

**CHAPTER 368**  
**CIVIL RIGHTS COMMISSION**

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## **Cross References**

Motion picture theater accommodation, see §489-9.

## **Law Journals and Reviews**

Employee Rights Under Judicial Scrutiny: Prevalent Policy Discourse and the Hawai'i Supreme Court. 14 UH L. Rev. 189 (1992).

Sexual Harassment in the Workplace: Remedies Available to Victims in Hawai'i. 15 UH L. Rev. 453 (1993).

## **Case Notes**

Section 368 [sic], which was quite similar to Americans with Disabilities Act (ADA), found to be the most "analogous" state statute regarding applicable limitations period for plaintiff's ADA claim; since statutory period of ninety days was appropriately "borrowed" and became part of plaintiff's ADA claim, and since plaintiff filed suit within this time period, plaintiff's claim was not time-barred under ADA limitations period; passenger ticket contract did not trump applicable state law and ADA limitations periods. 51 F. Supp. 2d 1057 (1999).

Plaintiff's [chapters] 368 and 378 state law claims against the county were time-barred under §46-72, where plaintiff never provided the county written notice of plaintiff's claim. 504 F. Supp. 2d 969 (2007).

Plaintiff's charges filed with the equal employment opportunity commission were deemed "dual-filed" with the Hawaii civil rights commission. Plaintiff timely filed the charge for claims under chapter 378 based on plaintiff's termination within the 180-day time limitation. 907 F. Supp. 2d 1143 (2012).

## **"PART I. GENERAL PROVISIONS**

**§368-1 Purpose and intent.** The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, including gender identity or expression, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy. It is the purpose of this chapter to provide a mechanism that provides for a uniform procedure for the enforcement of the State's discrimination laws. It is the legislature's intent to preserve all existing rights and remedies under such laws. [L 1988, c 219, pt of §1;

am L 1989, c 387, §1; am L 1991, c 2, §1; am L 1992, c 33, §5;  
am L 2011, c 34, §2]

" **§368-1.5 Programs and activities receiving state financial assistance.** (a) No otherwise qualified individual in the State shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by state agencies, or under any program or activity receiving state financial assistance.

(b) As used in this section, the term "disability" means the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment.

(c) As used in this section, "state financial assistance" means grants, purchase-of-service contracts, or any other arrangement by which the State provides or otherwise makes available assistance in the form of funds to an entity for the purpose of rendering services on behalf of the State. It does not include procurement contracts, state insurance or guaranty contracts, licenses, tax credits, or loan guarantees to private businesses of general concern that do not render services on behalf of the State. [L 1989, c 387, §2; am L 1992, c 33, §5]

" **§368-2 Civil rights commission established.** (a) There is established a civil rights commission composed of five members nominated and, by and with the advice and consent of the senate, appointed by the governor for staggered terms in accordance with section 26-34. The members appointed to the commission shall be selected on the basis of their knowledge and experience in civil rights matters and on the basis of a demonstrated commitment to the preservation of the civil rights of all individuals. The governor shall designate one of the commissioners as the chair of the commission.

(b) Any action taken by the commission shall be by a simple majority of the members of the commission. All decisions of the commission shall be reduced to writing and shall state separately its findings of fact and conclusions. Any vacancy in the commission shall not impair the authority of the remaining members to exercise all the powers of the commission. The governor may appoint an acting member of the commission during the temporary absence from the State or the illness of any regular member. An acting member, during the acting member's term of service, shall have the same powers and duties as the regular member.

(c) The members shall serve without compensation but shall be paid per diem and travel expenses when attending meetings of

the commission. The commission shall be within the department of labor and industrial relations for administrative purposes only. [L 1988, c 219, pt of §1; am L 1989, c 386, §5]

" **§368-3 Powers and functions of commission.** The commission shall have the following powers and functions:

- (1) To receive, investigate, and conciliate complaints alleging any unlawful discriminatory practice under part I of chapter 489, chapter 515, and part I of chapter 378, and complaints filed under this chapter, and conduct proceedings on complaints alleging unlawful practices where conciliatory efforts are inappropriate or unsuccessful;
- (2) To hold hearings and make inquiries, as it deems necessary, to carry out properly its functions and powers, and for the purpose of these hearings and inquiries, to administer oaths and affirmations, conduct depositions, compel the attendance of parties and witnesses and the production of documents by the issuance of subpoenas, examine parties and witnesses under oath, require answers to interrogatories, and delegate these powers to any member of the commission or any person appointed by the commission for the performance of its functions;
- (3) To commence civil action in circuit court to seek appropriate relief, including the enforcement of any commission order, conciliation agreement, or predetermination settlement;
- (4) To issue the right to sue to a complainant;
- (5) To order appropriate legal and equitable relief or affirmative action when a violation is found;
- (6) To issue publications and results of investigations and research that, in its judgment, will tend to promote goodwill and minimize or eliminate discrimination in employment, housing, and public accommodations;
- (7) To submit annually to the governor and the legislature a written report of its activities and recommendations for administrative or statutory changes required to further the purposes of this chapter;
- (8) To appoint an executive director, deputy executive director, attorneys, and hearings examiners who shall be exempt from chapter 76, and investigators and other necessary support personnel who shall be subject to chapter 76. Section 28-8.3 notwithstanding, an attorney employed by the commission as a full-time staff member may represent the commission in

litigation, draft legal documents for the commission, provide other necessary legal services to the commission, and shall not be deemed to be a deputy attorney general; and

- (9) To adopt rules under chapter 91. [L 1988, c 219, pt of §1; am L 1989, c 386, §6; am L 1991, c 80, §1 and c 252, §2; am L Sp 1993, c 8, §53; am L 2000, c 253, §150; am L 2001, c 55, §17(1)]

### Case Notes

Claim for negligent and/or intentional infliction of emotional distress against Hawaii civil rights commission not barred under §662-15(1), as acts of investigating complaint, instituting suit based on finding of reasonable cause, and sending demand letter were part of routine operations of commission and did not involve broad policy considerations encompassed within the discretionary function exception. 88 H. 85, 962 P.2d 344 (1998).

The discretionary function exception in §662-15(1) is limited to situations in which a government agent is engaged in the effectuation of "broad public policy"; the investigation of a complaint by the Hawaii civil rights commission, in and of itself, does not involve such considerations; thus, a counterclaim for negligence in the performance of an investigation is not barred by sovereign immunity. 88 H. 85, 962 P.2d 344 (1998).

" **§368-4 Records; confidentiality; disclosure; reporting requirements.** (a) All records of the investigation arising from a complaint filed with the commission shall be kept confidential and shall not be disclosed to anyone; provided that any factual matters provided to the commission during the intake and investigation of the complaint, including complainant and respondent statements and documents, pre-complaint questionnaires, witness statements for which the witness has not requested confidentiality or for whom the commission has not approved confidentiality pursuant to subsection (c), other documents received from witnesses, and correspondence with parties and witnesses may be disclosed:

- (1) As may be required by order of a court with jurisdiction in a case arising from a complaint filed with the commission; or
- (2) As may be requested by a party in a complaint filed with the commission, if a complainant verifies in writing that the complainant has received a notice of right to sue pursuant to section 368-12 and a civil

action has been filed or the right to sue has not expired, or if a respondent verifies in writing that the complainant has filed a civil action.

(b) All records of non-factual matters relating to the investigation and arising from a complaint filed with the commission, including:

- (1) Settlement discussions;
- (2) Financial records;
- (3) Commission attorney communications and work products;
- (4) Confidential witness statements; and
- (5) Commission investigatory procedures, including but not limited to:
  - (A) Training and educational discussions between staff;
  - (B) The case analysis manual;
  - (C) Procedures and standards used in case analysis;
  - (D) Investigatory directives;
  - (E) Investigative plans, strategies, or goals;
  - (F) Case reviews; and
  - (G) Investigator notes, impressions, recommendations, and reports;

shall be considered confidential records except as otherwise provided by law.

(c) In making a determination to approve or deny a request that a witness' identity or statement be kept confidential, the commission shall consider:

- (1) The relevance, materiality, and importance of the witness' statement;
- (2) The likelihood that the witness' statement could not be obtained without approval of a request that the witness' identity or statement be kept confidential; and
- (3) A reasonable and clearly definable fear by the witness that the witness or any other clearly identified person would suffer serious bodily or economic harm, retaliation, or termination of employment, if the witness' identity or statement were not kept confidential.

(d) The disclosure of records that are not related to the investigation arising from a complaint filed with the commission shall be subject to chapter 92F.

(e) The commission shall maintain complete records of all complaints filed with the commission and shall compile annual statistical data on the number of complaints filed and the status or disposition of those complaints by types of complaints.

(f) As used in this section, a "confidential witness statement" means:

- (1) A statement from a person who is not a complainant or respondent to a complaint filed with the commission;
- (2) Who requests their identity or statement be kept confidential; and
- (3) The commission approves the request for confidentiality pursuant to subsection (c).

(g) The commission shall provide to the governor and the legislature a report of that statistical data compiled pursuant to subsection (e) on an annual basis, not less than thirty days prior to the convening of the legislative session. [L 1988, c 219, pt of §1; am L 1989, c 386, §7; am L 1994, c 139, §1; am L 2010, c 139, §3]

" **[§368-5] Penalties.** Whoever intentionally resists, prevents, impedes, or interferes with the commission or any of its authorized agents or representatives in the performance of duties pursuant to this chapter, or who in any manner intentionally violates an order of the commission, shall be fined not more than \$500, or imprisoned for not more than ninety days, or both. [L 1988, c 219, pt of §1]

## "[PART II. REMEDIES]

### Revision Note

Part II designation added by revisor pursuant to §23G-15.

### Case Notes

No intentional infliction of emotional distress as commission's act of sending official letter to settle complaint if appellant paid monetary damages and took out newspaper ad not "outrageous" conduct. 88 H. 85, 962 P.2d 344 (1998).

The commission is subject to a duty to follow its own administrative rules, utilizing reasonable care, and was potentially negligent for instituting legal action barred by its own administrative rules. 88 H. 85, 962 P.2d 344 (1998).

Where appellant's counterclaim lacked any allegation of physical injury to appellant or another as a result of the conduct of the commission, action for negligent infliction of emotional distress could not be maintained. 88 H. 85, 962 P.2d 344 (1998).

**§368-11 Complaint against unlawful discrimination.** (a)  
The commission shall have jurisdiction over the subject of

discriminatory practices made unlawful by part I of chapter 489, chapter 515, part I of chapter 378, and this chapter. Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may file with the commission's executive director a complaint in writing that shall state the name and address of the person or party alleged to have committed the unlawful discriminatory practice complained of, set forth the particulars thereof, and contain other information as may be required by the commission. The attorney general, or the commission upon its own initiative may, in like manner, make and file a complaint.

(b) A complaint may be filed on behalf of a class by the attorney general or the commission, and a complaint so filed may be investigated, conciliated, heard, and litigated on a class action basis.

(c) No complaint shall be filed after the expiration of one hundred eighty days after the date:

- (1) Upon which the alleged unlawful discriminatory practice occurred; or
- (2) Of the last occurrence in a pattern of ongoing discriminatory practice.

(d) For the purposes of this chapter "unlawful discriminatory practice" means an unfair discriminatory practice or like terms, as may be used in part I of chapter 489, chapter 515, or part I of chapter 378. [L 1989, c 386, pt of §1; am L 1991, c 252, §3; am L 2001, c 55, §17(2), (3)]

### **Law Journals and Reviews**

Viability of the Continuing Violation Theory in Hawai'i Employment Discrimination Law in the Aftermath of Ledbetter. 30 UH L. Rev. 423 (2008).

### **Case Notes**

Plaintiff's submission of the pre-complaint questionnaire to the Hawaii civil rights commission constituted the filing of a complaint for purposes of calculating the state filing deadlines; plaintiff's complaint for state law sexual harassment was not filed with the commission in a timely manner. 468 F. Supp. 2d 1210 (2006).

The "single-filing" or "piggyback" rule applied under Hawaii law, where the "dual-filed" equal employment opportunity commission administrative complaints of four plaintiffs-intervenors were filed after the 180-day deadline in subsection (c) and the plaintiffs-intervenors sought to "piggyback" on the



timely administrative complaints of three other plaintiffs-intervenors. 504 F. Supp. 2d 1008 (2007).

Where original complaint was timely filed under subsection (c), amendment of complaint pursuant to Hawaii administrative rule §12-46-6.1 to add agent of employer responsible for alleged discriminatory conduct also did not violate statute of limitations under this section. 89 H. 269, 971 P.2d 1104 (1999).

" **[§368-12] Notice of right to sue.** The commission may issue a notice of right to sue upon written request of the complainant. Within ninety days after receipt of a notice of right to sue, the complainant may bring a civil action under this chapter. The commission may intervene in a civil action brought pursuant to this chapter if the case is of general importance. [L 1989, c 386, pt of §1]

#### Case Notes

Plaintiff's claims not time-barred, where defendant argued that certain claims were time-barred because plaintiff failed to serve defendant with complaint within ninety days of receipt of right to sue letters and that plaintiff had no intent to serve defendant with original complaint; among other things, plaintiff filed complaint within ninety days of receipt of right to sue letters and plaintiff was not also required to serve defendant within ninety-day period, plaintiff was only required to commence the civil action by filing complaint. 75 F. Supp. 2d 1113 (1999).

" **§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. At any time after the filing of a complaint but prior to the issuance of a determination as to whether there is or is not reasonable cause to believe that part I of chapter 489, chapter 515, part I of chapter 378, or this chapter has been violated, the parties may agree to resolve the complaint through a predetermination settlement.

(b) The executive director shall issue a determination of whether or not there is reasonable cause to believe that an unlawful discriminatory practice has occurred within one-hundred and eighty days from the date of filing a complaint unless the commission grants an extension of time to issue a determination.

(c) If the executive director makes a determination that there is no reasonable cause to believe that an unlawful discriminatory practice has occurred in a complaint filed, the executive director shall promptly notify the parties in writing. The notice to complainant shall indicate also that the complainant may bring a civil action as provided under section 368-12.

(d) When the executive director determines after the investigation that there is reasonable cause to believe that an unlawful discriminatory practice within the commission's jurisdiction has been committed, the executive director shall immediately endeavor to eliminate any alleged unlawful discriminatory practice by informal methods such as conference, conciliation, and persuasion.

(e) Where 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 eighty days of the filing of the complaint unless the commission has granted an extension of time, the executive director shall demand that the respondent cease the unlawful discriminatory practice. 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. [L 1989, c 386, pt of §1; am L 1991, c 252, §4; am L 2001, c 55, §17(4)]

### **Case Notes**

The commission did not exceed its statutory authority under subsection (b) and Hawaii administrative rule §12-46-12(f) by granting four extensions of the investigation into complainant's complaint; under the statute and rule, extensions are authorized and the number is not limited. 88 H. 10, 960 P.2d 1218 (1998).

Claim for negligent and/or intentional infliction of emotional distress against Hawaii civil rights commission not barred under §662-15(1), as acts of investigating complaint, instituting suit based on finding of reasonable cause, and sending demand letter were part of routine operations of commission and did not involve broad policy considerations encompassed within the discretionary function exception. 88 H. 85, 962 P.2d 344 (1998).

" **§368-14 Commission hearings.** (a) If, fifteen days after service of the final conciliation demand, the commission finds that conciliation will not resolve the complaint, the commission shall appoint a hearings examiner and schedule a contested case hearing that shall be held in accordance with chapter 91. The case in support of the complaint shall be presented at the hearing by counsel provided by the commission. Following the completion of the contested case hearing, the hearings examiner shall issue a proposed decision containing a statement of reasons including a determination of each issue of fact or law necessary to the proposed decision which shall be served upon the parties. Any party adversely affected by the proposed decision may file exceptions and present argument to the commission which shall consider the whole record or such portions thereof as may be cited by the parties. If the commission finds that unlawful discrimination has occurred, the commission shall issue a decision and order in accordance with chapter 91 requiring the respondent to cease the unlawful practice and to take appropriate remedial action. If there is no finding of discrimination, the commission shall issue an order dismissing the case.

(b) At any time after a complaint is filed, the commission may file a petition in the circuit court in the circuit in which the subject of the complaint occurred, or in the circuit in which a respondent resides or transacts business, seeking appropriate temporary relief against the respondent, pending final determination of proceedings under this chapter, including an order or decree restraining the respondent from doing or procuring any act tending to render ineffectual any order the commission may enter with respect to the complaint. The court may grant the temporary relief or restraining order as it deems just and proper, but no relief or order extending beyond five days shall be granted except by consent of the respondent or after hearing upon notice to the respondent and a finding by the court that there is reasonable cause to believe that the respondent has engaged in a discriminatory practice.

If a complaint is dismissed by final order of the commission or a court after a court has granted temporary relief or a restraining order under this subsection, the respondent is entitled to recover from the State damages and costs, not to exceed a total of \$500, sustained by reason of the temporary relief or restraining order in an action in the court that granted the temporary relief or restraining order. [L 1989, c 386, pt of §1; am L 1991, c 252, §5]

" **§368-15 Compliance review.** At any time in its discretion but not later than one year from the date of a conciliation

agreement, predetermination settlement, or after the date of a commission's order to cease an unlawful practice and to take appropriate remedy, the commission shall investigate whether the terms of the agreement, settlement, or order are being complied with by the respondent. Upon a finding that the terms of the agreement, settlement, or the terms of the commission's order, are not being complied with by the respondent, the commission shall take affirmative action as authorized in section 368-3. [L 1989, c 386, pt of §1; am L 1991, c 252, §6]

" **[§368-16] Appeals; de novo review; procedure.** (a) A complainant and a respondent shall have a right of appeal from a final order of the commission, including cease and desist orders and refusals to issue charges in the circuit court for the circuit in which the alleged violation occurred or where the person against whom the complaint is filed, resides, or has the person's principal place of business. An appeal before the circuit court shall be reviewed de novo. If an appeal is not taken within thirty days after the service of an appealable order of the commission, the commission may obtain an order for the enforcement of the order from the circuit court that has jurisdiction of the appeal.

(b) Where a respondent petitions for an appeal to the circuit court, the commission shall be a party to any proceeding as the appellee. The complainant shall have the right to intervene.

(c) A proceeding for review or enforcement of an appealable order is initiated by filing a petition in the circuit court. Copies of the petition shall be served upon the parties of record. Within thirty days after the service of the petition upon the commission or filing of the petition by the commission, or within further time as the court may allow, the commission shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including a transcript of the testimony, which need not be printed. By stipulation of the parties to the review proceeding, the record may be shortened. The court may grant temporary relief as it considers just, or enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the commission, or may remand the case to the commission for further proceedings. The commission's copy of the testimony shall be available at reasonable times to all parties for examination without cost.

(d) The final judgment or decree of the circuit court shall be subject to review by appeal in the same manner and form as other appeals from that court.

(e) A proceeding under this section shall be initiated not more than thirty days after a copy of the order of the commission is received, unless the commission is the petitioner or the petition is filed under subsection (d). If a proceeding is not so initiated, the commission may obtain a court order for enforcement of its order upon showing that a copy of the petition for enforcement was served on the respondent, that the respondent is subject to the jurisdiction of the court, that the order sought to be enforced is an order of the commission, regularly entered, and that the commission has jurisdiction over the subject matter and the respondent. [L 1989, c 386, pt of §1]

### Case Notes

A respondent who appeals a final order of the Hawaii civil rights commission, pursuant to this section, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the Hawaii civil rights commission. 101 H. 438, 71 P.3d 389 (2003).

Pursuant to subsection (a), the circuit court's standard of review when reviewing a decision of the Hawaii civil rights commission is de novo; the supreme court's standard of review of an appeal from circuit court regarding an appeal from the commission is a review of the circuit court's findings of fact under a clearly erroneous standard, and its conclusions of law de novo under the right or wrong standard. 102 H. 307, 76 P.3d 550 (2003).

" **§368-17 Remedies.** (a) The remedies ordered by the commission or the court under this chapter may include compensatory and punitive damages and legal and equitable relief, including, but not limited to:

- (1) Hiring, reinstatement, or upgrading of employees with or without back pay;
- (2) Admission or restoration of individuals to labor organization membership, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program, or other occupational training or retraining program, with the utilization of objective criteria in the admission of persons to those programs;
- (3) Admission of persons to a public accommodation or an educational institution;
- (4) Sale, exchange, lease, rental, assignment, or sublease of real property to a person;
- (5) Extension to all persons of the full and equal enjoyment of the goods, services, facilities,

privileges, advantages, or accommodations of the respondent;

- (6) Reporting as to the manner of compliance;
- (7) Requiring the posting of notices in a conspicuous place that the commission may publish or cause to be published setting forth requirements for compliance with civil rights law or other relevant information that the commission determines necessary to explain those laws;
- (8) Payment to the complainant of damages for an injury or loss caused by a violation of part I of chapter 489, chapter 515, part I of chapter 378, or this chapter, including a reasonable attorney's fee;
- (9) Payment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney's fees and expert witness fees, when the commission determines that award to be appropriate; and
- (10) Other relief the commission or the court deems appropriate.

(b) Section 386-5 notwithstanding, a workers' compensation claim or remedy does not bar relief on complaints filed with the commission. [L 1989, c 386, pt of §1; am L 1991, c 252, §7; am L 2001, c 55, §17(5)]

#### **Case Notes**

Subsection (a) had prospective effect only. 76 H. 454, 879 P.2d 1037 (1994).

Chapter 386 does not bar relief on claims filed with the commission. 85 H. 7, 936 P.2d 643 (1997).

Section permits court to award compensatory and punitive damages in civil actions brought under part I of chapter 378. 85 H. 7, 936 P.2d 643 (1997).

Employer was entitled to a jury trial, under article I, §13 of the Hawaii constitution, with respect to employees' allegation of sexual discrimination and retaliation, as subsection (a) empowered the Hawaii civil rights commission to award legal forms of relief, and, in proceedings before the commission, the employees and executive director claimed legal relief in the form of monetary damages of \$400,000 for each employee. 101 H. 438, 71 P.3d 389 (2003).