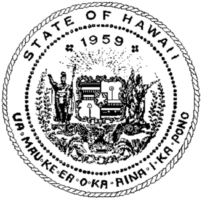


HAWAIʻI CIVIL RIGHTS COMMISSION

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

February 11, 2020
Rm. 309, 9:10 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: Liann Ebesugawa, Chair
and Commissioners of the Hawaiʻi Civil Rights Commission

Re: H.B. No. 2469

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. 2469 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. 2469, 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. 2469?

Workers and victims of workplace discrimination.

Historical context and big picture perspective

H.B. No. 2469 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. 2469. 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 or refer or terminations of employment that are not based on any prohibited discriminatory practices in section 378-2, Hawaii Revised Statutes, unequal pay due to sex discrimination as prohibited in 378-2.3, Hawaii Revised Statutes, criminal conviction record inquiries prohibited in 378-2.5, Hawaii Revised Statutes, and credit history inquiries prohibited 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. 2469 will have, if enacted.

H.B. No. 2469 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. 2469 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. 2469 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, 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;

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. 2469, 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. 2469.

Hawaii State House of Representatives Committee on Labor and Public Employment
Hearing Date/Time: Tuesday February 11, 2020 9:10AM
Place: Hawaii State Capitol, Room 309
Re: Testimony in STRONG OPPOSITION of H.B. 2469

Dear Chair Johanson, Vice Chair Eli, and Members of the Committee,

Members of AAUW of Hawaii are grateful for this opportunity to testify in strong opposition of H.B. 2469, which would change Hawaii's anti-discrimination law to allow an employer to refuse to hire, refer, or discharge an individual for reasons unrelated to discriminatory practices.

While on surface, this measure sounds reasonable, it would change Hawaii's anti-discrimination law to relieve employers from responsibilities when their employment actions were based on both discriminatory and nondiscriminatory intent. This bill would allow employers to use employment policies which seem neutral on surface which would however have a discriminatory impact.

The American Association of University Women (AAUW) of Hawaii is a state-wide organization made up of six branches (Hilo, Honolulu, Kauai, Kona, Maui, and Windward Oahu) and includes just over 650 active members with over 3800 supporters statewide. As advocates for gender equity, AAUW of Hawaii promotes the economic, social, and physical well-being of all persons.

Mahalo.

Younghee Overly
Public Policy Chair, AAUW of Hawaii
publicpolicy-hi@aauw.net

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

February 11, 2020
Rm. 309, 9:10 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: Elizabeth Jubin Fujiwara, Senior Partner,
Fujiwara & Rosenbaum, LLLC

Re: H.B. No. 2469

I have specialized in civil rights and employment law as a plaintiff's attorney since 1986 with an experience in hundreds of employment cases as well as found to be an expert in our courts.

This bill basically turns the analysis of employment law on its head! **Our law firm strongly opposes H.B. No. 2469.** H.B. No. 2469 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 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, our law firm has serious concerns over both the intent of the bill and unintentional consequences H.B. No. 2469 will have, if enacted.

H.B. No. 2469, 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."

In conclusion our law firms 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 mixedmotive cases, diminishing or eliminating employer responsibility where discrimination is a factor, but not the only factor, in an adverse employment action or decision.

This bill would definitely injure workers and victims of workplace discrimination without a doubt. If you didn't know, now you know.

HB-2469
Submitted on: 2/9/2020 7:05:24 PM
Testimony for LAB on 2/11/2020 9:10:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Joanna Amberger	Individual	Oppose	No

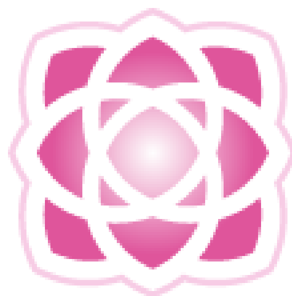
Comments:

Aloha Chair Johanson, Vice Chair Eli, and Members of the Committee,

I am writing in strong opposition to HB 2469, which would change Hawaii's anti-discrimination law to allow an employers to refuse to hire, refer, or discharge an individual for reasons unrelated to discriminatory practices.

While on the surface this measure sounds reasonable, it would change Hawaii's anti-discrimination law to relieve employers from responsibilities when their employment actions were based on both discriminatory and nondiscriminatory intent. This bill would allow employers to use employment policies which seem neutral on the surface to effect discriminatory employment practices. This bill is designed to chip away at the protections employees have worked so hard for.

Late Testimonies



MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

LATE

**HEARING BEFORE THE HOUSE COMMITTEE ON
LABOR & PUBLIC EMPLOYMENT
HAWAII STATE CAPITOL, HOUSE CONFERENCE ROOM 309
TUESDAY, FEBRUARY 11, 2020 AT 9:10 A.M.**

To The Honorable Aaron Ling Johanson, Chair;
The Honorable Stacelynn K.M. Eli, Vice Chair; and
Members of the Committee on Labor & Public Employment,

TESTIMONY IN SUPPORT OF HB2469 RELATING TO EMPLOYMENT

Aloha, my name is Pamela Tumpap and I am the President of the Maui Chamber of Commerce, with approximately 650 members. I am writing share our support of HB2469

The Maui Chamber of Commerce supports this clarification of the law. As Hawaii is an at-will employment state, employers should be able to refuse to hire or terminate an employee for any reason, as long as it is not discrimination. Firing an employee (or not hiring someone) for not being able to perform at a certain level is not a protected classification and not discrimination. It is important that this is allowed, despite the Adams v. CDM Media USA, Inc. case ruling.

We appreciate the opportunity to testify on this matter and ask that this bill be passed.

Sincerely,

Pamela Tumpap

Pamela Tumpap
President

To advance and promote a healthy economic environment for business, advocating for a responsive government and quality education, while preserving Maui's unique community characteristics.

95 Mahalani Street, Suite 22A, Wailuku, Hawaii 96793 808-244-0081 info@MauiChamber.com MauiChamber.com

Testimony to the House Committee on Labor & Public Employment
Tuesday, February 11, 2020 at 9:10 A.M.
Conference Room 309, State Capitol

LATE

RE: HB 2469, RELATING TO EMPLOYMENT

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

The Chamber of Commerce Hawaii ("The Chamber") **supports** HB 2469, which clarifies 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.

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 2009, CDM Media, a marketing firm sought to hire several sales executives and posted a job advertisement online. Christine Adams, who was 59 years old at the time, applied for a sales executive position. Ms. Adams had experience in sales but at the time she applied, she had been out of the workplace for five years. She was interviewed by the HR manager at CDM Media but was not hired based on a decision by the company's president who hired associates younger than Ms. Adams. Eventually this case made it to the Hawaii Supreme Court, which in a 3-2 decision on appeal, ruled that CDM Media failed to articulate a legitimate and non-discriminatory basis for its refusal to hire Ms. Adams and was therefore not entitled to summary judgment.

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 decision by the Hawaii Supreme Court imposes far greater restrictions, *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 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 the *Adams* case 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, the *Adams* case is a decision that if read broadly, could undue decades of settled law. We ask for your support on moving this bill forward.

Thank you for the opportunity to testify.

733 Bishop Street, Suite 1200 • Honolulu, Hawaii 96813 • Phone: (808) 545-4300 • Facsimile: (808) 545-4369

LATE

HB-2469
Submitted on: 2/11/2020 6:14:06 AM
Testimony for LAB on 2/11/2020 9:10:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Caroline Kunitake	Individual	Oppose	No

Comments:

Dear Chair Johanson and Members of the Committee on Labor and Public Employment,

I oppose HB2469.

This bill would change Hawaii’s anti-discrimination law to relieve employers from responsibilities when their employment actions were based on both discriminatory and nondiscriminatory intent.

We need to protect worker's rights, especially in discriminatory cases. There's no way to distinguish a discriminatory intent from a nondiscriminatory intent unless there is a complaint filed by the plaintiff who was fired. This complaint then must be fully investigated according to the employer's policies and state and federal labor laws. Employers have a responsibility to employees to be fair and just. HB2469 relieves the employer from this responsibility.

Mahalo,

Caroline Kunitake