HAWAIʻI CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 6, 2018
Rm. 309, 8:30 a.m.

To: Representative Aaron Ling Johanson, Chair
Members of the House Committee on Labor & Public Employment

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

Re: H.B. No. 2201

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 (on the basis of disability). 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.

HCRC testimonies on similar bills heard in 2016 and 2017 were lengthy and emphasized the technical and complex legal consequences of the bills. That discussion is certainly relevant and necessary for your deliberations, and the HCRC's full testimony follows. **However, the issues and what is at stake are at their heart simple and compelling, and are laid out in the Summary of HCRC Testimony on these first two pages**, with the full testimony following on pages 3-7.

SUMMARY OF HCRC TESTIMONY

H.B. No. 2201, would amend HRS §378-3(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, refusing to refer, or [discharge] from 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;

Effect: In circumstantial evidence cases, eliminates requirement that an employer's proffered reason for an adverse employment action be legitimate and supported by evidence, as well as nondiscriminatory, allowing employers to carry their burden by articulating even explanations that are illegitimate (untrue) and not worthy of credence; arguably undermines and diminishes employer responsibility for adverse employment actions based on mixed motive (partly motivated by discriminatory and nondiscriminatory intent); arguably undermines and eliminates employer responsibility for facially neutral policies that have a discriminatory impact (*e.g.*, 6' height requirement for fire fighters that has disparate impact on Asians and women); arguably creates an affirmative defense for employers that does not exist, allowing an employer to overcome circumstantial evidence discrimination claim by showing any plausible reason for its action that is not based on a prohibited bases, regardless of circumstantial evidence of discriminatory intent.

Important note:

At trial, a plaintiff still carries the 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.

Who is hurt by H.B. No. 2201?

Workers and victims of workplace discrimination.

Historical context and big picture perspective:

H.B. No. 2201, transforms Hawaii's state fair employment law, from being stronger than federal fair employment law to being weaker than federal law. There is no analogous or similar language to the proposed amended statutory language in federal Title VII law. If this bill is enacted, federal law will no longer be the "floor" beneath which state law does not fall; our state law protection for victims of discrimination will be the "basement."

It is astounding that Hawai'i is considering the abandonment of democratic principles and values that made enactment of Hawaii's fair employment law in 1963 an integral and important part of a legislative platform protecting the rights and dignity of Hawaii's workers, pre-dating the enactment of the Civil Rights Act of 1964.

HCRC Full Testimony

The HCRC opposes H.B. No. 2201. 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, 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 H.B. No. 2201, will have, if enacted.

H.B. No. 2201, is intended to legislatively reverse the decision of the Hawai'i Supreme Court in *Adams v. CDM Media USA, Inc.*, 135 Hawai'i 1 (2015).

The discussion of the *Adams* decision and the proposed S.B. No. 2201, 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 …"

H.B. No. 2201, 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, refusing to refer, or [discharge] from 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 three-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; 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; and, 3. The proposed amendment arguably eliminates employer liability for facially neutral policies that have a discriminatory disparate impact on racial minorities and women.

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 H.B. No. 2201, 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 under current law, 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.
4) Arguably undermine and eliminate employer liability for facially neutral policies that have a discriminatory disparate impact based on race, sex, or other prohibited discriminatory basis.

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 H.B. No. 2201.

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the House Committee on Labor & Public Employment
Tuesday, February 6, 2018 at 8:30 A.M.
Conference Room 309, State Capitol

RE: HOUSE BILL 2201 RELATING TO EMPLOYMENT

Chair Johanson, Vice Chair Holt, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **strongly supports** HB 2201, which clarifies the grounds under which an employer may take employment action without committing a discriminatory practice; takes effect on 7/1/2018.

The Chamber is Hawaii's leading statewide business advocacy organization, representing 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

In the past, because Hawaii is an at-will employment state, an employer could take an adverse employment action (*e.g.*, firing, demotion, refusal to hire) for *any* non-discriminatory reason. The new rule stated by the State Supreme Court in a 3-2 decision imposes far greater restriction, *i.e.*, that the adverse action must be related to the person's ability to perform the job. Justice Pollack explicitly stated that "the nondiscriminatory reason articulated by the employer for the adverse employment action must be related to the ability of the individual to perform the work in question." While most hiring's or adverse actions are based on those reasons, there are workplace related issues such as level of performance level or team performance that are factors. The court's ruling creates prohibitions for employers to act on these matters.

There are several other aspects of *Adams* that are troubling. One is that the Court stated that undisclosed hiring criterion creates an inference that the reason for not hiring an employee is discriminatory. In other words, if an employer ends up not hiring an applicant for a reason that is not stated in the job posting, the employer is on the hook for a discrimination claim.

Another troubling aspect is that the Court stated that the decision maker for a hiring decision must have personal knowledge of the issues/reasons for not hiring a candidate. This is often impractical for any employer, large or small, who rely on HR reps or office managers to conduct all the interviews, while a senior management person makes the ultimate hiring decision.

In short, *Adams* is a decision that if read broadly, could destroy decades of settled law. We ask for your support on moving this bill forward.

Thank you for the opportunity to testify.

1132 Bishop Street, Suite 2105 • Honolulu, Hawaii 96813 • Phone: (808) 545-4300 • Facsimile: (808) 545-4369

Testimony to the
House Committee on Labor & Public Employment
February 6, 2018
8:30 a.m.
State Capitol - Conference Room 309

RE: HB 2201 Relating to Employment

Aloha Chair Johanson, Vice Chair Holt and members of the committee:

On behalf of the Society for Human Resource Management – Hawaii Chapter ("SHRM Hawaii"), we are writing in support to HB 2201, relating to employment. This bill seeks to clarify that Hawaii's anti-discrimination law does not prohibit or prevent an employer, employment agency, or labor organization from refusing to hire or refer or from discharging an individual for reasons unrelated to unlawful discriminatory practices.

Human resource management professionals are responsible for the alignment of employees and employers to achieve organizational goals. HR professionals seek to balance the interests of employers and employees with the understanding that the success of each is mutually dependent. SHRM Hawaii represents more than 800 human resource professionals in the State of Hawaii. We look forward to contributing positively to the development of sound public policy and continuing to serve as a resource to the legislature on matters related to labor and employment laws.

Mahalo for the opportunity to testify.

Fujiwara & Rosenbaum, LLLC
Alakea Corporate Tower
1100 Alakea St., Fl. 20, Suite B
Honolulu, Hawaii 96813

February 6, 2018
Rm. 309, 8:30 a.m.

To: The Honorable Aaron Ling Johanson, Chair
Members of the House Committee on Labor and Public Employment

From: Elizabeth Jubin Fujiwara, Senior Partner,
Fujiwara & Rosenbaum, LLLC

Re: **H.B. No. 2201--Strong Opposition**

I have specialized in civil rights and employment law as a plaintiff's attorney since 1986,
representing workers, employees, and citizens whose rights have been violated.

Our law firm strongly opposes H.B. No. 2201. As the HCRC testifies the stated intent of the bill seems innocuous: "…to clarify that Hawaii's anti-discrimination law"." However, along with the HCRC we have serious concerns over both the intent of the bill and the unintentional consequences H.B. No. 2201 will have, if enacted.

H.B. No. 2201 is intended to legislatively reverse the decision of the Hawai'i Supreme Court
in *Adams v. CDM Media USA, Inc.*, 135 Hawai'i 1 (2015). Basically, it would repudiate the needed
protections that have been in place for many decades**. At this time our rights are already being
attacked by Donald Trump, a racist, white nationalist, and misogynist, and other Republicans in Washington. Especially in this post-Weinstein, MeToo#, Times-Up era, there is no compelling reason to follow suit in Hawai'i. Unless, of course, this legislature would like to give victims of sexual harassment, for example, less rights, making it harder to prove their cases in court; then, please go ahead and pass H.B. No. 2201. If you do so, please let me know how you are going to explain this to your spouses, your mothers, your sisters, your daughters why you are responsible for taking away their rights, when 1 out of 3 women in the workplace are sexually harassed.**

Moreover, as explained at length in the HCRC's excellent analysis, which we adopt *in toto* herein, the discussion of the *Adams* decision and the proposed H.B. No. 2201 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.

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

HAWAIʻI CHAPTER
745 Fort Street Mall, Suite 311, Honolulu, Hawaiʻi 96813
Tel: 808-523-5050 Fax: 808-697-2726

LATE

February 6, 2018
Rm 309, @ 8:30 a.m.

To: Representative Aaron Ling Johanson, Chair
Members of the House Committee on Labor & Public Employment

From: Elbridge W. Smith, President
Hawaii Chapter, National Employment Lawyers Association

Re: H.B. No. 2201

The Hawaii Chapter, National Employment Lawyers Association (NELA),[1] which represents private sector and government sector employees in Hawaii regarding discrimination claims and wrongful employment adverse actions, offer these comments in opposition to H.B. No. 2201 to amend HRS §348-3(3).

In so doing, NELA Hawaii fully endorses and supports the already submitted testimony of the Hawaiʻi Civil Rights Commission from Linda Hamilton Krieger, Chair, HCRC. We need not reiterate the cogent facts and position HCRC has so adequately expressed. We do note that such Bill is a move by anti-democratic and anti-workers' rights motivated employers to promote their private interests at the expense of Hawaii's long history of protecting the civil rights of its citizen workers. Hawaii's civil rights protections for the victims of discrimination (our fair employment laws of 1963) preceded those of the Federal government, and still surpassed those of the Federal Civil Rights Act of 1964. We have remained at the top of such ladder, and some other states have also sought to catch up. But, this Bill will put us far down, if not at the bottom of, such a protection ladder.

Simply put, despite the burden on the employee to prove discrimination in every case, this Bill gives employers a get-out-of-jail-free card, by simply their mouthing a "seemingly" non-discriminatory reason for their action, and then denying an employee the ability to prove such reason is false or merely a pretense – a mask for discriminatory conduct -- which would still have been the employee burden. Please reject this Bill.

Thank you,

---

[1] NELA is a national organization of over 3,500 plaintiffs' lawyers, founded in 1985 to provide assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. NELA is the country's only professional organization that is comprised exclusively of lawyers whose practice is comprised of at least 51% representation of employees in cases involving employment discrimination, wrongful termination, employee benefits and other employment related matters.