HB-1267
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Testimony for LAB on 2/7/2019 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Victor K. Ramos	Individual	Oppose	No

Comments:

Although I agree with the concept, I think it is inappropriate to place it here.

LATE

HAWAIʻI CIVIL RIGHTS COMMISSION

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February 7, 2019
Rm. 309, 9:30 a.m.

To: The Honorable Aaron Ling Johanson, Chair
The Honorable Stacelynn K.M. Eli, Vice 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. 1267

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 testimony on H.B. No. 1267 is lengthy and emphasizes 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 a Summary of HCRC Testimony on these first two and a half pages**, with the full testimony following on pages 3-8.

SUMMARY OF HCRC TESTIMONY

H.B. No. 1267, 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, from refusing to refer, or [~~discharge~~] from discharging any individual for

reasons relating to the ability of the individual to perform the work in question[~~;~~] or unrelated to any practices or actions prohibited by sections 378-2, 378-2.3, 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.

Note: At trial, a plaintiff always 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. 1267?

Workers and victims of workplace discrimination.

Historical context and big picture perspective

H.B. No. 1267, transforms Hawai'i'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 the Hawai‘i legislature is considering the abandonment of democratic principles and values that made enactment of Hawai‘i’s fair employment law in 1963 an integral and important part of a legislative platform protecting the rights and dignity of Hawai‘i’s workers, pre-dating the enactment of the Civil Rights Act of 1964.

The HCRC opposes H.B. No. 1267. 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 Hawai‘i 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. 1267 will have, if enacted.

H.B. No. 1267 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 H.B. No. 1267 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. 1267 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 H.B. No. 1267, 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) 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.

3) 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.

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. 1267.