

HAWAI'I CIVIL RIGHTS COMMISSION

2014-2015 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: Restoring Lost Enforcement Capacity and Improving Effective Civil Rights Law Enforcement

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 or 3 permanent investigator positions that were lost due to the recession, budget cuts, and reduction in force (RIF) have been restored.

A comparison of the HCRC's investigation caseload¹ 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.

¹ "Investigation caseload" includes cases in investigation, from time of filing through completion of investigation and submission of a recommendation.

In October 2015, as a result of concerted efforts to reduce investigation case inventory, the investigation caseload was 367 cases, still 49% more than the July 2007 level. Of those, 17% 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 2016, 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. The restoration of even one investigator position will make a substantial impact, an incremental first step toward a recommitment to strong civil rights law enforcement.

With or without a restoration of capacity and enforcement positions, the HCRC enforcement section will consider and implement internal improvements in its process and procedures, that will allow better use of finite resources for effective and efficient investigation, conciliation, and litigation of discrimination complaints. With fewer investigators, the HCRC is moving away from specialization in the investigation process, toward a more integrated process. Rather than having investigators' work defined by functional specialization (intake, response monitoring and assessment, stages of investigation, and prioritization of case), the HCRC is moving toward reintegration of its investigator process, so all investigators are equipped and able to handle investigations from intake through disposition. This should yield improved efficiency and continuity in investigation, as well as more well-rounded and supported investigators. Caveat: fair housing cases will continue to be investigated by dedicated fair housing investigators.

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-five 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."² 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."³

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.⁴ Otherwise, the state courts will dismiss a lawsuit for failure to exhaust administrative remedies. This

² 1989 House Journal, Standing Committee Report 372.

³ Id.

⁴ 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.

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 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 sixteenth full year on June 30, 2015. The program enjoyed a productive year, despite operating without a permanent Mediation Coordinator. In FY 2015, the HCRC was able to update and redescribe the position, and engage in recruitment and selection to fill this critical position. The new Program Specialist – Mediation Coordinator started work at the beginning of FY 2016. No longer dependent on part-time mediation program administration by enforcement staff covering in the absence of a mediation coordinator, the HCRC looks forward to revitalization and 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 Hawaii (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 2015, 36 cases were referred into mediation, and 28 mediations were completed (dispositions). Of the 28 dispositions, 15 resulted in mediated settlements (53.6%), and 13 cases resulted in no agreement (46.4%). All 15 of the mediated settlements were in employment cases, 13 of which were dual-filed with the EEOC.

The total disclosed monetary value of mediated agreements was \$139,670 with a wide variety of affirmative relief as well. (In 4 cases, the monetary consideration was subject to a confidentiality clause and not disclosed.) Mediation Center of the Pacific had 7 settlements; West Hawaii Mediation Center and Kauai Economic Opportunity, Inc. each had 2 settlements; Ku`ikahi Mediation Services (Hilo) had 1 settlement; and there were 3 settlements with private mediators.

The primary bases of discrimination of the 15 settlements were as follows: Sex -- 10 (including 4 pregnancy and 4 sexual harassment); Disability -- 2; Race -- 2; Ancestry -- 1. Many of the completed mediations also included charges on other protected bases.

Although monetary settlements were achieved in most agreements, almost all mediated agreements also involved some form of non-monetary affirmative relief. Examples of non-monetary relief 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 2014 at the Blaisdell Exhibition Hall, for several hundred attendees. The theme of the training was "EEO Updates and Lesbian, Gay, Bisexual and Transgender Discrimination Issues in the Workplace" and included remarks by HCRC Commissioners Wallace Fukunaga and Kim Coco Iwamoto. The training featured panels on EEO basics, legal updates, laws prohibiting discrimination against LGBT employees, strategies to prevent such discrimination, and workplace issues specific to transgender employees. In addition, the winners of the E `Ola Pono Art & Video

Competition, a statewide student contest co-sponsored by the HCRC and the University of Hawaii Growing Pono Schools Project, were presented by former Commissioner Sara Banks.

During FY 2015 the HCRC worked in partnership with the Medical-Legal Partnership for Children in Hawai'i ("MLPCH") to engage in targeted outreach to Micronesian communities, in collaboration with the U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity ("HUD FHEO"), and the U.S. Equal Employment Opportunity Commission ("EEOC"). This activity was supported by HUD Partnership Initiative ("HUD PI") funding, providing nine "know your rights" workshops during FY 2015 and producing a Marshallese language version of four civil rights videos. These Marshallese language videos will be posted on the HCRC webpage in FY 2016, along with previously produced English, Ilocano, Tagalog, and Chuukese language versions.

During FY 2015 the HCRC continued to be an active participant in a fair housing committee, comprised of representatives from the housing departments of each county and the State, HUD Honolulu Field Office, Hawaii Public Housing Authority, Legal Aid Society of Hawaii, 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) Hawaii, Hawaii 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 800+ people took advantage of these informative and free trainings.

During FY 2015 the HCRC also conducted outreach and/or participated in the following:

- Various classes, panels, and programs at the William S. Richardson School of Law, University of Hawaii

- Informational exchanges with U.S. State Department Professional fellows (international civil rights leaders)
- Kahala Elementary School Career Day
- Honolulu Pride Parade and Celebration
- Annual Martin Luther King, Jr. Holiday Parade and Festival
- Hawaii Friends of Civil Rights Annual Dinner
- Statewide Fair Housing Month events, including a proclamation by Mayor Caldwell at Honolulu Hale
- Oahu WorkLinks Job Quest Job Fair
- Local radio and television appearances

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 2015, the HCRC continued its emphasis on maintaining efficiency without sacrificing effective law enforcement.

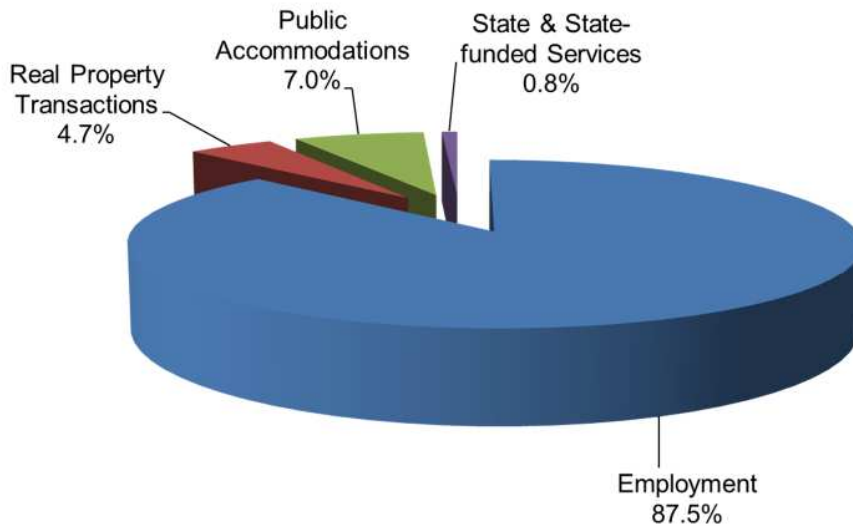
Intake

During FY 2015, the HCRC received 2864 telephone and walk-in inquiries. HCRC investigators completed 661 intakes, and 598 discrimination complaints were filed with the HCRC, an average of 49.8 complaints a month.

Of the 598 complaints that were filed with the HCRC, 359 complaints originated with HCRC investigators (averaging 29.9 per month), and another 239 cases originated with the federal EEOC or HUD. These 239 cases were dual-filed under state law with the HCRC.

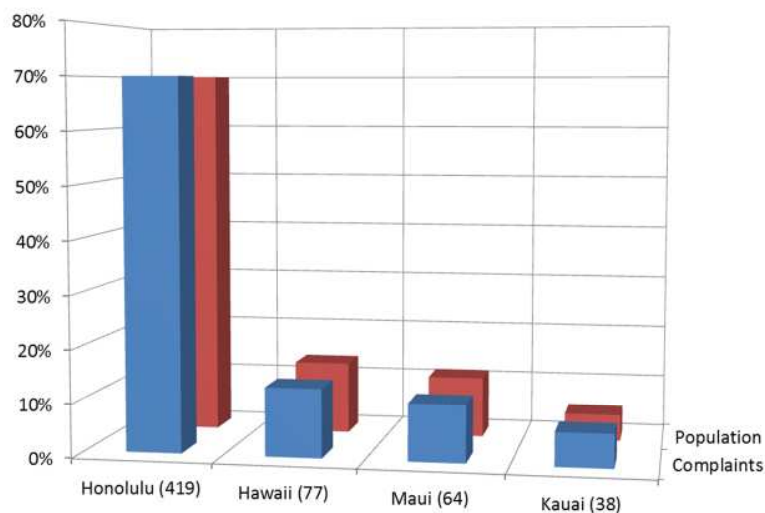
The 598 cases included 523 employment cases, 42 public accommodations cases, 28 real property transactions (housing) cases, and 5 access to state and state-funded services complaints. The other inquiries and intake interviews did not lead to filed charges due primarily to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected bases; or c) the complainant's decision not to pursue the complaint.

Complaints Filed FY2015



The 598 charges accepted by the HCRC consisted of 419 Honolulu County complaints, 77 Hawai'i County complaints, 64 Maui County complaints, and 38 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%).

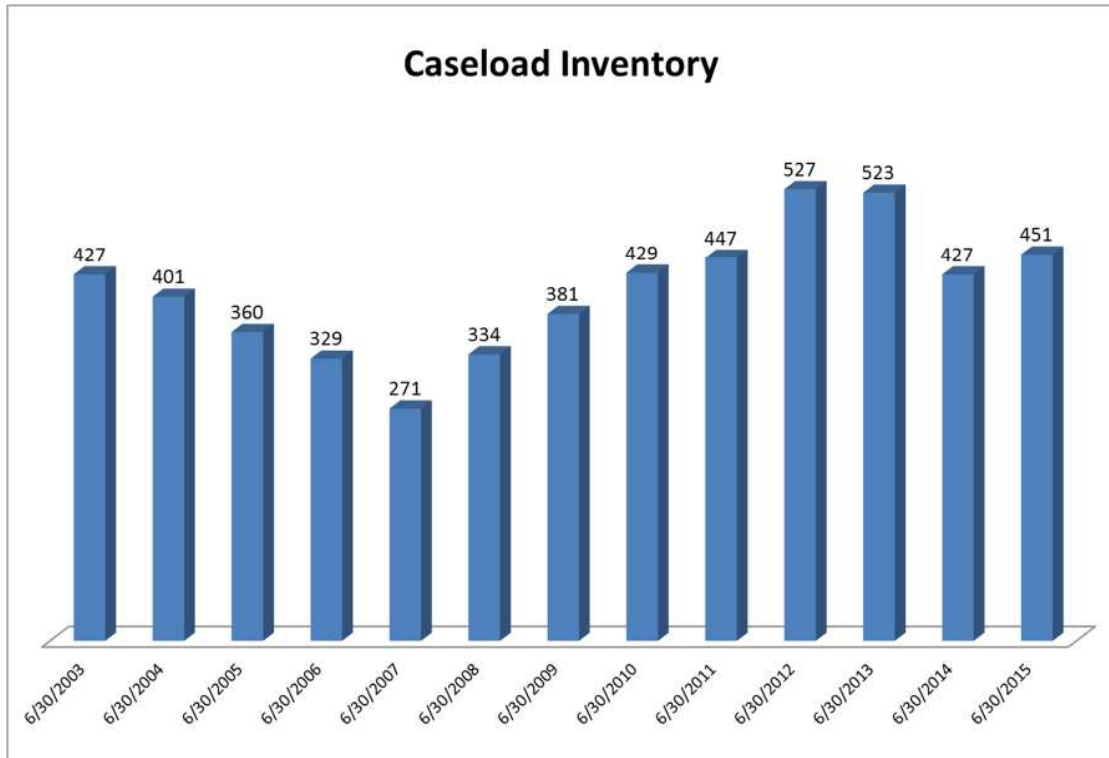
Complaints Filed by County FY 2015



	Honolulu (419)	Hawaii (77)	Maui (64)	Kauai (38)
Complaints	70.1%	12.9%	10.7%	6.4%
Population	70.0%	13.6%	11.4%	5.0%

Closures⁵

HCRC investigators and attorneys closed 332 cases during FY 2015 (a decrease of 38 cases from FY 2014), for an average closure rate of 27.7 cases per month, down from 30.8 cases per month in FY 2014. HCRC investigations resulted in cause determinations in 15 cases, up from 12 cause determinations in FY 2014. As of June 30, 2015, there were 451 cases pending with HCRC investigators; on June 30, 2014, there were 427 pending cases.



⁵ 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 2015, HCRC investigations resulted in 15 cause determinations, and 35 cases were closed on the basis of pre-determination settlement or resolution between parties. 234 cases were closed on the basis of no-cause determinations upon completion of investigation. The ratio of cause determinations and predetermination settlements/resolutions (50) 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 (284) for this fiscal year is 17.6%.

The average period for case closure by investigators was 498 days, as compared to 520 days for FY 2014, 438 days for FY 2013, and 351 days for FY 2012. 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	25	8.99%	7.53%
Pre-Determination Settlements	10	3.60%	3.01%
Cases Resolved by Attorneys	9	3.24%	2.71%
No Cause Determinations	<u>234</u>	<u>84.17%</u>	<u>70.48%</u>
Subtotal	278	100.0%	83.73%
	No. of Cases	% of Subtotal	% of Total Closures
Non-merit Closures			
Complainant Elected Court Action	28	51.85%	8.43%
No Jurisdiction	1	1.85%	0.30%
Complaint Withdrawn	8	14.81%	2.41%
Complainant Not Available	5	9.26%	1.51%
No Significant Relief Available	1	1.85%	0.30%
Complainant Failed to Cooperate	<u>11</u>	<u>20.37%</u>	<u>3.31%</u>
Subtotal	54	100.00%	16.27%
Total Number of Closures	332		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.

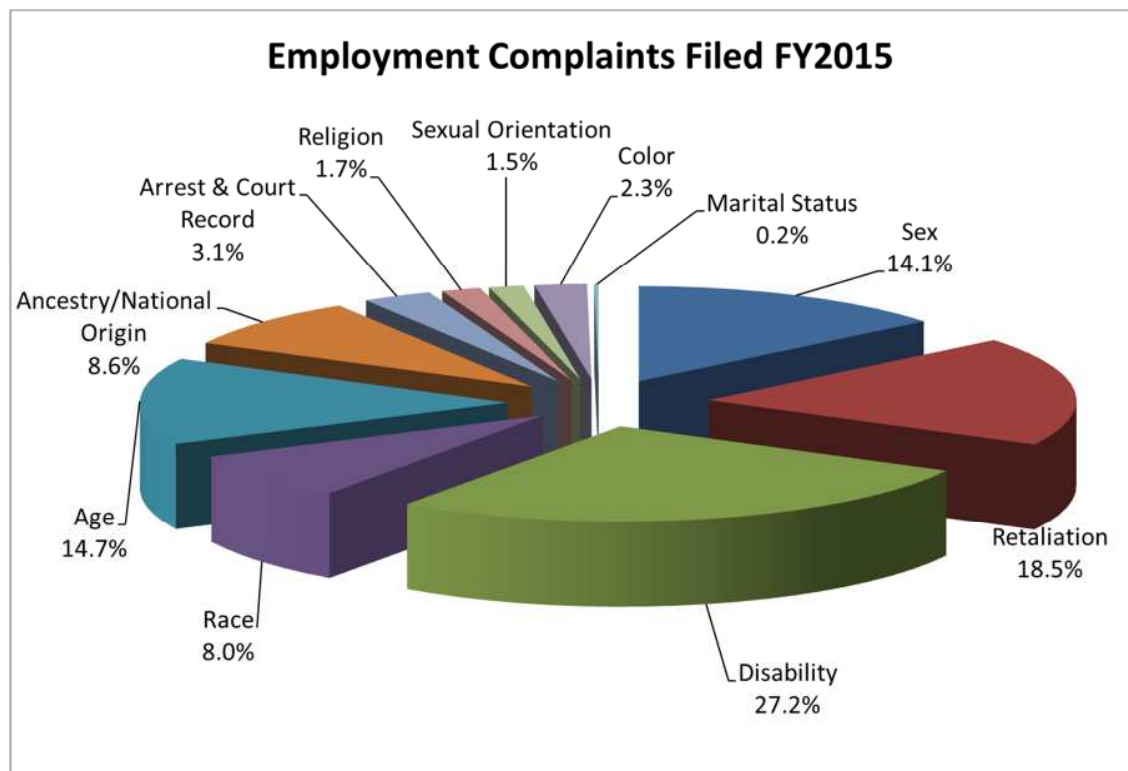
The HCRC has a work-share agreement with the EEOC. Under the work-share agreement, a case is filed with both agencies where there is concurrent jurisdiction. However, only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 523 employment cases were accepted by the HCRC. The HCRC was the intake agency for 284 of these cases, and the HCRC dual-filed another 239 cases

originating with EEOC. Of the HCRC-originated cases, 80.3% were also filed with EEOC.

Of the 523 employment complaints filed, the bases most cited were disability, in 142 cases (27.2%); retaliation, in 97 cases (18.5%); age, in 77 cases (14.7%); and sex, in 74 cases (14.1%). Of the sex discrimination complaints, 22 (29.7% of all sex cases) alleged sexual harassment and 18 (24.3% of all sex cases) were based on pregnancy.

Ancestry/national origin was the fifth most cited basis with 45 cases, representing 8.6% of all employment cases, followed by race in 42 cases (8.0%), arrest and court record in 16 cases (3.1%), color in 12 cases (2.3%), religion in 9 cases (1.7%), sexual orientation in 8 cases (1.5%), and marital status in 1 case (0.2%). There were no cases based on credit history or credit report, child support obligations, National Guard participation, breastfeeding, or domestic violence or sexual violence victim status.

The case closure period averaged 525 days for the 271 employment cases that were closed or caused by HCRC investigators during FY 2015.

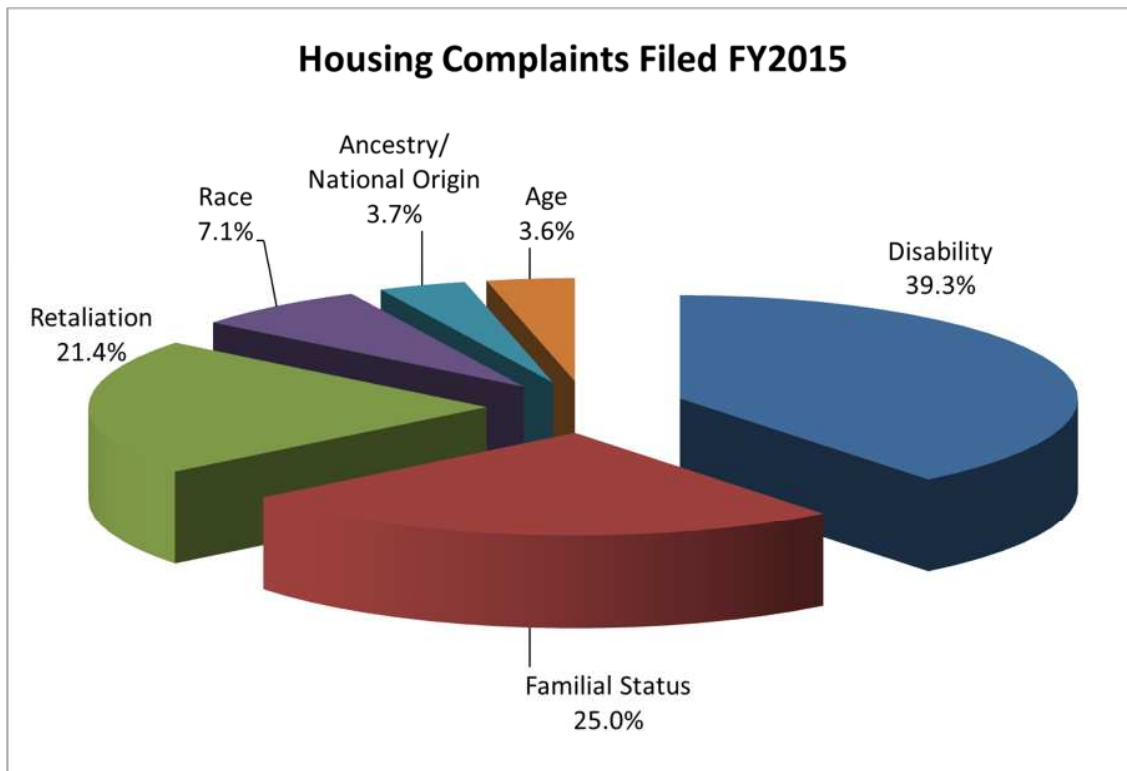


Real Property Transactions (Housing) Cases

During FY 2015, the HCRC accepted 28 cases of housing discrimination. There were 11 cases based on disability (39.3%); followed by 7 cases based on familial status (25.0%); 6 cases based on retaliation (21.4%); 2 cases based on race

(7.1%); and 1 case each based on age and ancestry/national origin (3.6%). There were no cases based on color, HIV infection, marital status, religion, sex, or sexual orientation.

Housing case closures averaged 423 days for the 32 cases closed or caused during FY 2015.

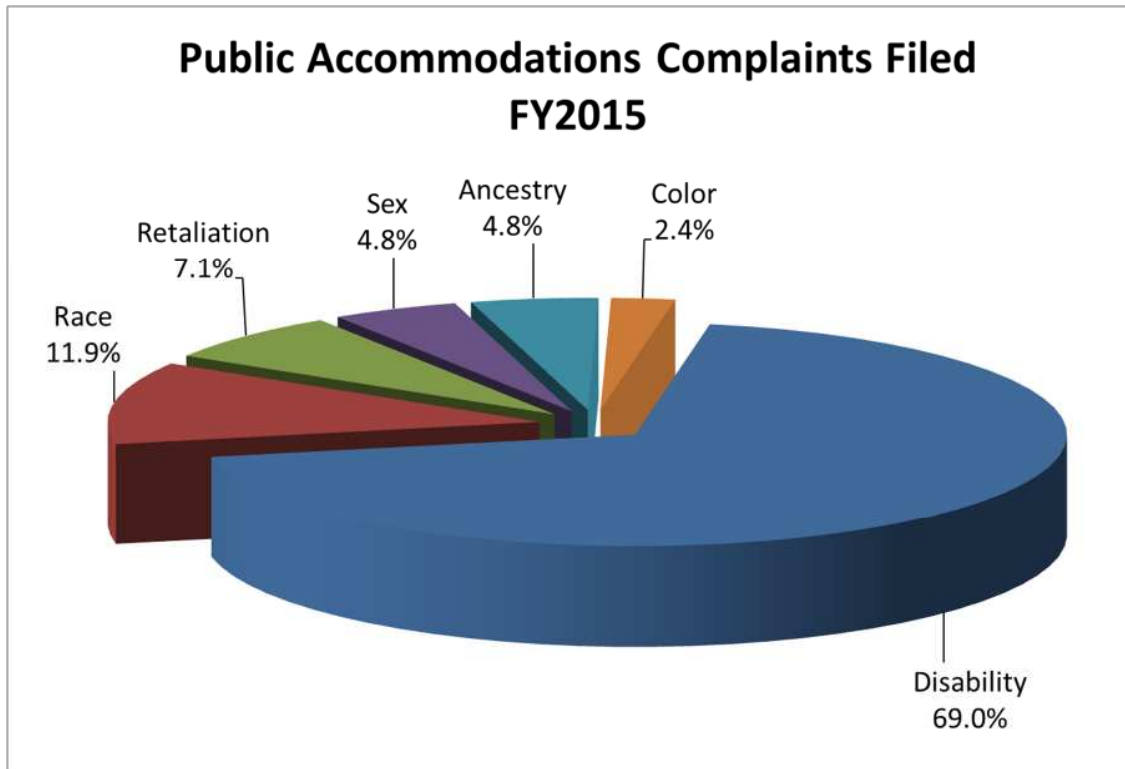


Public Accommodations Cases

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, 42 new cases of public accommodations discrimination were accepted. Of these, 29 cases were based on disability (69.0%); 5 cases were based on race (11.9%); 3 cases were based on retaliation (7.1%); 2 cases each were based on ancestry and sex (4.8%); and 1 case was based on religion (2.4%). There were no cases based on color or sexual orientation.

Public accommodations case closures averaged 346 days for the 26 cases closed or caused during FY 2015.



Access to State and State-Funded Services Cases

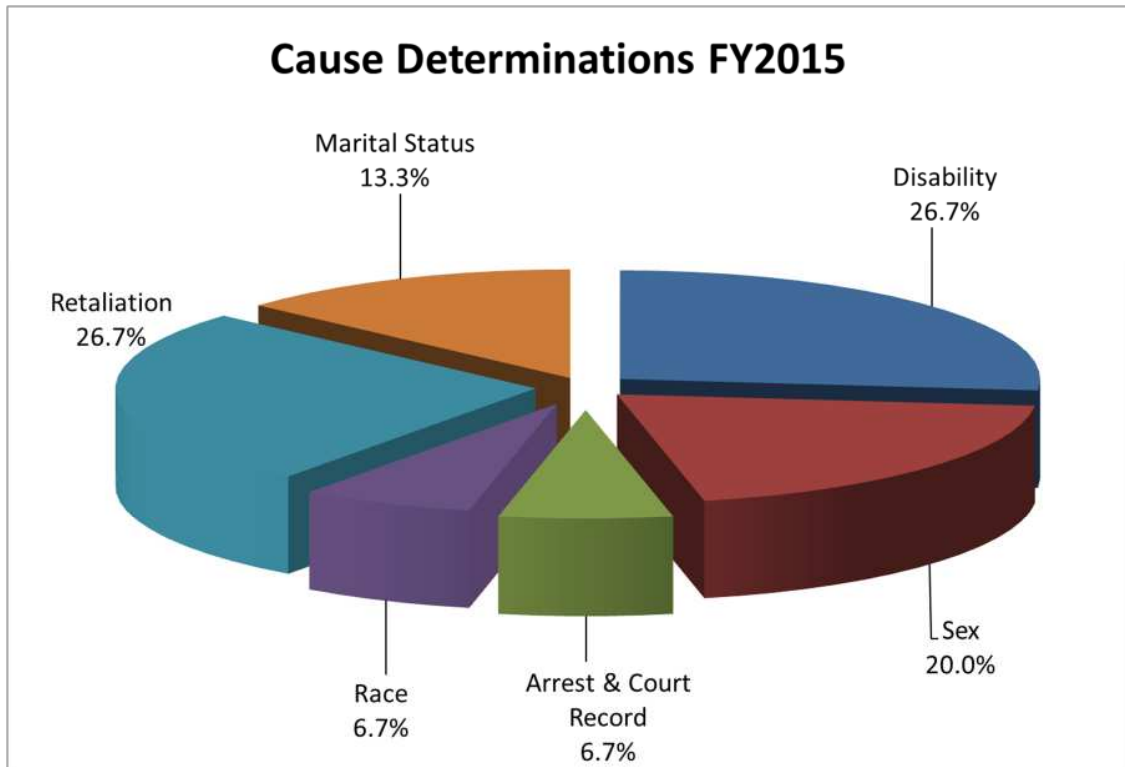
H.R.S § 368-1.5 prohibits state agencies, or any program or activity receiving state financial assistance from excluding from participation, denying benefits or otherwise discriminating against persons with disabilities (the only protected class under this statute).

During FY 2015, there were 5 cases filed under § 368-1.5. There were 4 cases filed under § 368-1.5 that closed during the fiscal year, averaging 228 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 2015, 15 recommendations for cause were brought forward for legal action. Of these cases, 7 (46.7%) were housing cases, 7 (46.7%) were employment cases, and 1 (6.7%) was a public accommodation case.

Of the 15 investigations with a cause recommendation, 4 each were based on disability and retaliation (26.7%); 3 were based on sex (20%); 2 were based on marital status (13.3%); and 1 each were based on arrest and court record and race (6.7%).



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 2015 the HCRC continued to successfully obtain monetary relief through settlement of complaints. In the 9 cause cases that were settled, HCRC attorneys obtained monetary settlements totaling \$263,500. Of the 35 cases settled prior to an investigative finding, 11 of those cases involved confidential settlements, the terms of which were not disclosed to the HCRC. Of the remaining 24 cases settled prior to an investigative finding, monetary relief totaled \$176,870. This figure includes pre-determination settlements obtained through HCRC investigators and settlements between the parties (\$37,200), as well as investigative settlements obtained through the HCRC mediation program (\$139,670). Collectively the HCRC's known monetary settlements for FY 2015 totaled \$440,370. Since the settlement terms are unknown for 11 closed cases, the actual total figure for all monetary settlements in FY 2015 is probably significantly higher than \$440,370.

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 2015, a significant number of employers, housing providers, and public accommodations voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following are illustrative of the HCRC cases that were resolved through conciliation or mediation and describe the relief obtained during FY 2015:

- Complainants in a housing case alleged that they were subjected to discrimination during the application and waitlist process for an apartment unit. The claims of discrimination were based on marital status, sexual orientation, disability, HIV status, and retaliation. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included payment of \$3,600 to the complainants, an update of the respondents' non-discrimination policy, and fair housing training for the respondents.
- Two employment cases alleged that a complainant was subjected to sexual harassment in the workplace, followed by discrimination based on sex and retaliation after she reported the sexual harassment internally. The HCRC investigated the sexual harassment case and issued a Notice of Cause. Thereafter, both cases were settled for \$140,000, nine months of COBRA payments, and a neutral job reference for the complainant; as well as non-discrimination training for the respondent's managers, supervisors, and employees.
- The complainant in a public accommodation case alleged that he was subjected to disability discrimination when the respondent healthcare provider denied him a requested accommodation that would have allowed effective communication and access to the respondent's services. The HCRC investigated the case and issued a Notice of Cause. The case was settled for payment of \$3,000 to the complainant, and a revision of the respondent's

office policy to acknowledge its responsibility to provide appropriate auxiliary aids and services when necessary to accommodate patients' disability-related communication needs.

- The complainants in a housing case alleged that they were subjected to discrimination on the basis of familial status, national origin/ancestry, and color in the form of unequal terms and conditions of their tenancy. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included payment of \$7,500 to the complainants, review and posting of the respondents' non-discrimination policy, and fair housing training for the respondents' staff.
- The complainant in an employment case alleged that she was subjected to discrimination on the basis of her disability by being denied a reasonable accommodation, denied reinstatement from medical leave, and terminated from employment. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included payment of \$6,500 to the complainant, respondent's adoption of a non-discrimination policy, and dissemination of that non-discrimination policy to all employees.

HCRC Warning Letters

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

Case Decisions

Contested Cases

On August 26, 2014, the Commission issued a final decision and order in 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. The Commission held the Research Institute for Hawaii, USA ("RIH"), and its CEO Christopher Damon Haig, liable for religious and sexual harassment and

discrimination their former executive director Kay Lorraine Bate. The Commission also found that Bate was terminated in retaliation for complaining about the harassment.

The Commission ordered RIH and Haig to pay Bate \$343,200 in back pay, \$200,000 in compensatory damages for injury to her feelings, emotions, and mental well-being, and \$300,000 in punitive damages. In addition, the Commission ordered the employer to implement a non-discrimination policy and to cease and desist from discriminating on the basis of religion or sex. The Commission held Haig individually responsible because RIH was his “alter ego” and use of RIH’s corporate status as a shield against individual liability would “bring about injustice and inequity.”

RIH and Haig took an appeal from the final decision of the Commission to the Circuit Court. The Circuit Court issued a case management order in Civil No. 14-1-2014-09, and an order granting interlocutory appeal. RIH and Haig have filed a notice of appeal; Bate and HCRC have filed a notice cross-appeal.

The Bate v. RIH case presents important issues on appeal, including the scope of the right to a jury trial on claims on which the Commission awarded legal relief, including compensatory and punitive damages, under SCI Management Corp. v. Sims, 101 Hawai’i 438, 71 P.3d 389 (2003).

On October 28, 2014, the Commission issued an order refusing to consider a petition for declaratory relief in In the Matter of TD FOOD GROUP, INC. Petitioner TD Food Group, Inc. (“TD”), sought a declaratory ruling that if TD complied with the state Food Safety Code (“Code”) by limiting individuals with disabilities to the use of “service animals” (to the exclusion of other assistance animals) under the conditions permitted by the Code, it would not be in violation of the state law prohibiting discrimination in places of public accommodation. The Commission cited a statement submitted by the HCRC Executive Director, deferring to the health and safety jurisdiction and expertise of the Department of Health in promulgating and enforcing the Code, recognizing that food establishments are legally bound to comply with the specific prohibitions of the Code. The Commission found there was no case or controversy, declining to consider the petition and dismissing it without prejudice.

On October 28, 2014, the Commission issued a final decision and order in In the matter of Linda Elento, DR No. 14-017, on a petition for declaratory relief. The Commission held that the HCRC has jurisdiction over student complaints of disability discrimination against public schools and public charter schools, under HRS § 368-1.5, either as “state agencies” or “programs and activities receiving state financial assistance.”

The Hawai’i Technology Academy and the Department of Education, State of Hawai’i, took an appeal to the Circuit Court. The Circuit Court reversed the Commission decision, holding that the Commission had “... acted in excess of its statutory authority and/or jurisdiction,” without further explanation. The HCRC

filed a notice of appeal, and the case has been transferred to the Hawai'i Supreme Court.

Legislation

Four bills and one resolution relating to civil rights were passed during the 2015 Legislative Session.

SB 1291, enacted as Act 242, allows planned community associations and associations of apartment owners to prohibit the smoking of medical marijuana, if they prohibit the smoking of tobacco. Expressly does not diminish the fair housing law obligation of housing providers to provide reasonable accommodations for persons with disabilities.

SB 1113, enacted as Act 190, compiles, clarifies, and expands the authority of the State Department of Health to conduct background checks that include criminal history record checks, adult abuse perpetrator and child abuse record checks, and certified nurse aid registry checks for people seeking employment with the state or contractors for work that involves direct client care in healthcare facilities.

HB 1272, enacted as Act 39, requires theater chains that operate theaters in more than two locations in Hawai'i to provide open movie captioning during at least two showings a week of each movie that is produced and offered with open movie captioning. Also requires all movie theaters to provide, upon request, audio description of any motion picture that is produced and offered with audio description.

HB 631, enacted as Act 226, amends HRS § 338-17.7 to change the standard for changing gender designation on birth certificate; requires affidavit from licensed treating physician attesting that applicant has received appropriate clinical treatment resulting in "complete" gender transition.

HCR 141 was adopted, requesting the State Department of Land and Natural Resources and the counties to improve access to shoreline for persons with disabilities.

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 2015 the HCRC had 25 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.

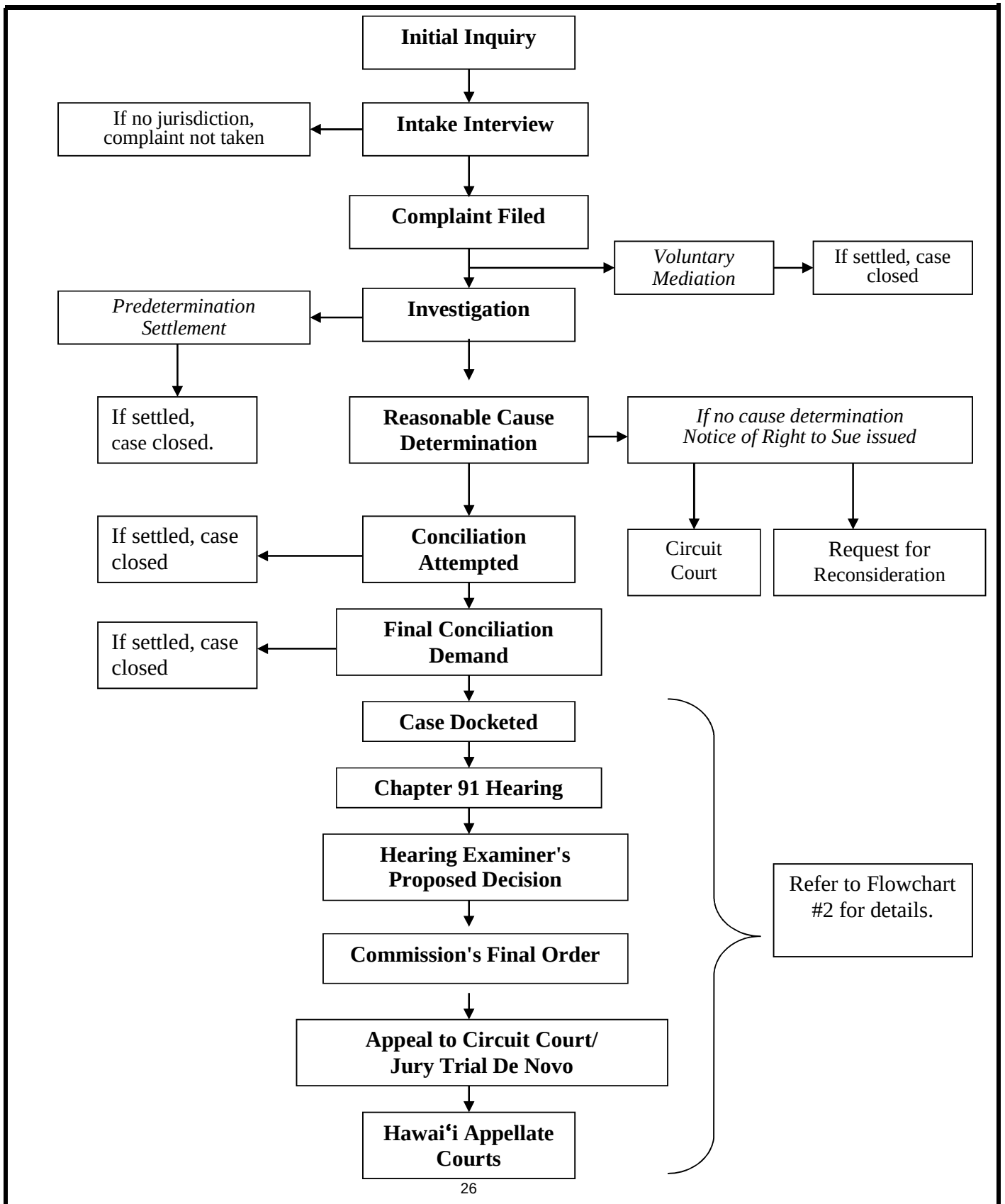
- 1 “Unlawful discrimination” may occur in any of the following ways:
 - a. Disparate Treatment – this is the usual form of discrimination; it occurs when individuals are treated in an unequal manner because of a “protected basis.” Examples of disparate (unequal) treatment include: firing an employee 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 of 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 2015, of all 332 investigative and attorney case closures, 8.43% (28) were closed on the basis of the complainant electing court action. The remaining cases (304) were closed on the following bases: in 70.48% of the cases (234), the Executive Director found no cause and dismissed the complaint, 10.54% (35) of the investigation cases were settled prior to a cause determination or were resolved by the parties, 2.71% (9) of the cases were resolved by staff attorneys, and the remaining 7.83% of the cases (26)

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."

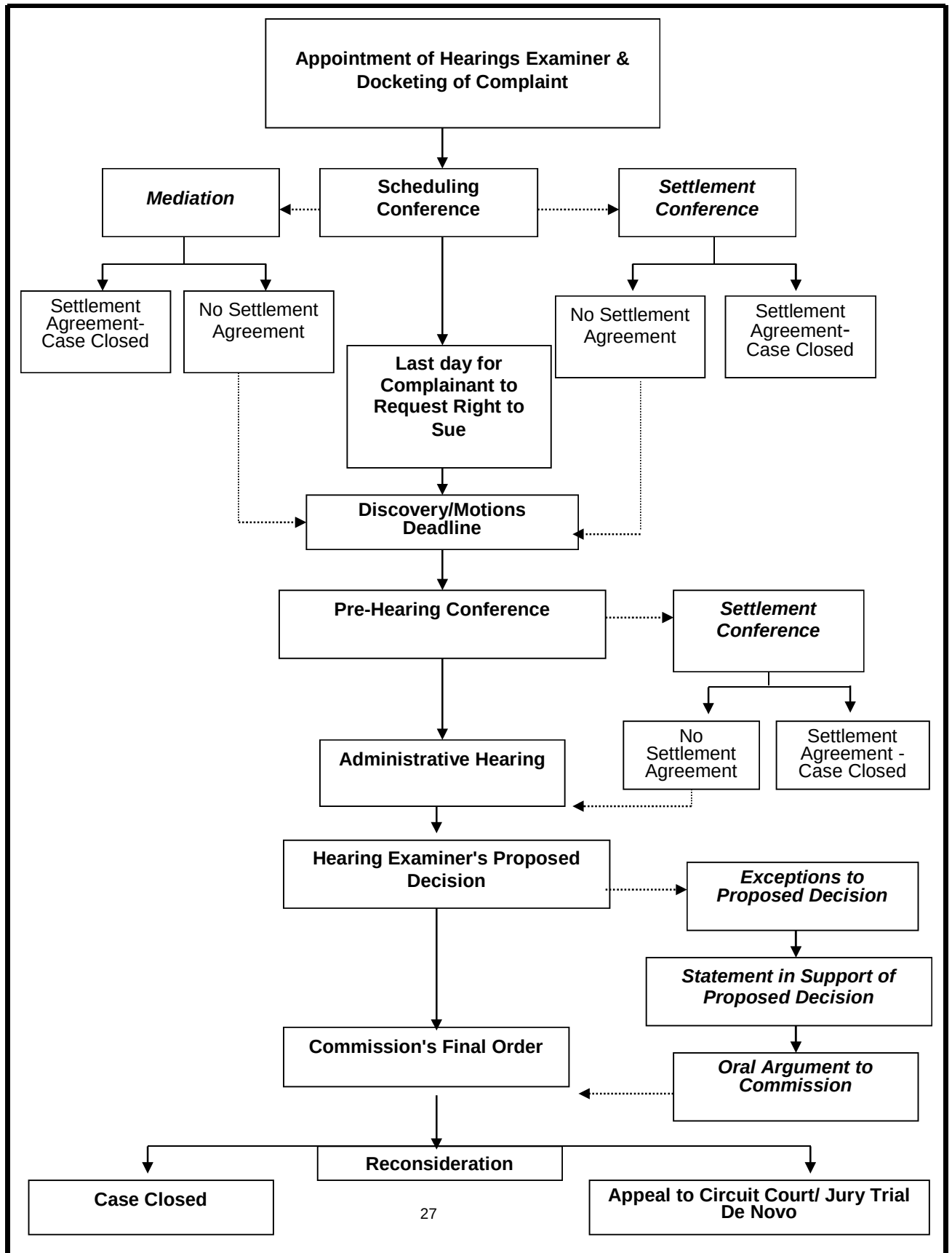
⁵ The HCRC enforcement, hearing and appeal procedures are illustrated in Flowchart # 1. In *SCI Management Corporation, et. al. v. Darryllynne Sims, et. al.*, 101 Hawai'i 438, 71 P.3d 389 (2003), the Hawai'i Supreme Court held that "a respondent who appeals a final order of the HCRC, pursuant to HRS § 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) , serving as holdover 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), serving as holdover 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 2015 the HCRC staff consisted of 25 positions:*

- Enforcement Staff:
 - Executive Director
 - Deputy Executive Director
 - Enforcement Attorneys (3)
 - Program Specialist – 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.