LATE TESTIMONY

ATTORNEY DAPHNE E. BARBEE-WOOTEN
1188 BISHOP STREET, SUITE 1908
HONOLULU, HAWAII 96813
(808) 533-0275

Senator Gilbert S.C. Keith-Aragan, Chair,
Sen. Karl B. Rhoads, Vice Chair
Judiciary Committee members
Hearing Date: 2-22-17, 9:00 am., Room 016

TESTIMONY IN OPPOSITION TO
S.B. NO. 675

Dear Senator Gilbert S.C. Keith-Aragan, Chair, Sen. Karl B. Rhoads, Vice Chair and Judiciary Committee members

I am a Civil Rights attorney who practices employment law in Honolulu. I am a former Hawaii Civil Rights Commissioner.

I strongly oppose S.B. No. 675. I read and agree with the testimony of Hawaii Civil Rights Commission which says that while 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, HRS there are concerns over both the intent of the bill and unintentional consequences S.B. No.675 will have.

S.B. No.675 is intended to legislatively reverse the decision of the Hawaii Supreme Court in Adams v. CDM Media USA, Inc., 135 Hawaii 1 (2015). There is no reason to do this.

As explained at length in the HCRC's testimony the discussion of the Adams decision and the proposed S.B. No.675 should not change summary judgment standards of proof. The Supreme Court in Adams was correct. Summary judgment is not a trial, and evidence should be viewed in the light most favorable to the non moving party, plaintiff. At trial, employers' defenses, if any, may be considered by the trier of fact. There is no need for this bill, nor need to clarify HRS 378-2 just as there is no need to clarify that not speeding is a defense to a speeding charge.

Please do not pass this bill.

Sincerely,

Daphne E. Barbee-Wooten
Attorney at Law

LATE TESTIMONY

Fujiwara & Rosenbaum, LLLC
Alakea Corporate Center
1100 Alakea Street, 20th Floor
Honolulu, Hawaii 96813

February 22, 2017
Conference Room 016

To: Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair
SENATE COMMITTEE ON JUDICIARY AND LABOR

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

Re: **S.B. No. 675--Strong Opposition**

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

Our law firm strongly opposes S.B. No. 675. S.B. 675 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). This amendment is a huge step backward and will make employment discrimination cases more likely to be dismissed at the summary judgment stage.

When a lawsuit is filed, employers routinely file to have cases dismissed at summary judgment before a trial is ever held. Throughout the years I have opposed hundreds of employers' Motions for Summary Judgment. Quite often an employer argues it has made a decision to not hire, demote, fire or otherwise affect the terms of our client'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, when **the real reason is blatant discrimination** based on the person's sex or race or ethnicity or age or religion or sexual orientation or a combination, especially when it's an older woman who is the wrong minority. *See* for example, ***Lam v. U.H.***, a 9th circuit case. It is even more troubling when the discrimination is out and out retaliation for trying to protect the employee's own civil rights or another employee's.

The Hawai'i Supreme Court, studying the legislative history of the **original 1963 Act 180**, made it clear in ***Adams*** 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. These decisions of hiring, demotion, firing, etc., **must be based on and related to the requirements of the actual job in question.** Thus, since 1963 to this day, employers in Hawai'i **cannot just make up excuses.** ***Adams*** has continued to require employers to articulate a legitimate, work-related reason for its action.

The proposed amendment would allow employers to pick reasons/excuses that have absolutely nothing to do with the person's ability to do the work in question, 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.

Moreover, the proposed amendment would **leave employees unprotected in other ways**. For instance, an employer should not be able to terminate an employee, if the employee engages in off-duty support of civil rights issues, such as, protesting against the Muslim ban, or supporting equal pay for women or supporting reproductive rights, because such activities are not related to the employees' ability to do the job at work.

There is no compelling reason to reverse our rights under the law. At this time our rights are already being attacked by Donald Trump and the Republicans in Washington. There is no reason to follow suit in Hawai'i, where we are known for our protection of civil rights. Here in Hawaii, we are a **community that believes -- fundamentally** -- that each person is the **equal of every other**. This belief cuts across race, sex, sexual orientation, ability status, nationality, immigration history, religion, gender identity, economic means, language, and age. For example,

•Hawai'i passed the civil rights laws giving women & minorities protection in employment before the federal civil rights law --Title VII --was enacted.
• In 1970 Hawai'i gives a woman a right to abortion without any onerous restrictions.
•In 1972 Hawai'i was the first state to pass the ERA in our constitution. There is still no federal ERA.
• In 1978 Hawai'i again showed its strong commitment to the protection of civil rights. Article I, Section 5 of the Hawai'i Constitution provides that "no person shall be denied the enjoyment of civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."
•In 1978 Hawai'i passed the Right to Privacy in our constitution with greater expectations of privacy than other states.

Adams reaffirms that employers can only have cases dismissed when they establish the reason was directly related to the work, not a made up reason that can be used to mask discrimination. To adopt the proposed amendment would overrule **Adams**. Adopting this bill will lead to the 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.

When we are **at our best**, we celebrate diversity, embrace our differences, and build on each others' strengths. **With Hawai'i's history,** delineated above, it is clear that **we believe strongly in social justice**. It is now more critical than ever for us to remember our core values and draw on them collectively, with a sense of pride and continue to enact such laws and oppose those that oppress Hawai'i's citizens.

We respectively urge that S.B. 675 be held. Thank you for your consideration.

LATE TESTIMONY

The Twenty-Ninth Legislature
Regular Session of 2017

THE SENATE
Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair
State Capitol, Conference Room 016
Wednesday, February 22, 2017; 9:00 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON S.B. 675
RELATING TO EMPLOYMENT

The ILWU Local 142 **strongly opposes** S.B. 675, which clarifies the grounds under which an employer may take employment action without committing a discriminatory practice. The bill would take effect on 1/1/2018.

On the face of it, this proposal simply seems to clarify what employers are permitted to do—that hiring, refusing to refer, or discharging an applicant or an employee should be the legal right of an employer as long as Hawaii's anti-discrimination law is not violated.

However, the problem lies in what is being deleted from and added to the statutory language. The section in question states that "Nothing in this part shall be deemed to…Prohibit or prevent an employer, employment agency, or labor organization from refusing to hire or refer or discharging any individual for reasons unrelated to sections 378-2, 378-2.3, 378-2.5, or 378-2.7."

The current statute allows for the employment action to be taken **only** for reasons "relating to the ability of the individual to perform the work in question." The statute was specific—that the employer may hire, discharge of refuse to hire only if the individual is not able to perform the work for which he/she is to be hired or was hired.

However, S.B. 675 proposes to broaden the reasons for an employment action as long as it does not discriminate against protected classes. This will allow the employer greater latitude to take an employment action and will lessen the burden of proof for the employer.

The ILWU respectively urges that S.B. 675 be held. Thank you for considering our views on this measure.

LATE TESTIMONY

SHRM HAWAII

Testimony to the Senate Committee on
Judiciary and Labor
February 22, 2017 at 9:00 a.m.
State Capitol - Conference Room 16

RE: SB 675 Relating to Employment

Aloha members of the Committee:

We are Cara Heilmann and John Knorek, the Legislative Committee co-chairs for the Society for Human Resource Management – Hawaii Chapter ("SHRM Hawaii"). SHRM Hawaii represents more than 800 human resource professionals in the State of Hawaii.

We are writing to support SB 675, which clarifies the grounds under which an employer may take employment action without committing a discriminatory practice. This bill helps to address a new rule articulated by the State Supreme Court which imposes significant restrictions on at-will employment. We believe that this measure is an important step toward clarifying the grounds under which an employment may take employment action.

Human resource professionals are keenly attuned to the needs of employers and employees. We are the frontline professionals responsible for businesses' most valuable asset: human capital. We truly have our employers' and employees' interests at heart. We will continue to review this bill and, if it advances, request to be a part of the dialogue concerning it.

Thank you for the opportunity to testify.