HAWAIʻI CIVIL RIGHTS COMMISSION

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February 29, 2016
Rm. 016, 10:00 a.m.

To: The Honorable Gilbert Keith-Agaran, Chair
Members of the House Committee on Labor & Public Employment

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawaiʻi Civil Rights Commission

Re: S.B. No. 3036

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

The HCRC opposes S.B. No. 3036. The stated intent of the bill seems innocuous: "…to clarify that Hawaii's anti-discrimination law, as set forth in part I of chapter 378 of the Hawaii Revised Statutes, does not prohibit refusals to hire, refusals to refer, or discharges that are unrelated to discriminatory practices in section 378-2, unequal pay in 378-2.3, criminal conviction records in 378-2.5, and credit history in 378-2.7, Hawaii Revised Statutes." However, the HCRC has serious concerns over both the intent of the bill and unintentional consequences S.B. No. 3036 will have, if enacted.

S.B. No. 3036 is intended to legislatively reverse the decision of the Hawaiʻi Supreme Court in *Adams v. CDM Media USA, Inc.*, 135 Hawaiʻi 1 (2015).

The discussion of the *Adams* decision and the proposed S.B. No. 3036 statutory change can and must be technical and complex, encompassing the legal standard for summary judgment, the analytical framework for proof of discrimination by circumstantial evidence, shifting burdens of production or going forward as distinct from burdens of proof or persuasion.

In simple terms, the *Adams* decision makes it easier for plaintiffs in employment discrimination cases brought under state law, HRS chapter 378, part I, to overcome motions for summary judgment and have a decider of fact (jury or judge) make the ultimate factual determination of whether there was unlawful intentional discrimination in circumstantial evidence cases, based on evidence presented at trial. The Court relied on statutory language dating back to the initial enactment of the Hawai‘i fair employment law, providing that nothing in the law "prohibits or prevents an employer … from refusing to hire, refer, or discharge any individual for reasons relating to the ability of the individual to perform the work in question …"

S.B. No. 3036 would amend HRS § 378-3, by amending paragraph (3) to read:

> 378-3 Exceptions. Nothing in this part shall be deemed to:
>
> * * * * *
>
> (3) Prohibit or prevent an employer, employment agency, or labor organization from refusing to hire[~~,~~] or refer[~~,~~] or [~~discharge~~] discharging any individual for reasons [~~relating to the ability of the individual to perform the work in question;~~] unrelated to sections 378-2, 378-2.5, or 378-2.7;

The HCRC's concerns are at least two-fold: 1. The proposed amendment could alter the analytical framework for circumstantial evidence cases, and arguably creates an affirmative defense where there is none under current state or federal law; and, 2. The proposed amendment could alter the analysis of mixed-motive cases, diminishing or eliminating employer responsibility where discrimination is a factor, but not the only factor, in an adverse employment action or decision. There is no analogous or similar language to the proposed amended statutory language in the federal Title VII law.

What is *Adams v. CDM Media USA, Inc*.?

The Court in *Adams* addressed the analytical framework that applies on summary judgment in state employment discrimination cases involving proof/inference of discriminatory intent by circumstantial

evidence.

The Court reviewed the analytical framework applied in state employment discrimination cases based on circumstantial evidence, citing *Shoppe v. Gucci Am., Inc.*, 94 Hawai‘i 368 (2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

The basic *Shoppe* / *McDonnell Douglas* three-step analysis is simplified here:

First step: The plaintiff has the burden of establishing, by a preponderance of the evidence. a prima facie discrimination case, comprised of these elements: 1) that plaintiff is a member of a protected class; 2) that plaintiff is qualified for the position applied for (or otherwise in question); 3) that plaintiff was not selected (or subjected to other adverse employment action); and, 4) that the position still exists (filled or continued recruitment).

Second step: Once the plaintiff has established a prima facie discrimination case, the burden of production then shifts to the employer, who must proffer a legitimate, nondiscriminatory reason for the adverse employment action or decision. This does not shift the burden of proof to the employer.

Third step: If the employer proffers a legitimate, nondiscriminatory reason for the adverse employment action or decision, the burden then shifts to the plaintiff to demonstrate that the employer's proffered reason(s) are pretextual (*i.e.*, a pretext for discrimination). The burdens of persuasion and proof of this ultimate question of fact, whether the employer was more likely than not motivated by discrimination or the employer's proffered reason is not credible, lie with the plaintiff.

The *Adams* Court focused on the second step of the *Shoppe* / *McDonnell Douglas* analysis, exploring and discussing what constitutes a **legitimate**, nondiscriminatory reason. The Court held: that the employer's proffered reason must be legitimate, and that the articulated reason/explanation must be based on admissible evidence; if not, the employer has not met its burden of production.

The Court reviewed the legislative history of the HRS chapter 378 fair employment law prohibition against employment discrimination, looking back to the 1963 enactment of Act 180 (which predated the enactment of the federal law, Title VII of the Civil Rights Act of 1964), which included this statutory

language:

(1) It shall be unlawful employment practice or unlawful discrimination:

(a) For an employer to refuse to hire or employ or to bar or discharge from employment, any individual because of his race, sex, age, religion, color or ancestry, provided that an employer may refuse to hire an individual ***for good cause relating to the ability of the individual to perform the work in question*** …

(emphasis added).

The legislature included similar language when it recodified and reorganized the statutory anti-discrimination prohibitions and exceptions in 1981, into what became HRS §§ 378-2 and 378-3. HRS § 378-3(3) continues to provide:

§ 378-3 Exceptions.

Nothing in this part shall be deemed to:

* * * * *

(3) Prohibit or prevent an employer, employment agency, or labor organization from refusing to hire, refer, or discharge any individual for reasons relating to the ability of the individual to perform the work in question …

Citing the legislative history of the original 1963 Act 180, which provides that employers may refuse to hire, bar, or discharge for "good cause relating to the ability of the person to perform the work in question," its continuing effect based on the 1981 recodification of the exception in HRS § 368-3(3), and rules of statutory construction, the Court held that a "legitimate, non-discriminatory reason" proffered in the second step of the *Shoppe* / *McDonnell Douglas* analysis "**must be related to the ability of the individual to perform the work in question**." *Adams v. CDM Media USA, Inc.*, 135 Hawai'i 1 (2015), at 22.

This employer's burden to articulate a legitimate, work-related reason for its action is not a burden of proof. The legitimacy of the articulated explanation is distinct from proving that the

articulated reason is true or correct. *Id*., at 23.

The *Adams* Court also held that on summary judgment, an employer's proffer of a legitimate, non-discriminatory reason for its action must be based on admissible evidence. *Id*., at 28-29.

DISCUSSION

The amendment to HRS 378-3(3) proposed in S.B. No. 3036, ostensibly intended to clarify or correct the meaning of a "legitimate, nondiscriminatory reason" in the *Shoppe* / *McDonnell Douglas* analysis, could be interpreted to result in the following unintended consequences:

1) Eliminating the requirement in the *Shoppe* / *McDonnell Douglas* analysis that requires an employer's proffered articulated reason for its action be both **legitimate** and nondiscriminatory. This would allow employers to carry their burden by articulating virtually any reason other than a discriminatory reason for their actions, even explanations that are illegitimate and not worthy of credence.
2) Arguably create an affirmative defense for employers that does not exist, where an employer can overcome circumstantial evidence discrimination claim by showing any plausible reason for its action that is not based on a prohibited bases, regardless of the circumstantial evidence of discriminatory intent.
3) Possibly undermine and diminish employer responsibility for adverse acts that are partly, but not wholly, motivated by discriminatory intent, a departure from state and federal law on mixed motive cases.

The *Shoppe* / *McDonnell Douglas* analytical scheme was created to help plaintiffs, allowing them to prove claims of unlawful discrimination in cases where there is no direct evidence of discriminatory intent. But the *Shoppe* / *McDonnell Douglas* shifting burden analysis has evolved, through formalistic application, to make it difficult for plaintiffs to overcome summary judgment, with courts requiring plaintiffs to prove pretext, and often the ultimate factual issue of whether the

preponderance of the evidence establishes that unlawful discrimination occurred, at that pre-trial stage.

The *Adams* decision changed that, making it easier for the plaintiff to survive summary judgment, to have the opportunity to present evidence of discrimination to a fact-finder at trial, whether jury or judge. However, at trial the plaintiff still bears the ultimate burden of proof and persuasion, and is required to prove the ultimate fact of discrimination by a preponderance of evidence. *Shoppe v. Gucci America, Inc.*, 94 Hawai‘i 368 (2000), at 379.

CONCLUSION

The HCRC opposes S.B. No. 3036.

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February 26, 2016

To: The Honorable Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair; Members of the Committee

From: Carl M. Varady

Re: S.B. 3036–Testimony in Opposition

DATE: Monday, February 29, 2016, 10:00 a.m., Conference Room 016 State Capitol
415 South Beretania Street

Chairperson Keith-Agaran, Vice-Chairperson Shimabukuro and Members of the Committee:

This testimony is submitted in opposition to the proposed amendment of HRS § 378-3 contained in S.B. 3036. I offer this testimony as an attorney representing numerous workers throughout Hawai'i who have sought to exercise their rights to be free from discrimination, to report and oppose discrimination and be free from retaliation for doing so. This amendment is a huge step backward and will make employment discrimination cases more likely to be dismissed at summary judgment. Employees' rights under Hawaii's anti-discrimination laws will be limited in an extreme manner not apparent from the fact of the bill. It is **not** a "housekeeping" measure. It is an attempt by corporate interests to use your Committee and the Legislature as tools to prune workers' civil rights significantly.

In *Adams v. CDM Media USA, Inc.*, 135 Hawai'i 1 (2015), the Hawai'i Supreme Court made it clear that Hawaii's anti-discrimination law does not allow employers to offer **just any "plausible" excuse** for not hiring, demoting, firing or otherwise affecting the terms of someone's employment. Hiring, demotion, firing or other terms of employment must be based on and related to the **requirements of the actual job in question**. The Hawai'i Supreme Court did not extend Hawaii's anti-discrimination law in *Adams*. It looked at the legislative history of the original 1963 Act 180.

That Act provided that employers may refuse to hire, bar, or discharge for "good cause ***relating to the ability of the person to perform the work in question***." That language has continued in effect. In 1981 the Legislature re-codified this exception in HRS § 368-3(3). Applying the rules of statutory construction, the Hawai'i Supreme Court held that where an employer offers what it claims to be a "legitimate, non-discriminatory reason" for not hiring, demoting, firing or otherwise affecting the terms of someone's employment, the employer's excuse "must be related to the ability of the individual to perform the work in question." *Adams v. CDM Media USA, Inc.*, 135 Hawai'i 1 (2015), at 22. In other words, since 1963, employers in Hawai'i cannot make up excuses for not hiring, demoting, firing or otherwise affecting the terms of someone's employment; whatever employers state as the reason for such action must be based on the requirements of the job. *Adams* continues to require employers to articulate a legitimate, work-related reason for its action. The legitimacy of the explanation given by the employer is a separate issue from proving that the reason given by the employer is true. *Id.*, at 23.

The proposed amendment would allow employers to pick reasons for not hiring, demoting, firing or otherwise affecting the terms of someone's employment that have nothing to do with the person's ability to do the work in question. The proposed amendment would only prohibit employers from not hiring, demoting, firing or otherwise affecting the terms of someone's employment based on the enumerated categories of HRS § 378-2--*e.g.*, sex including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status.

The proposed amendment would allow employers to not hire, demote, fire or otherwise affect the terms of someone's employment based on such excuses such as: (1) non-English accent; (2) physical stature or weight; (3) "personality;" (4) neighborhood of residence; or (5) vague assertions of "unfitness" or "inexperience." None of these are expressly protected *per se* by HRS § 378-2.

More importantly, when a lawsuit is filed, employers routinely file to have cases dismissed at summary judgment before a trial is ever held. An employer often argues it has made a decision to not hire, demote, fire or otherwise affect the terms of someone's employment based on vague assertions of "unfitness" or "inexperience," without ever having to explain how these vague criteria relate to the work in question. *Adams* reaffirms that employers can only have cases dismissed when they establish the reason for not hiring, demoting, firing or otherwise affecting the terms of someone's employment was directly related to the work, not a made up reason that can be used to mask biases based on gender, race, national origin, religion and the like.

To adopt the proposed amendment would overrule *Adams*. Adopting this bill will lead to dismissal of employees' discrimination suits based on fabrication and employers hiding improper motives. Valid cases will be dismissed for pretextual reasons. Workers will suffer prohibited discrimination without a remedy and legal representation, already scarce, will become even more difficult to find.

Hawai‘i law does not put its thumb on the scale in favor of employers. The proposed amendment would do just that. Your Committee is asked to hold this bill.

Mahalo to you and the Committee for the opportunity to submit this testimony

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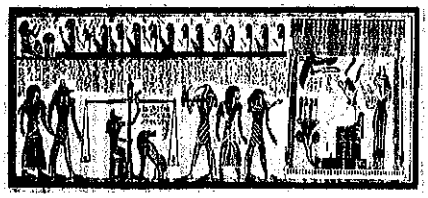

TO: COMMITTEE ON JUDICIARY AND LABOR, Hearing Date: 2-29-2016, 10:00 am.
Conference Room 016
State Capitol
415 South Beretania Street
Honolulu, Hawaii

RE: TESTIMONY IN OPOSITION TO SB 3036 RELATED TO EMPLOYMENT

Dear Senator Keith-Agaran, Chair & Senator Maile S.L. Shimabukuro and Committee Members:

My name is Attorney Daphne E. Barbee-Wooten and I practice Civil Rights Law in the State of Hawai'i. I am writing to express my opposition to SB 3036 which amends our current civil rights laws to allow an employer or employment agency to terminate employees for grounds which have not been listed in the civil rights Law. The amendment changes Hawaii Supreme Court law in Adams vs. CDM Media USA, Inc., 135 Hawaii 1 (2015). According to the Adams case, a legitimate non discriminatory reason for terminating an employee must be related to the ability of the individual to perform his or her work. Id. page 22.

An employer should not be able to terminate an employee if the employee engages in off duty support of civil rights issues such as equal pay for women, because that is not related to the employees ability to do the job at work. I am concerned that this amendment will open the flood gates to permit employers to do away with the focus on an employee's ability to do the work. In an employment setting employees are hired for a job and if they do their job, the employer should not be able terminate them for unrelated reasons. By taking away the paragraph requiring that a legitimate reason for termination must be based upon and related to the individual employee's ability to perform the work, it leaves employees unprotected. Please do not vote in favor of this Bill. Thank you.

Sincerely,

Daphne E. Barbee-Wooten
Attorney at Law