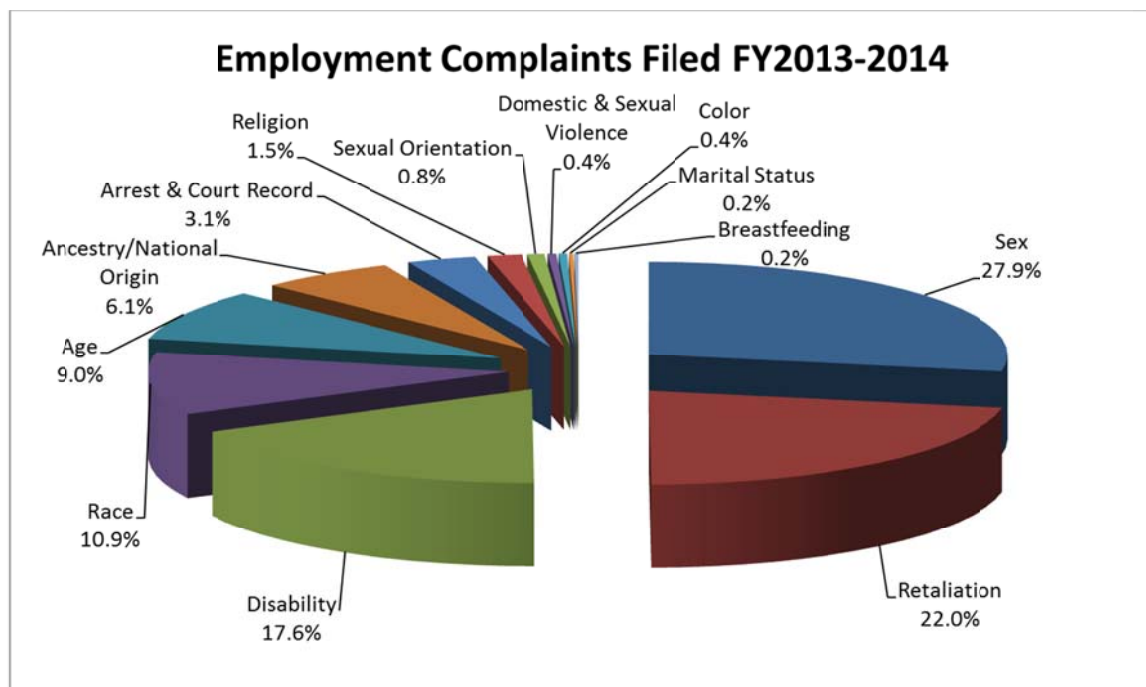
H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex (including gender identity or expression), sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, domestic or sexual violence victim status, credit history or credit report, assignment of income for child support obligations, National Guard participation, and 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. Under the work-share agreement, a case is filed with both agencies where there is concurrent jurisdiction. However, only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 523 employment cases were accepted by the HCRC. The HCRC was the intake agency for 233 of these cases, and the HCRC dual-filed another 290 cases originating with EEOC. Of the HCRC-originated cases, 80.9% were also filed with EEOC.

Of the 523 employment complaints filed, the bases most cited were sex, in 146 cases (27.9%); retaliation, in 115 cases (22.0%); and disability, in 92 cases (17.6%). Of the sex discrimination complaints, 33 (22.6% of all sex cases) alleged sexual harassment and 23 (15.8% of all sex cases) were based on pregnancy.

Race was the fourth most cited basis with 57 cases, representing 10.9% of all employment cases, followed by age in 47 cases (9.0%), ancestry/national origin in 32 cases (6.1%), arrest and court record in 16 cases (3.1%), religion in 8 cases (1.5%), and sexual orientation in 4 cases (0.8%). The bases of color and domestic or sexual violence victim status were cited in 2 cases each (0.4%), and marital status and breastfeeding were cited in 1 case each (0.2%). There were no cases based on credit history or credit report, child support obligations, or National Guard participation.

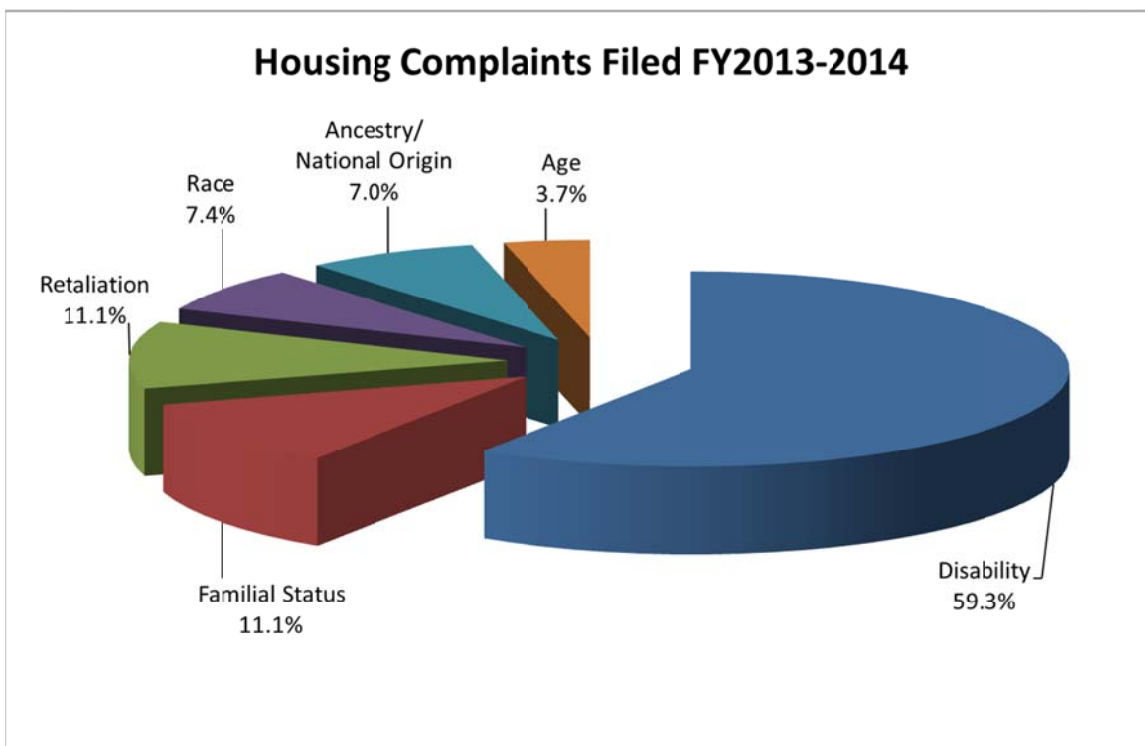
The case closure period averaged 537 days for the 295 employment cases that were closed or caused by HCRC investigators during FY 2014.



Real Property Transactions (Housing) Cases

During FY 2014, the HCRC accepted 27 cases of housing discrimination. There were 16 cases based on disability (59.3%); followed by 3 cases each based on familial status and retaliation (11.1%); 2 cases each based on race and sex (7.4%); and 1 case based on age (3.7%). There were no cases based on ancestry/national origin, color, HIV infection, marital status, religion, or sexual orientation.

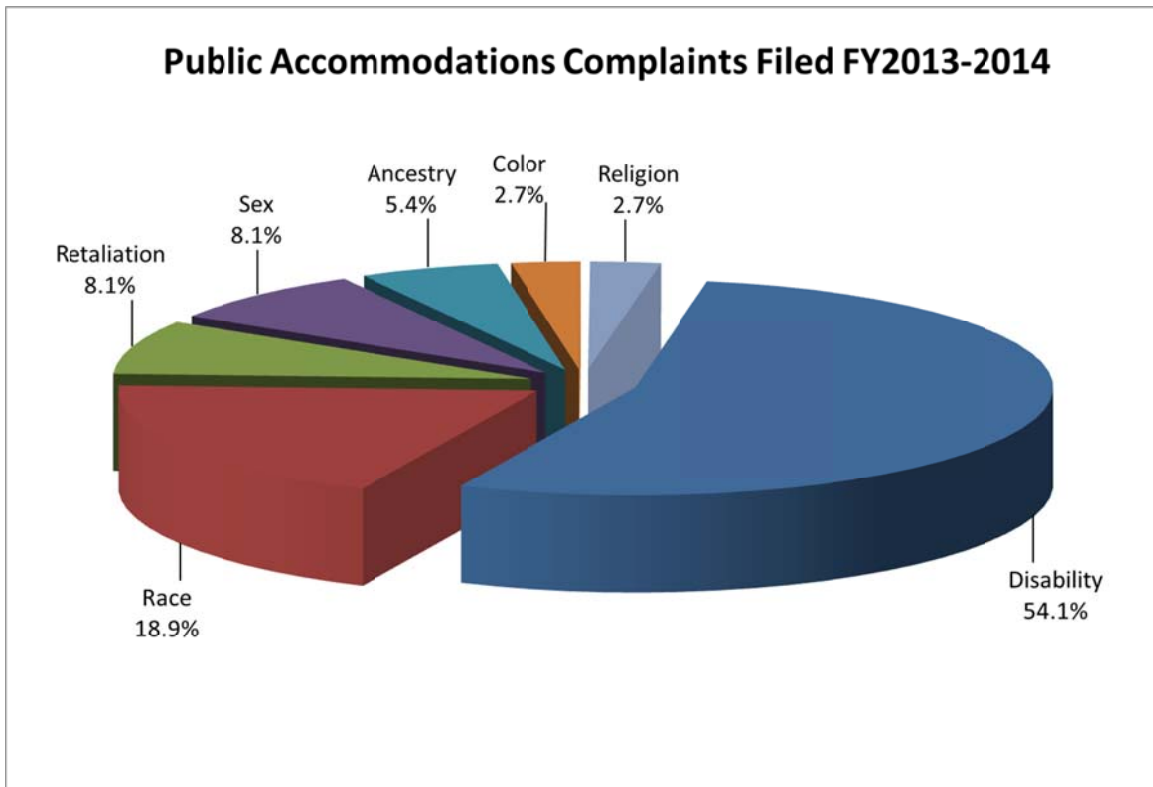
Housing case closures averaged 274 days for the 33 cases closed or caused during FY 2014.



Public Accommodations Cases

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

During the fiscal year, 37 new cases of public accommodations discrimination were accepted. Of these, 20 cases were based on disability (54.1%); 7 cases were based on race (18.9%); 3 cases each were based on retaliation and sex (8.1%); 2 cases were based on ancestry (5.4%); and 1 case each was based on color and religion (2.7%). There were no cases based on sexual orientation. Public accommodations case closures averaged 515 days for the 38 cases closed or caused during FY 2014.



Access to State and State-Funded Services Cases

H.R.S § 368-1.5 prohibits state agencies, or any program or activity receiving state financial assistance from excluding from participation, denying benefits or otherwise discriminating against persons with disabilities (the only protected class under this statute).

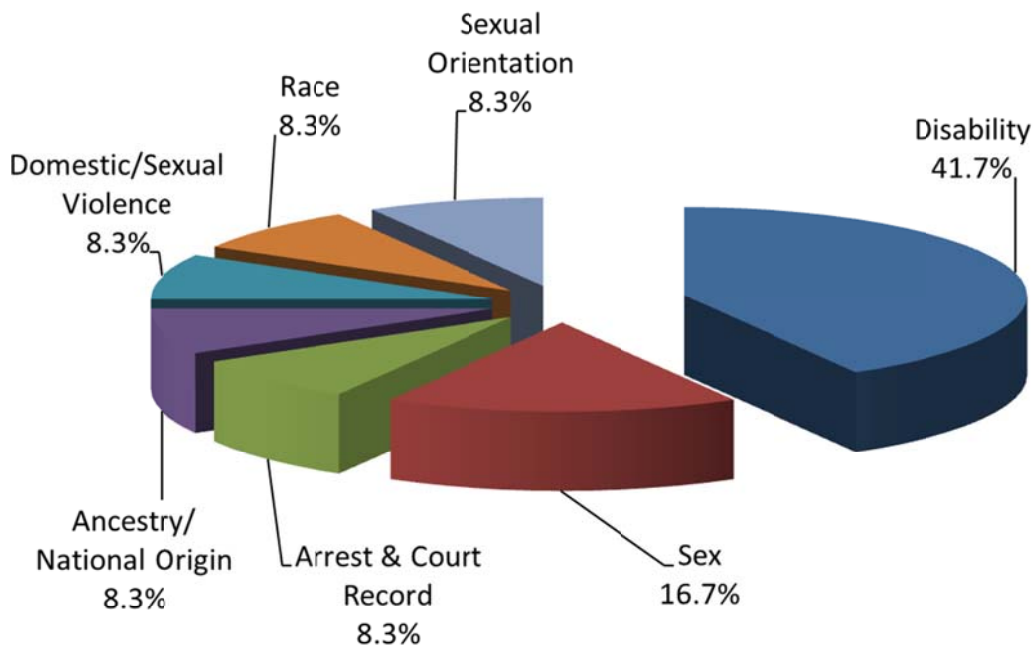
During FY 2014, there were 6 cases filed under § 368-1.5. There were 9 cases filed under § 368-1.5 that closed during the fiscal year, averaging 876 days per closure.

Cause Cases

When an investigation results in a recommendation that there is reasonable cause to believe that discrimination has occurred, the case is assigned to an HCRC enforcement attorney for legal action. In FY 2014, 12 recommendations for cause were brought forward for legal action. Of these cases, 5 (41.7%) were housing cases, 4 (33.3%) were employment cases, and 3 (25.0%) were public accommodation cases.

Of the 12 investigations with a cause recommendation, 5 were based on disability (41.7%); 2 were based on sex (16.7%); and 1 each were based on ancestry/national origin, arrest and court record, domestic or sexual violence victim status, race, and sexual orientation (8.3%).

Cause Determinations FY2013-2014



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 2014 the HCRC continued to successfully obtain monetary relief through settlement of complaints. In the 4 cause cases that were settled, HCRC attorneys obtained monetary settlements totaling \$41,500. Of the 49 cases settled prior to an investigative finding, 17 of those cases involved confidential settlements, the terms of which were not disclosed to the HCRC. Of the remaining 32 cases settled prior to an investigative finding, monetary relief totaled \$280,770. This figure includes pre-determination settlements obtained through HCRC investigators and settlements between the parties (\$150,270), as well as investigative settlements obtained through the HCRC mediation program (\$130,500). Collectively the HCRC's known monetary settlements for FY 2014 totaled \$322,270. Since the settlement terms are unknown for 17 closed cases,

the actual total figure for all monetary settlements in FY 2014 is probably significantly higher than the \$322,270 amount.

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

In some instances, non-monetary relief can be an important element of a settlement. For example, some complainants have received a letter of apology pursuant to the terms of a settlement. A simple apology sometimes goes a long way towards healing the rift between a complainant and respondent, and this form of relief is often not available as a court ordered remedy. Some cases were resolved when an employer, housing provider, or public accommodation corrected an unlawful discriminatory policy or practice after notice of the violation. During FY 2014, a significant number of employers, housing providers, and public accommodations voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following are illustrative of the HCRC cases that were resolved through conciliation, pre-determination settlement, or mediation and describe the relief obtained during FY 2014:

- In an employment case involving discrimination on the basis of domestic violence victim status, in which an employee was terminated after the complainant had a TRO against her ex-boyfriend after he assaulted her, and he continued to repeatedly call the office, the complaint was settled for \$2500, adoption of a non-discrimination policy, training for all managers on the anti-discrimination policy with a focus on the protection against discrimination on the basis of domestic violence victim status, and provision of a neutral job reference letter. (Lost wages were limited because the branch where the complainant worked closed a month after she was terminated in a restructuring and consolidation that resulted in the elimination of a number of positions, including complainant's position.)
- In an employment case involving discrimination on the basis of race and retaliation, the complaint settled for \$2,500, as well as review and posting of a non-discrimination policy, and training.
- In a case involving disability discrimination in a place of public accommodation, the complaint settled for \$10,000 and adoption of a non-discrimination policy to increase access to persons with disabilities.

- In an employment case involving sexual harassment and retaliation, the complaint settled for \$30,000, a number of changes to company policies, and training.
- In a housing case involving discrimination on the basis of disability, the complaint settled for \$50,000, review and posting of a non-discrimination policy, and training.
- In an employment case involving discrimination on the basis of age, ancestry, and race, the complaint settled for \$15,000 and a neutral letter of reference.
- In an employment case involving discrimination on the basis of disability, the complaint settled for the transfer of the complainant to another position within the company at the complainant's current level of pay and benefits.
- In a housing case involving discrimination on the basis of ancestry, a shelter denied a request for an interpreter for a Chuukese family, who were told that they "need to learn English," and subsequently were penalized for violating rules that were provided only in English. Settlement between the parties included transfer from the shelter to a 3 bedroom rental, and agreement to provide interpreters when requested by recipients of services.

HCRC Warning Letters

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

Case Decisions

Contested Cases

On March 8, 2013 the case of William D. Hoshijo, on Behalf of the Complaint filed by Kay Lorraine Bate v. Research Institute for Hawaii.USA, Docket No. 13-001-E-RH-SH-R was docketed for hearing. This case involved claims of hostile work environment harassment based on religion (Jewish) and sex (female) as well as termination based on religion and retaliation. The

contested case hearing was held in September, October and December 2013 and the Commission issued a final decision in favor of Complainant in November 2014.

Hawai'i Supreme Court

On November 30, 2012 the HCRC filed an amicus brief in the case of Lales v. Wholesale Motors, Inc. (Hawai'i Supreme Court No. 28516). This case involved a claim of ancestry harassment against a supervisor and the employer. The HCRC asserted that individual supervisors and agents could be liable for discriminatory conduct under HRS § 378-2 and that an employer is strictly liable for supervisor harassment pursuant to HAR §§ 12-46-109(c) and 12-46-175(d). On February 13, 2014 the Hawai'i Supreme Court issued its decision holding that individual employees (including supervisors) cannot be liable as "employers" under HRS § 378-2(1) and (2), although individual employees can be liable as "aiders and abettors" under HRS § 378-2(3). The Court also held that employers are strictly liable for supervisor ancestry harassment under HAR § 12-46-176(d) and that the federal defenses to harassment under Faragher v. City of Boca Raton, 524 U.S. 775 (1998) are not applicable under Hawai'i's anti-discrimination laws.

Legislation

One bill and one resolution relating to civil rights were passed during the 2013 regular session and the Hawai'i Marriage Equity Act was passed during the 2013 Special Session.

SB 2420, enacted as Act 18 amends HRS § 846-2.7 to allow criminal history record checks for county employees who have access to secured areas relating to traffic management and confidential information, and for employees who use firearms for non-law enforcement purposes. These three new categories of employees are now exempt from the arrest and court record discrimination protections under HRS § 378-2.5.

HCR 12, which was adopted, requests the University of Hawai'i to affirm its commitment to Title IX and the Violence Against Women Act through notices, developing implementation plans, and hiring personnel dedicated to implementing these acts.

SB 1 Sp. 2013, enacted as Act 1 (Hawai'i Marriage Equity Act of 2013), amended HRS Chapter 572 to recognize marriages between individuals of the same sex in the State of Hawai'i so that same sex couples may receive all the federal rights, benefits, protections and responsibilities afforded to opposite-sex couples who marry. (The legislature had previously extended state rights, benefits, protections and responsibilities to same-sex couples through civil unions.) Act 1 provides for an exemption which allows any clergy, minister, priest,

rabbi, officer of any religious denomination or society, or religious society not having clergy but performing solemnizations, to refuse to solemnize any marriage or civil union that is against their religious beliefs or faith. It also provides for an exemption that allows a religious organization or nonprofit organization operated, supervised or controlled by a religious organization to refuse to provide goods, services or its facilities or grounds for the solemnization or celebration of a marriage that is in violation of its religious beliefs or faith.

Appendix

Overview

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

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

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

The HCRC has five (5) uncompensated volunteer Commissioners who are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and their commitment to preserve the civil rights of all individuals.

The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes. During FY 2014 the HCRC had 26 positions, 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

Where appropriate, after a complaint is filed with the HCRC, the parties are offered an opportunity to voluntarily mediate the complaint through the HCRC Mediation

Program. If the parties agree to mediate, the HCRC mediation coordinator refers the parties to a community mediation center, which schedules and holds mediation sessions. Parties may alternatively choose to hire a private mediator.

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

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

Upon the issuance of a finding of reasonable cause to believe that unlawful discrimination has occurred, the HCRC enforcement attorney attempts to conciliate or settle the complaint.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 complaint before an impartial hearings examiner. The respondent (represented by themselves or by counsel or representative of their choice) is also given the opportunity to present his/her case at the hearing. Generally, a complainant may intervene in the contested case process as a party and also be represented by counsel or other representative of their choice.

After the completion of the contested case hearing, the hearings examiner issues a proposed decision based on the evidence. The five-member Commission Board then reviews the proposed decision and the hearing record. The parties may file written exceptions and support statements and present oral arguments to the Board. The Commission Board then accepts, rejects, or modifies the proposed decision, issues a final decision and order, and awards remedies, if appropriate. This decision is legally binding. If any party disagrees with the decision, she/he has 30 days to file an appeal to the State Circuit Court. Furthermore, a Respondent who appeals a decision of the Commission Board is entitled to a jury trial on any claims that form the basis for an award of common law damages.⁵

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

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

- c. Public Accommodations (Chapter 489, H.R.S.) The protected bases that a public accommodation may not discriminate on are: race, sex (which includes gender identity and expression), 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.

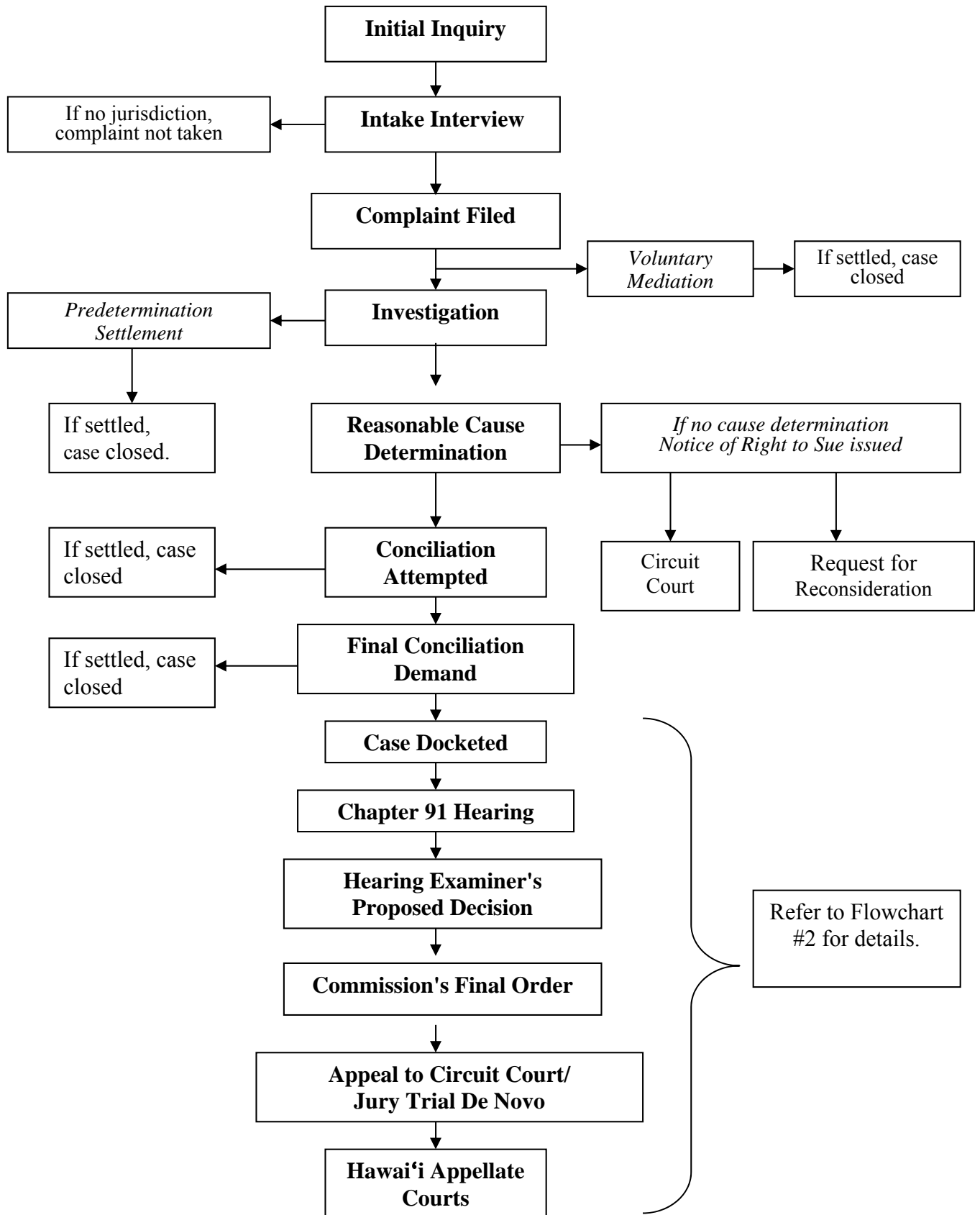
³ Complaints filed with the HCRC usually involve a discrete act – such as termination, eviction, demotion, etc. – or involve acts that are ongoing and constitute a continuing violation. An example of a “continuing violation” is sexual harassment that began more than 180 days before the complaint is filed, 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 2014, of all 370 investigative and attorney case closures, 7.30% (27) were closed on the basis of the complainant electing court action. The remaining cases (343) were closed on the following bases: in 64.32% of the cases (238), the Executive Director found no cause and dismissed the complaint, 13.24% (49) of the investigation cases were settled prior to a cause determination or were resolved by the parties, 1.89% (7) of the cases were resolved by staff attorneys, and the remaining 13.24% of the cases (49) were closed because there was no jurisdiction, the complaint was withdrawn, the complainant was unavailable and could not be located, the complainant failed to cooperate, the complainant failed to accept a just offer of settlement, no significant relief was available, or due to administrative closure."

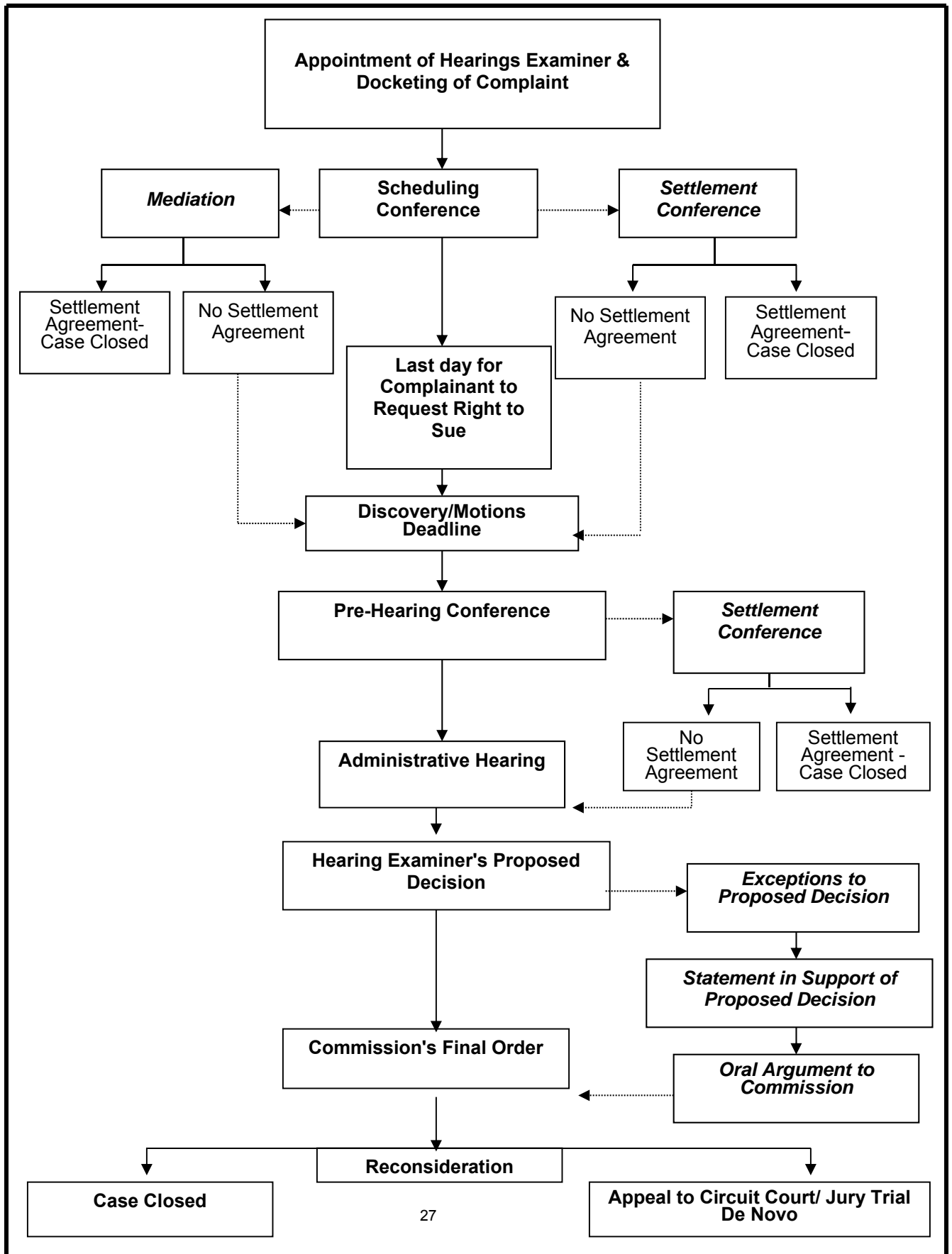
⁵ The HCRC enforcement, hearing and appeal procedures are illustrated in Flowchart # 1. In *SCI Management Corporation, et. al. v. Darryllynne Sims, et. al.*, 101 Hawai'i 438, 71 P.3d 389 (2003), the Hawai'i Supreme Court held that “a respondent who appeals a final order of the HCRC, pursuant to HRS § 368-16, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the HCRC.” This does not apply to respondents in housing cases, who can elect to take the case to circuit court after a finding of reasonable cause under HRS §515-9.

⁶ HCRC contested case procedures are illustrated in Flowchart # 2.

HCRC Procedural
Flowchart #1



HCRC Contested Case Flowchart #2



HCRC Commissioners

Linda Hamilton Krieger Chair (term 2011-2015)

Linda Hamilton Krieger grew up in Hawai'i and returned home in 2007 to join the faculty at the William S. Richardson School of Law as a Professor of Law and Director of the Ulu Lehua Scholars Program. Professor Krieger received a BA degree from Stanford University and is a graduate of New York University Law School. Prior to teaching, Professor Krieger worked for 13 years as a civil rights lawyer. From 1980-1986 she was a Staff Attorney and Director of Clinical Programs at the Employment Law Center of the Legal Aid Society of San Francisco, and from 1985-1991 she was a Senior Staff Attorney for the EEOC, San Francisco Regional Office. During that period, she litigated a number of significant state and federal sex and race discrimination cases in the areas of pregnancy discrimination and sexual harassment. She also played a significant role in drafting state and federal legislation in these subject matter areas. Professor Krieger has also published numerous articles on Title VII of the Civil Rights Act of 1964, disability discrimination, affirmative action, international comparative equality law and policy, and theories of law and social change.

Raymund Liongson Commissioner (term 2011–2015)

Raymund Liongson is an Associate Professor and Coordinator of the Philippine Studies Program at Leeward Community College and the director of Sulong Aral, a program funded by the U.S. Department of Education to help students of Filipino ancestry finish college. He is a board member of the Filipino Community Center, and is also a member and past president of the Filipino Coalition for Solidarity, an advocacy group for Filipino American W.W. II veterans, immigrants and workers in the areas of discrimination, language access, domestic violence and sexual harassment. In 2010, Professor Liongson spearheaded Filipino census fairs in Waipahu and Kalihi to encourage those communities to participate in the 2010 census. In 2009, he was part of a fact-finding commission to investigate labor and management practices at the Pacific Beach Hotel and has been active in promoting job security, wage increases and better benefits for Filipino hotel workers. Professor Liongson received his M.A. in education from Northwestern University in the Philippines and Ph.D. in education from the University of the Philippines.

Kim Coco Iwamoto
Commissioner, (term 2012-2016)

Kim Coco Iwamoto is property manager/owner of Affordable Quality Apartment Rentals (dba AQuA Rentals, LLC). She most recently served the people of Hawai'i as an elected member of the State Board of Education from December 2006 – April 2011. Prior to this, Ms. Iwamoto was Managing Attorney at Volunteer Legal Services Hawai'i and a volunteer at Legal Aid Society of Hawai'i. Before becoming an attorney, Ms. Iwamoto interned at the Hawai'i Intermediate Court of Appeals, the New Mexico Supreme Court, the San Francisco Human Rights Commission and the Hawai'i Civil Rights Commission. Ms. Iwamoto was born on the island of Kauai and raised on Oahu. She is a graduate of St. Louis High School, received her BA in Creative Writing from San Francisco State University and her Juris Doctorate from University of New Mexico.

Wallace T. Fukunaga
Commissioner, (term 2012-2016)

Wallace Fukunaga is currently the Interim Executive Director of the Counseling and Spiritual Care Center of Hawai'i. Prior to this, Rev. Fukunaga was a campus minister and lecturer at UH Manoa and was active in several land, anti-war and civil rights issues. Later Rev. Fukunaga became a legislative liaison for the Honolulu Community Action Program, advocating on behalf of the poor, and was an entrepreneur, serving as President of the self-start corporation, Northshore Resources, Inc., which was named "Small Business of the Year" by WorkHawaii. In 1990 he returned to the ministry and served various congregations on Oahu and Kauai. He also served on the Board of Trustees of Pacific School of Religion, the Board of Governors of the Japanese Cultural Center of Hawai'i, and the Boards of Directors of the Japanese American Citizens League and Interfaith Alliance of Hawai'i. Rev. Fukunaga was born in Hawai'i and graduated from McKinley High School. He received his BA from Harvard University, a Master of Divinity from Princeton Theological Seminary, and a Doctor of Ministry from the Pacific School of Religion.

Artemio Constantino Baxa

Commissioner, (term 2013-2017)

Artemio C. Baxa first practiced law in the Philippines. He received his law degree from the Ateneo De Manila University, a masters in comparative law from the University of Chicago Law School, and a juris doctorate at the University of Hawai'i William S. Richardson School of Law. In Hawai'i, Mr. Baxa was in private law practice with Lowenthal, August and Graham for five years and served as a Maui County deputy prosecutor for more than twenty five years. He is a retired Second Circuit Court judge, and is presently an appellate attorney with the Maui Prosecutor's Office. Mr. Baxa served as President of the Maui County Bar Association, and as an officer/board director in various civic and community organizations, including Vice-President of the United Filipino Council of Hawai'i, and Board member on Maui Catholic Charities of Hawai'i (present), Maui County Charter Commission (2011-2012), and the University of Hawai'i Board of Regents (2008-2013). Mr. Baxa's interest in civil rights began when he worked as a bellhop; when he served minorities and other underprivileged populations as a Community Aide, Child Care and Transportation Services Director, and Community Improvement and Development Coordinator in an anti-poverty program (MEO); as Maui County's Deputy Director of Housing and Human Concerns; and when he prepared the report, "Filipino Immigration and Social Challenges in Maui County (1972)", a comprehensive analysis of a countrywide survey of the needs and problems of Filipino immigrants in Maui County.

HCRC Staff

During FY 2013-2014 the HCRC staff consisted of 25 positions:*

- Enforcement Staff:
 - Executive Director
 - Deputy Executive Director
 - Enforcement Attorneys (3)
 - Administrative Assistant – Mediation Coordinator
 - Investigator-Supervisors V (2)
 - Investigator IV (8)
 - Investigator III-IV (temporary) (2)
 - Secretary III
 - Office Assistants (III-IV) (4)
- Adjudication Staff:
 - Chief Counsel
 - Secretary II

* Staffing levels reflect permanent (22) and temporary (3) positions which were either filled or vacant during FY 2014.