

LABtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, March 12, 2016 12:31 PM
To: LABtestimony
Cc: louis@hawaiidisabilityrights.org
Subject: Submitted testimony for SB2895 on Mar 15, 2016 10:30AM

SB2895

Submitted on: 3/12/2016

Testimony for LAB on Mar 15, 2016 10:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Hawaii Disability Rights Center	Comments Only	Yes

Comments: While this SD1 version may represent an improvement over the original bill, we still have some concerns about the granting the Commission the ability to dismiss a case after it has previously found cause to believe that the claimant suffered discrimination. We also do not believe that precluding judicial review of that decision is good policy.

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If the purpose of the bill is to “Establishes an advisory law enforcement employment standards and training board responsible for developing statewide employment standards and training for county and state law enforcement officers who carry firearms and wear a badge” than why is it **“Employment standards and training recommendations; voluntary implementation.** Each government agency may voluntarily implement the employment standards and training recommendations for its law enforcement officers who wear badges and carry firearms”. Why expend time establishing an advisory board (possibly tax dollars) for a system that’s “may” or is “voluntary”. If this is to create a facade that something is being done to create trust in “the immense power and authority that the State and counties grant to police, sheriffs, and other law enforcement officers who carry firearms, it is important to establish recommended statewide standards for these officers. These standards would benefit county and state departments or agencies, as well as the general public” than fine, but if faith in change is required, than shouldn’t it be mandatory. As any law enforcement, legal agency,. Etc. wields great power over a victim with their “discretionary” abilities – I should know, I’ve heard, and been to a number of them, with much the same results – misfeasance, nonfeasance, and most of all malfeasance. Heard the “join the...and you can get away with stuff like this” (harassment/terroristic threatening/etc. being the “stuff like this”) Heard a lot of stories like the DLNR – though that was to an abandoned building by the water – decades ago, though this seems to be the first one that’s reached the news. Suppose many don’t report it, because of fear of retaliation or issues with going against someone with “power”. Dealing with a lot of “discretionary”/bullying type comments/blatant disregard for laws already in place/etc. because of the mentality behind the “power”. I’ve even been told that my emails are unintelligible or understandable – than had that labeled as misfeasance or nonfeasance – with my claims dropped, and an investigation refused.

Course this doesn’t even cover the other incidents that have occurred in recent years and made it to the news like a police officer trying to enter a home under false pretences (covered as an officer attempting to burglarizing a home); the officer who’s gun was fired in Target; the officer who went surfing while on duty; the arcade/game room incident; etc. Not to mention the parties that occurred in my neighborhood of “police family”/”police officer”/etc. Intimidation tactics/harassment/etc. occurring nightly, after I submitted a report – though starting prior to this, as with each officer who denied filing a report for me, turned to shouts of “file a police report” shouted nightly as party fodder – with claims of being police officers. (Not to mention the uniformed police officers I spoke to, of which one told me that if I wanted to file a police report to call 911 again and another officer would come and take it.)

With this type of “standard” (as this was not a handful of officers – this isn’t even after just meeting with officers who came to my home, but speaking with those who are on a desk, because of all their years of service and with rank - this is after meeting with officers over a period of 8 years – to the point an officer mentioned he could find my home blindfolded and another told me not to call unless there was blood) for those with “power” don’t you think a public outcry would occur. That the public deserves to have officers that they can trust and rely in – not one department saying the officers are “trained” to do this, but in actuality get away with doing something else.

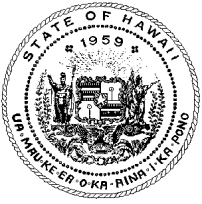
As I've mentioned previously, I've actually had dealing with the "HCRC" and those claiming to work for the "HCRC" (during the midnight "investigations" that were conducted years before I actually contacted the HCRC for assistance, than after contacting them – with a recognizable voice present during each "investigation" that was supposedly conducted. Which I did bring to the attention of the director, but nothing ever came of it, but continued if not more vocal outbursts or comments) And which I assume had to do with the ""**§368-13 Investigation and conciliation of complaint.** (a) After the filing of a complaint, or whenever it appears to the commission that an unlawful discriminatory practice may have been committed, the commission's executive director shall make an investigation in connection therewith..." as my claim was against my then employer and their "parties" held in my neighborhood to defame or as they put it "do everything illegal" as they supported the "co-op" in breaking the contract that was and is still in effect regarding my duplex. (With some supporters still actively picketing or bringing up previous company topics...but it's been over 2 years now since the HCRC dropped my claim...) Which again brings me to the "in the executive director's discretion, may:" portion. The HCRC already has the "discretion" to assist or deny victims from receiving assistance from them – even had shouts that they're "volunteers" and complaints of how they work for no pay, and that my claim was "dropped" because "you not Hawaiian" shouted in my neighborhood from people claiming to work for the HCRC. (Also had shouts from a female about how I was "asking for too much"/"who do you think you are..." and the comparison between a company I listed from when the harassment started, as well) I even had the comment I made to the investigator assigned to my case, when he asked what I hoped to achieve, and my response of "to ensure this never happens to anyone else", even though my case was extreme, being repeated back to me, along with "cause it's you" and "not getting nothing"/"you didn't want nothing" (this usually with the as long as it's you, and doesn't happen to anyone else bit usually tacked on) Course, I also have letters/emails from the HCRC that it's within their power to drop my claim, and that during the investigation the amount of time before they'd request any security footage from my former employer being 2 years – even though I mentioned that there were time constraints and tried arguing that I'm not upset that the investigators have their set procedures in place and can't/won't change the order in which they receive/process complaints. (Course before the end of the "investigation" claims of the lawyer representing my employer was also mentioned...but...)

The HCRC has too much leeway as is over a victim's right to receive justice and their civil rights enforced. And then to add in "The executive director's determination to issue a final conciliation demand shall be subject to reconsideration by the commission on the commission's own initiative but shall not be subject to judicial review. The executive director may demand appropriate affirmative action as, in the judgment of the executive director, will carry out the purpose of this chapter, and include a requirement for reporting on the manner of compliance." Basically taking away the victims right again, to have the claim reevaluated and checked for compliance by an impartial party, is just how much "power" to destroy a person's life are you giving agencies. They can dismiss a complaint even if they find wrong doing, because the company doesn't want to negotiate. They don't have to answer to a judicial review board. They have discretionary power. And only the right to housing, is exempt – which is great, but basically by not enforcing and being able to dismiss a claim and send it for a "right to sue" (which considering the comments I've received from lawyers of "I don't see nothing" yet wanting to keep the copy of my statements or review them, or "lawyers can't testify against other lawyers" from one, when I

didn't even mention a lawyer being involved, and was discussing other incidents; with even a lawyer saying it was legal for employees to go through my purse, change a number on my cell phone, etc. without my permission...Not to mention the shouts from supposed people of my former co-worker/HCRC/legal entities, that it was because "everybody knows" so, why pay for something that's being told to everyone who has the ability to fix the problem – not to mention used in another manner, as many seem to be here to "count" or record other items of amusement for them...) – my shirt lifted, I've had a female chase after me; my bag rummaged through, without my knowledge and items removed or changed; nearly every item listed on the HCRC form completed, though for the most part in a manner that seems to allow for the HCRC to disregard; even my testimony that I received was not exactly what I said, with one area blatantly incorrect; etc.

Basically what I'm trying to say, is that sometimes a victim can't afford or obtain a lawyer to seek justice and the HCRC/EEOC are the last chance the victim has to obtain justice, and when the 'discretionary powers' are invoked, that too much power leads to abuse of power and the guilty are never brought to justice and allowed to continue on. As if you're held to a higher standard, and fall through those cracks and abuse your power, do you really believe that the commission will on its "own initiative" perform a judicial review. My case/claim is over, the time limit ended...even with the offenders still continuing to act inappropriately and in a manner more fitting of terroristic threatening than as representatives of any institution other than possibly the inmates of a correctional institution.

In any event, please don't approve this bill to go any further...the discretionary power in place now, has already ruined my life and livelihood, and the guilty have had ample pleasure in reminding me daily. Three years since I've worked for the company, and they're still monitoring my restroom usage or when not work related, seem to be over the "contract"...And as far as I know, they don't work for the employer any longer, just seem to enjoy acting as if they do, and have shouted the company's name in the neighborhood numerous times, but nothing has been done to prevent them...which is another issue with legal agency's or those in "power" and their 'discretionary power'...8 years total...



LATE

HAWAI‘I CIVIL RIGHTS COMMISSION

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March 15, 2016
Rm. 309, 10:30 a.m.

To: The Honorable Mark Nakashima, Chair
Members of the House Committee on Labor & Public Employment

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawai‘i Civil Rights Commission

Re: S.B. No. 2895, S.D.1

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai‘i’s laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai‘i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

The HCRC supports S.B. No. 2895, S.D.1, with a suggested amendment.

S.B. No. 2895, S.D.1, authorizes the HCRC Executive Director, in cases in which a notice of cause has been issued and conciliation efforts fail, to: 1) issue a final demand, and docket the case for litigation; **OR**, 2) dismiss the complaint and issue a notice of right to sue. The bill also provides an exception for dual-filed fair housing cases, as required by U.S. Department of Housing and Urban Development (HUD) federal substantial equivalence requirements.

The current HRS § 368-13(e) mandates that when conciliation efforts in a cause case fail to secure a conciliation settlement, the Executive Director *shall* issue a final conciliation demand. § 368-14 then requires that the case be docketed for contested case hearing / trial before a Hearings Examiner.

The mandatory language in the statute, with the use of the word "shall" in mandating each next step of the process has several consequences negatively affecting the efficiency and effectiveness of HCRC civil rights law enforcement, affecting the way that cases are investigated and conciliated.

The bill provides for prosecutorial discretion, allowing the Executive Director to decide which cases should be litigated. **Similar discretion is provided to and exercised by the U.S. Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964.**

The current mandatory language creates problems and inefficiencies, stemming from the difference between the “reasonable cause” standard applied in investigation and the “preponderance of evidence” standard applied in litigation, administrative hearing and judicial review. Simply put, there are cases that are cause cases but not litigation cases, in which there may be reasonable cause, but it would be difficult to prevail at hearing and on appeal. The result is that the HCRC is forced to use its limited resources in an inefficient manner, in conciliation and investigation, rather than focusing its resources on strong cases that should be litigated.

This bill will in some measure help to alleviate the problems created by loss of enforcement resources since 2007, by allowing for more strategic use of existing resources.

S.B. No. 2895 also provides a new subsection 368-13(f) that makes an exception to the exercise of discretion by the Executive Director under the amendment to subsection 368-13(e). The new subsection (f) maintains the mandatory language from the current statute for cases that are dual-filed under both our state fair housing law, chapter 515, and the federal Fair Housing Act. These comprise approximately 10-15% of the complaints filed with the HCRC. Our federal partners at the U.S. Department of Housing and Urban Development (HUD) Office of Fair Housing and Equal Opportunity (FHEO) have advised us that this exception is required to maintain substantial equivalence with federal fair housing law.

S.B. No. 2895, the S.D.1 Amendment, and the HCRC Request for an H.D.1 Amendment

S.B. No. 2895, in its original form and in the S.D.1, provides for HCRC Executive Director discretion in cause cases where conciliation has failed, to: 1) issue a final demand, which triggers the docketing of the case for a contested case hearing; or, 2) to dismiss the complaint and issue a notice of right to sue.

Both S.B. No. 2895 and the S.D.1 provide that the Executive Director's dismissal of a complaint with the issuance of a notice of right to sue shall not be subject to judicial review. This is consistent with current state and federal law, under which there is no express or implied judicial review of a non-final decision of the Commission (or the EEOC). The Commission issues final decisions on cases that are litigated in contested case hearings.

The original S.B. No. 2895 and the S.D.1 differ primarily in the assignment of statutory authority to reconsider the Executive Director's exercise of discretion in docketing a case for contested case hearing or dismissing it with a notice of right to sue. In the original S.B. No. 2895, the authority to reconsider that exercise of discretion was assigned to the Executive Director, on the Executive Director's own initiative. In the S.D.1, the Senate has assigned the authority to reconsider the Executive Director's exercise of discretion to the Commission, on its own initiative.

The S.D.1 assignment of authority to the Commission to reconsider the Executive Director's exercise of discretion is problematic and impracticable in several respects:

Under HRS Chapter 368, and HAR Title 12, Chapter 46, Subchapter 1, the Hawai'i Civil Rights Commission is statutorily divided into two functional sections, with the Executive Director responsible for enforcement (investigation, conciliation, and litigation), and the Commission responsible for adjudication (contested case hearings through final orders, declaratory relief, and rule relief). Final orders of the Commission are subject to appeal in the Circuit Court, pursuant to HRS § 368-16. HAR § 12-46-40 expressly prohibits ex parte communication between HCRC enforcement staff and the Commission (and its Chief Counsel), to separate adjudication from pre-hearing stages.

Accordingly, the Executive Director is responsible for enforcement dismissals of complaints, under HAR § 12-46-11. The rule also provides that, "[t]he dismissal of a complaint may be reconsidered on the executive director's own initiative at any time or upon the complainant's written request ..." This makes sense, given that the Commission's adjudication role does preclude access to pre-hearing stages of complaint processing, investigations, and enforcement dismissals. It also makes sense and gives common meaning to

the term “reconsideration,” as the rule provides for reconsideration (rather than appeal or review) by the person authorized to make the determination.

It is true that the current statute, HRS § 368-13(d), provides for Commission “reconsideration” of the Executive Director’s determination that a final conciliation demand is to be made, which triggers the docketing of a case for a contested case hearing under HRS § 368-14. Once the final demand is made, the Commission is notified, because if the case is not settled within 15 days of the final demand, the Commission appoints a Hearings Examiner and the case is docketed for a contested case hearing. Reconsideration at this point is not substantive, but typically requested to postpone docketing and allow additional time for conciliation efforts. This is distinct and different in kind from the reconsideration of dismissals of complaints, not truly a reconsideration but a procedural mechanism to allow the rescission or extension of a final demand, to allow for additional conciliation efforts. The use of the word “reconsideration” in the current statute may be inappropriate, but it has not caused problems in operation.

The HCRC requests an H.D.1, with an amendment restoring the original S.B. No. 2895

proposed HRS § 368-13(e) language, which read:

(e) [~~Where~~] When the executive director has determined that there is reasonable cause to believe that an unlawful discriminatory practice has occurred and has been unable to secure from the respondent a conciliation agreement acceptable to the commission within [~~one hundred and~~] one hundred eighty days of the filing of the complaint, unless the commission has granted an extension of time, the executive director [~~shall demand~~], in the executive director's discretion, may:

- (1) Demand that the respondent cease the unlawful discriminatory practice[~~-~~]; or
- (2)
- (3) Dismiss the complaint and issue a notice to the complainant indicating that the complainant may bring a civil action as provided under section 368-12.
- (4)

The executive director's determination that a final conciliation demand is to be made shall be subject to reconsideration by the commission on its own initiative but shall not be subject to judicial review. The executive director may demand appropriate affirmative action as, in the judgment of the executive director, will effectuate the purpose of this chapter, and include a requirement for reporting on the manner of compliance.

The executive director's determination to dismiss a complaint and to issue a notice of right to sue issued **may be reconsidered on the executive director's own initiative** but shall not be subject to judicial review.

The HCRC supports passage of S.B. No. 2895, S.D.1, in an H.D.1 incorporating the HCRC's suggested amendment.