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DEPT. COMM. NO. 85

**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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December 18, 2020

The Honorable Ronald D. Kouchi,
President and Members of the Senate
Thirty First State Legislature
State Capitol, Room 409
Honolulu, HI 96813

The Honorable Scott K. Saiki, Speaker
and Members of the House of
Representatives
Thirty First State Legislature
State Capitol, Room 431
Honolulu, HI 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

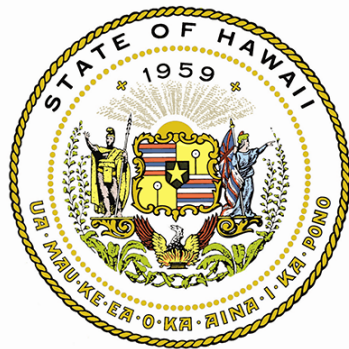
For your information and consideration, I am transmitting two (2) copies of the Department of Labor and Industrial Relations (DLIR) Hawaii Civil Rights Commission 2019-2020 Annual Report for the fiscal year ending June 30, 2020, as required by sections 368-3(7), 368-4(e), and 515-9(a)(6), Hawaii Revised Statutes (HRS).

In accordance with section 93-16, HRS, I am also informing you that the report may be viewed electronically at <http://labor.hawaii.gov/find-a-report/>.

Sincerely,

Anne Eustaquio
Director

Enclosure



HAWAI'I CIVIL RIGHTS COMMISSION

2019-2020 Annual Report

David Y. Ige, Governor

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Department of Labor & Industrial Relations

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Table of Contents

Table of Contents	- 1 -
Mission Statement.....	1
Overview	1
The State of Hawai'i's Constitutional Civil Rights Mandate.....	1
Hawai'i Civil Rights in Crisis: The impact of the COVID-19 Pandemic Emergency	1
The Challenge Going Forward: Restoring Civil Rights Capacity After COVID-19	3
Resolution.....	4
An Effective and Uniform Enforcement Scheme.....	11
A Fair Administrative Process.....	11
Civil Rights Law Enforcement: State & Federal Law.....	12
Mediation Program	13
Public Education & Outreach	15
Caseload Statistics.....	17
Intake.....	17
Closures	19
Employment Cases.....	22
Real Property Transactions (Housing) Cases.....	24
Public Accommodations Cases	24
Access to State and State-Funded Services Cases	25
Cause Cases	26
Case Settlements.....	26
HCRC Warning Letters.....	29
Case Decisions	29
State Court Cases	29
Legislation	30
Appendix	30
Overview.....	30
Administrative Procedure.....	31
HCRC Commissioners.....	37

Mission Statement

The mission of the Hawai'i Civil Rights Commission is to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education.

Overview

The State of Hawai'i's Constitutional Civil Rights Mandate

Article I, Section 5 of the Hawai'i Constitution is the foundation of our state civil rights laws. It provides that: "No person shall ... be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." There is no counterpart to this civil rights mandate in the U.S. Constitution.

Hawai'i Civil Rights in Crisis: The impact of the COVID-19 Pandemic Emergency

2020 was an unusual and challenging year for the Hawai'i Civil Rights Commission (HCRC), framed and defined by the COVID-19 pandemic emergency and the State and HCRC responses to the pandemic.

Governor David Y. Ige issued an emergency proclamation on March 4, 2020, marking the beginning of the unprecedented COVID-19 pandemic emergency. On the afternoon of March 17, 2020, DLIR division and attached agency administrators were called to a meeting and briefed on a DHRD "Slow the Spread of COVID-19" directive issued that day, to be implemented after the Governor announced the directive later that afternoon. Non-essential employees who were unable to telework were directed to stay-at-home for fifteen days.

The HCRC took the March 17 directive seriously and HCRC employees were directed to stay-at-home for 15 days starting on March 18, 2020, as nonessential workers. In doing so, a distinction was drawn between the important civil rights work of the HCRC and the essential health, safety, welfare, fiscal, and safety net functions of other departments, divisions, and agencies. The HCRC took note that even the state legislature had recessed the 2020 legislative session for an indefinite period on March 16 to limit the spread of COVID-19.

The HCRC did not anticipate being out of the office for longer than the initial 15 day stay-at-home period starting on March 18. However, with the extension of the stay-at-home directive, the HCRC reassessed its course going forward and, recognizing the urgent need for restoration of mission critical services, recalled staff and reopened the HCRC office on April 27, 2020, in order to effect the compelling state interest in civil rights law enforcement.

While the HCRC office was closed, HCRC staff were redeployed to assist the Department of Labor and Industrial Relations with processing an unprecedented number of unemployment insurance claims. During the closure, HCRC management staff continued to work remotely, on redeployment, program administration, COVID-19 emergency leave issues, planning for restoration of services, and communication with state administration, programs, and legislators, federal agencies, and community contacts.

During this period, six of eight HCRC investigators were redeployed to assist with processing of Unemployment Insurance (“UI”) claims: three returned to the HCRC effective June 1, 2020; two returned by June 16, 2020; and one remained out on FMLA through the end of July 2020 and returned in August. In addition, the remaining two of eight permanent investigator positions were vacant in March and frozen due to pandemic-related budget cuts; pending recruitment to fill these positions was canceled.

The Ke’elikolani Building (which houses the HCRC office) was largely closed to the public during the pandemic emergency; but in the fourth quarter of 2020 the DLIR initiated a transition plan towards reopening the building to public access, starting with limited appointment-based access. While the building was closed, the HCRC continued to provide services via telephone, fax, e-mail, and in writing, with no in-person public contact, except if required to provide a disability-related accommodation.

Restoration of HCRC Capacity and Services with COVID-19 Safety Measures

The recall of HCRC staff required implementation of safety measures to protect employees and the public, including:

- Social distancing and other recommended safety practices (sanitizing surfaces, hand sanitizing and washing, mandatory wearing of non-medical masks, avoiding in-person meetings and congregating in groups, staying home if sick);

- Building and office closed to the public;

- Services provided via telephone, fax, e-mail, and in writing; with no in-person public contact unless required to provide a disability-related accommodation;

- Ensuring safe spacing between work stations (either offices with doors or work stations spaced at least 6’ apart or with 7’ tall partitions between work stations);

Eliminated physical meetings in the conference room, which were replaced by the use of MS TEAMS as a platform for remote meetings (with required hardware procurement) and use of portable plexiglass partitions for small meetings; and

Discontinued use of the office kitchen facility for eating meals.

Implementation of Telework for HCRC Investigators, Attorneys, and Mediation Program Specialist

The COVID-19 pandemic emergency and the initial stay-at-home directive made the HCRC realize that the lack of capacity for telework was a limitation that had to be addressed going forward.

As a result, the HCRC planned and implemented telework for its mediation program specialist, and hybrid telework (two days per week) for attorneys and investigators. In developing a pandemic emergency telework policy, considerations included: importance of staff presence in the office for supervision, input and support, collaboration, and accountability; necessity of access to support staff, confidential database(s), confidential documents and files; confidentiality, security and integrity of confidential data and information; scheduling of meetings and trainings; and equipment costs to support telework.

Federal HUD FHAP CARES Act Funding

In order to mitigate the impact of loss of enforcement capacity due to two of eight permanent investigator positions being vacant, frozen, and de-funded, the HCRC applied for and was awarded HUD FHAP CARES Act funding for one (1) federal-funded temporary investigator position for one year.

The Challenge Going Forward: Restoring Civil Rights Capacity After COVID-19

Even before the COVID-19 pandemic emergency, the HCRC was understaffed as a result of cuts imposed in 2009-2010, when in response to the Great Recession, the HCRC lost 3 of 11 permanent investigator positions, a loss of 27% of investigator capacity which was never restored.

The earlier 2009-2010 loss of investigator capacity was then compounded by additional COVID-induced losses in 2020. Of the HCRC's remaining 8 permanent investigator positions, 2 were vacant, with active recruitment to fill pending, in mid-March 2020 when the COVID-19 pandemic emergency broke. Those vacant positions were frozen and defunded, leaving the HCRC with only 6 funded, filled permanent investigator positions at the end of October 2020, or 55% of HCRC investigator capacity in 2009.

This loss of capacity directly affected HCRC productivity in FY 2020.

During the 2020 COVID-19 Pandemic Emergency, the initial stay-at-home directive, subsequent redeployment of employees, and loss of staffing directly resulted in loss of HCRC capacity to conduct intake and timely and effectively investigate discrimination complaints. The investigation caseload grew from 321 cases at the end of FY 2019 to 379 at the end of FY 2020. The size and age of the investigation caseload had a negative effect on timely and effective investigation and enforcement. Older cases are more difficult to investigate, conciliate, and litigate.

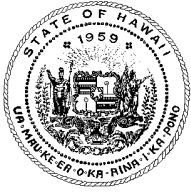
FY 2020 yielded 7 reasonable cause determinations, and 5 conciliation settlement agreements in cause cases, with monetary settlements totaling \$133,360. In addition to these conciliation settlements in cause cases, the HCRC closed 36 cases based on settlements prior to an investigative finding in FY 2020 with monetary relief totaling \$115,980, including pre-determination settlements obtained through HCRC investigators and settlements between the parties (\$53,050), as well as investigative settlements obtained through the HCRC mediation program (\$62,930). Collectively the HCRC's known monetary settlements for FY 2020 totaled \$249,340. In addition to monetary relief, the HCRC seeks and obtains non-monetary affirmative relief in all settlements to which the HCRC is a party, to stop discriminatory conduct, prevent future harm, and avoid future violations of law.

The COVID-19 Pandemic Emergency and the looming state budget crises that it has engendered will have a deeper, more profound impact on the HCRC than is reflected by lower annual productivity benchmarks for this FY 2020 annual report. If HCRC enforcement capacity is not restored and maintained, the continuing efficacy of the HCRC as a civil rights law enforcement agency will be eroded and diminished to the point that Hawai'i's historical commitment to civil rights will be laid threadbare - without meaningful enforcement, civil rights are rendered illusory.

Recognizing that the State of Hawai'i and the Hawai'i Civil Rights Commission stand at a crossroads in our deeply held commitment to civil rights, the Commissioners of the HCRC adopted the following resolution, inserted in its entirety:

Resolution

URGING THE STATE OF HAWAI'I TO DEMONSTRATE ITS HISTORICAL AND CONTINUING COMMITMENT TO CIVIL RIGHTS, GIVING MEANING TO STRONG STATE CIVIL RIGHTS LAWS BY REBUILDING CAPACITY, MAINTAINING AND RESTORING RESOURCES FOR STATE CIVIL RIGHTS LAW ENFORCEMENT.



HAWAI'I CIVIL RIGHTS COMMISSION

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

URGING THE STATE OF HAWAI'I TO DEMONSTRATE ITS HISTORICAL AND CONTINUING COMMITMENT TO CIVIL RIGHTS, GIVING MEANING TO STRONG STATE CIVIL RIGHTS LAWS BY REBUILDING CAPACITY, MAINTAINING AND RESTORING RESOURCES FOR STATE CIVIL RIGHTS LAW ENFORCEMENT.

WHEREAS, Hawai'i has a proud civil rights history of our own civil rights movement that paralleled the civil rights movement on the US continent; and

HAWAI'I'S HISTORY OF RACIAL AND ANCESTRY-BASED DISCRIMINATION

WHEREAS, Hawai'i has a history of racial and ancestry-based segregation dating back to the Kingdom of Hawai'i, when a ruling oligarchy brought in foreign laborers to work on sugar plantations; and

WHEREAS, In 1850, the Masters and Servants Act created a contract labor system, a form of indentured servitude; with annexation in 1898, the Masters and Servants Act was prohibited by the Organic Act, imposing the post-Civil War 13th Amendment prohibition against slavery and peonage; and

WHEREAS, Hawai'i has a history of race and ethnicity-based occupational stratification with roots deep in the plantation system, with private sector employment largely segregated along similar lines through World War II; and

WHEREAS, Hawai'i has similar histories of segregation in housing, from segregated plantation camps to segregated neighborhoods, reinforced by restrictive racial covenants, education, implemented both through exclusive private institutions and the English standard school system, and private clubs; and

WHEREAS, Of the 47 men executed in Hawai'i between 1827 and 1957, before the abolition of the death penalty, 24 (51%) were Filipino, 10 (21%) were Japanese, and only 1 was Haole; and

HAWAII'S CIVIL RIGHTS MOVEMENT AND COMMITMENT TO STRONG CIVIL RIGHTS LAWS

WHEREAS, This historical context set the stage for the civil rights movement in Hawai'i that followed World War II, with a confluence of forces that created the dramatic changes that followed: the history of organizing, strikes, struggles and successes of the ILWU and organized labor; the return of nisei veterans; and the 1954 Democratic Party revolution; and

WHEREAS, Hawai'i's civil rights movement was directly tied to the progress of organized labor and the ILWU, who in efforts to organize plantation workers won important victories securing: the right to vote; the right to assemble and associate; the right to trial by jury of peers; and the rights to free speech and due process; and

WHEREAS, As a result of its civil rights movement, Hawai'i historically has had stronger civil rights protections than federal law, which is a "floor" beneath which state law protections against discrimination cannot drop, rather than a "ceiling" above which state law protections cannot rise; and

WHEREAS, The foundation of our state civil rights laws is found in Art. I § 5 of the Hawai'i Constitution which states that "[n]o person . . . shall be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry," the provision granting our citizens the fundamental right to be free from race, religion, sex or ancestry discrimination, first adopted by the Constitutional Convention of 1950 (ratified as Article I, § 4), prior to Hawai'i becoming a state; and

WHEREAS, The delegates to the Constitutional Convention of 1950 were motivated by their collective experience, Hawai'i's history of *de jure* (in law) and *de facto* (in fact) discrimination, which spawned a commitment to civil rights and a civil rights movement much like that which would transform the American south and the nation; and

WHEREAS, In 1963, a year before the passage of the Civil Rights Act of 1964, Hawai'i enacted its state fair employment law, as an integral part of a platform of laws enacted to protect the rights, economic well-being, productivity, safety, and dignity of Hawai'i's workers, including abolishment of the death penalty, labor laws protecting the right to organize, minimum wage, workers compensation, temporary disability insurance, unemployment insurance, occupational health and safety, and pre-paid health; and

WHEREAS, The Hawai'i Supreme Court has recognized that "[t]he public policy of the State of Hawaii disfavoring . . . discrimination is embodied in our statutes and our Constitution" and that "[t]he strength of this expressed public policy

against . . . discrimination is beyond question.” [State v. Hoshijo Ex Rel. White, 102 Hawai‘i 307, 317 (2003), quoting Hyatt Corp. v. Honolulu Liquor Comm’n, 69 Hawai‘i 238, 244 (1987)] ; and

HAWAI‘I CIVIL RIGHTS COMMISSION ESTABLISHED FOR MEANINGFUL ENFORCEMENT OF CIVIL RIGHTS LAWS

WHEREAS, The Hawai‘i Civil Rights Commission (HCRC) was established by Act 219, L. 1988, and Acts 386 and 387, L. 1989, organized in 1990, and opened its doors in 1991; and

WHEREAS, The HCRC has an important constitutional and statutory mandate because Hawai‘i has a compelling state interest in civil rights law enforcement, protecting the right of all people in the State to be free from unlawful discrimination; and

WHEREAS, Prior to the establishment of the HCRC, jurisdiction over state anti-discrimination laws was split among several state departments, with limited and sporadic enforcement, and state prosecution of discrimination complaints was virtually non-existent; and

WHEREAS, Prior to the establishment of the HCRC, complainants who could not afford private attorneys to seek remedies in court had no administrative process to adjudicate their claims, few employment discrimination cases were brought to court under state law, and there were few court interpretations of state law anti-discrimination laws; and

WHEREAS, The intent of the legislature in creating the HCRC was “...to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State’s commitment to preserving the civil rights of all individuals;” and

WHEREAS, The cornerstone of the HCRC statutory scheme was the establishment of a uniform procedure “...designed to provide a forum which is accessible to anyone who suffers an act of discrimination;” and

WHEREAS, The HCRC’s enabling statute, H.R.S. Chapter 368, declares that discrimination because of race, color, religion, age, sex (including gender identity and expression), sexual orientation, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy; and

WHEREAS, The HCRC exercises jurisdiction over Hawai‘i’s laws prohibiting discrimination in employment (H.R.S. Chapter 378, Part I), housing (H.R.S.

Chapter 515), public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. § 368-1.5) ; and

WHEREAS, Under its statutory mandate, the HCRC receives, investigates, conciliates, litigates, and adjudicates complaints of discrimination, providing a uniform procedure for the enforcement of the state’s discrimination laws; and

WHEREAS, Under the doctrine of exhaustion of administrative remedies, state courts require the filing of HCRC complaints before resort to court action, with statutory exceptions for fair housing complaints and civil actions for sexual harassment or sexual assault; and

HAWAI’I CIVIL RIGHTS IN CRISIS: THE IMPACT OF THE COVID-19 PANDEMIC EMERGENCY

WHEREAS, Governor David Y. Ige issued an emergency proclamation on March 4, 2020, marking the beginning of the unprecedented COVID-19 pandemic emergency that has touched every aspect of the lives of Hawai’i’s people - with resulting infections, hospitalizations, and lives lost; and

WHEREAS, In an effort to slow the spread of COVID-19, subsequent emergency proclamations have imposed stay-at-home directives, shut downs of high-risk businesses and public parks, limits on gatherings, social distancing mandates, mandatory quarantines, and other safety measures; and

WHEREAS, The pandemic emergency has taken a heavy toll on the financial well-being of people and families, in the form of job loss, business closures, inability to pay rent or mortgages, and food insecurity; and

WHEREAS, The catastrophic impact of the COVID-19 pandemic on the state economy will have a direct impact on state tax revenues, with a projected budget shortfall of \$ 2.3 billion for FY 2020 and FY 2021, requiring state general fund budget cuts, which could include furloughs, reductions in force (RIFs), and targeted vertical cuts to state programs; and

WHEREAS, The HCRC has federal contracts with the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Housing and Urban Development (HUD) Office of Fair Housing and Equal Opportunity (FHEO), both of which require maintenance of state effort and prohibit unilateral reduction in state funding for investigation of dual-filed fair employment and fair housing complaints, respectively; and

WHEREAS, Even before the COVID-19 pandemic emergency, the HCRC was understaffed as a result of cuts imposed in 2009-2010, when in response to the

Great Recession, the HCRC lost 3 of 11 permanent investigator positions, a loss of 27% of investigator capacity which was never restored; and

WHEREAS, Of the HCRC's remaining 8 permanent investigator positions, 2 were vacant in mid-March 2020 when the COVID-19 pandemic emergency broke - those vacant positions have been frozen and defunded, leaving the HCRC with only 6 funded, filled permanent investigator positions at the end of October 2020, or 55% of investigator capacity in 2009; and

WHEREAS, Additional targeted cuts to the HCRC's general fund budget will require cuts to the remaining 6 investigator positions or 3 permanent enforcement attorney positions, going to the heart of the HCRC civil rights law enforcement capacity; and

WHEREAS, Targeted cuts to the HCRC's general fund staffing will affect every stage of the HCRC process, intake and filing, investigation, conciliation, litigation, and adjudication of complaints of discrimination complaints, eviscerating the HCRC's capacity to effectively perform its civil rights law enforcement functions; and

HAWAI'I CIVIL RIGHTS COMMISSION PROVIDES ACCESS TO JUSTICE FOR HAWAI'I'S PEOPLE THROUGH STRONG CIVIL RIGHTS LAW ENFORCEMENT

WHEREAS, The HCRC is the only state agency where anyone who believes that they have suffered from discrimination in their place of employment, in housing, or in a place of public accommodation (e.g., a store or hotel) can seek vindication of their rights under state law; and

WHEREAS, The HCRC statutory enforcement mechanism provides the only effective means to pursue justice for those who cannot afford a private attorney, particularly in cases in which damages are not substantial enough to retain a private attorney, and in cases which present difficult issues or require extensive investigation; and

WHEREAS, Without effective enforcement, state anti-discrimination laws would be rendered meaningless; **now, therefore, be it**

RESOLVED, That the Hawai'i Civil Rights Commission urges the State of Hawai'i to reaffirm its historical commitment to civil rights for all Hawai'i's people, strong civil rights laws, and strong civil rights law enforcement, vindicating the compelling state interest in eliminating discrimination by, even in this difficult time, maintaining support and resources to build the capacity required to give meaning to that commitment; and be it further

RESOLVED, That copies of this Resolution be transmitted to Governor David Y. Ige, Senate President Ronald D. Kouchi, House Speaker Scott Saiki, Chair Donovan M. Dela Cruz of the Senate Committee on Ways and Means, Chair Sylvia Luke of the House Committee on Finance, Chair Brian T. Taniguchi of the Senate Committee on Labor, Culture and the Arts, Chair Richard H.K. Onishi of the House Committee on Labor & Tourism, Director of Labor and Industrial Relations Anne Perreira-Estaquio, and Director of Finance Craig K. Hirai.

DATED: November 12, 2020

LIANN EBESUGAWA
CHAIR

JOAN LEWIS
COMMISSIONER

WILLIAM J. PUETTE
COMMISSIONER

JON MATSUOKA
COMMISSIONER

Fair and Effective Enforcement – History and Structure of the HCRC

The HCRC was organized in 1990 and officially opened its doors in January 1991. For twenty-eight years the HCRC has enforced state laws prohibiting discrimination in employment (HRS Chapter 378, Part I), housing (HRS Chapter 515), public accommodations (HRS Chapter 489), and access to state and state-funded services (HRS §368-1.5). The HCRC receives, investigates, conciliates, and adjudicates complaints of discrimination.

The HCRC currently has four (4) uncompensated volunteer Commissioners, with one vacancy. They are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and commitment to preserve the civil rights of all individuals. The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes.

An Effective and Uniform Enforcement Scheme

Prior to the establishment of the HCRC, jurisdiction over state anti-discrimination laws was split among several state departments. Enforcement was limited and sporadic. State prosecution of discrimination complaints was virtually non-existent. Nearly all aggrieved were left with litigation of individual lawsuits as their only recourse. For complainants who could not afford private attorneys to seek remedies in court, there was no administrative process to adjudicate their claims. As a result, few employment discrimination cases were brought to court under state law, and there were few court interpretations of state law.

The intent of the legislature in creating the HCRC was “...to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State’s commitment to preserving the civil rights of all individuals.”¹

The cornerstone of the HCRC statutory scheme was the establishment of a uniform procedure “...designed to provide a forum which is accessible to anyone who suffers an act of discrimination.”²

A Fair Administrative Process

The HCRC is committed to, and its procedures are structured to ensure fairness to both complainants and respondents. The HCRC is divided into two separate and distinct sections: a) the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and b) the adjudication section, which

¹ 1989 House Journal, Standing Committee Report 372

² Id.

conducts hearings, issues orders and renders final determinations on discrimination complaints filed with the HCRC.

The Commissioners have delegated HCRC enforcement authority to the Executive Director. The Commissioners have authority to adjudicate and render final decisions based on the recommendations of their hearings examiners, and oversee the adjudication section through their Chief Counsel.

The Commissioners, Chief Counsel, and hearings examiners are not involved in or privy to any actions taken by the Executive Director in the investigation and pre-hearing stages of the HCRC process. Likewise, the Executive Director and enforcement section are not permitted to communicate ex parte with the Commissioners, Chief Counsel or hearings examiners about any case.

The HCRC investigates discrimination complaints as a neutral fact-gatherer. At the conclusion of an investigation, a determination is made whether or not there is reasonable cause to believe unlawful discrimination has occurred.

The law requires filing of a complaint with the HCRC in most (but not all) cases before filing a discrimination lawsuit in state court.³ Otherwise, the state courts will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement reduces court caseloads by eliminating claims which are non-jurisdictional, or non-meritorious, or complaints that are closed or settled through the HCRC administrative process. As a result, the great majority of cases filed with the HCRC are resolved, reach disposition, and are closed without resort to the courts.

Civil Rights Law Enforcement: State & Federal Law

Federal fair employment and fair housing laws are enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and U.S. Department of Housing and Urban Development (HUD) Office of Fair Housing and Equal Opportunity (FHEO), respectively. Pursuant to work share and cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law (“dual-filed” complaints). Both EEOC and HUD contracts require maintenance of state effort and dedication of state resources for investigation of dual-filed complaints.

While Hawai‘i and federal fair employment and fair housing laws are similar, they are not identical. Hawai‘i has more protected bases than federal law, and there

³ Pursuant to HRS § 378-3(10) an employee may file a direct civil action for sexual harassment. Similarly, pursuant to HRS § 515-9(b), an aggrieved person may file a direct civil action for fair housing complaints. While the statutes allow these direct civil actions in these cases, only a small number are filed; the great majority of complaints are still filed with the HCRC.

are substantial differences in the definition of “employer” and the statute of limitations for filing charges of employment and housing discrimination. In addition to these jurisdictional differences, Hawai‘i law provides stronger protections against pregnancy discrimination and sexual harassment in employment.

The greater protections in Hawai‘i law are attributable to the strong civil rights mandate contained in the Hawai‘i State Constitution, HCRC statutes, HCRC rules, HCRC Commission and state court decisions. In contrast, federal court interpretations of federal civil rights laws have historically resulted in narrower protections against discrimination. The issue of state versus federal standards is an important one, particularly in states like Hawai‘i that have a strong commitment to equal opportunity and non-discrimination.

Mediation Program

The HCRC's voluntary mediation program completed its twenty-first full year on June 30, 2020. The program continued to enjoy a productive year, but it was also a time of significant adjustments and changes in adapting to the COVID-19 pandemic emergency.

Complainants, respondents and the HCRC, with the strong support of the Commissioners, want prompt and fair resolutions to discrimination complaints. To help accomplish this goal, the HCRC developed its voluntary mediation program, a process in which neutral third persons (often a team of two co-mediators with at least one attorney-mediator) help the parties discuss, clarify, and settle complaints.

The HCRC voluntary mediation program uses trained community mediators who are unbiased and do not rule on the merits of the complaint. The HCRC provides the mediators with the basic facts of each case needed to understand the dispute. The mediators then assist the parties to reach voluntary agreements. These agreements may include apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation can save time, money and resources. It also can eliminate the stress of litigation and allow the parties to explain their side of the case and to control the process of resolving the disputes in a non-adversarial manner.

The HCRC works with trained, senior mediators from the Mediation Centers of Hawai‘i (MCH), a statewide network of community non-profit mediation centers. MCH utilizes a facilitative approach to mediation. MCH mediators receive training on civil rights laws and settling disputes by HCRC and MCH staff on a regular basis. The HCRC Program Specialist - Mediation Coordinator facilitates the process by explaining, encouraging, referring, and reviewing mediation and its benefits to the parties. There are mediation centers on Oahu (Mediation Center of the Pacific), Maui (Mediation Services of Maui), East Hawai‘i (Ku‘ikahi

Mediation Center in Hilo), the West Hawai'i Mediation Center in Kailua-Kona, and Kauai (Kauai Economic Opportunity, Inc. Mediation Program). The centers charge fees on a sliding scale for the sessions, which can be waived or reduced if there is financial hardship.

Private mediation is also available if the parties choose. Private mediations generally utilize an evaluative approach, in which the law and possible damages are emphasized. Private mediation is an important part of the HCRC mediation program. Parties are free to select commercial private mediators who charge market rates or private mediators from the Access ADR program, a reduced fee program of the MCP.

Mediation can occur at any stage of the intake, investigation, conciliation, or hearing process. Mediation is first offered when the complaint is accepted. At this early stage disputes are often easier to resolve because the facts are fresh, damages may not have accumulated, and the positions of the parties may still be fluid. However, parties may voluntarily choose mediation at any time during the HCRC investigative, conciliation or hearing process.

Since the inception of the HCRC's mediation program, all types of complaints have been eligible for voluntary mediation except for housing complaints. After much research and planning, at the end of FY 2017 the HCRC launched a pilot program to offer the mediation of housing complaints for the first time, with the HCRC's Program Specialist - Mediation Coordinator, Sharon Ferguson-Quick, personally conducting those mediations. Since then the HCRC's housing mediation program has flourished under Ms. Ferguson-Quick's leadership, and it has become a standard component of the HCRC's overall mediation system.

In FY 2020 the COVID-19 pandemic brought about numerous changes in the HCRC's mediation program. In-person mediations were no longer possible due to social distancing requirements, so the HCRC staff worked with their community partners to develop standard procedures for conducting remote mediations. In addition, the HCRC updated its equipment, including acquiring specialized computer software, in order to resume the in-house mediation of housing complaints. Presently, all types of mediations offered by the HCRC are being conducted safely and effectively through video conferencing.

In viewing all the mediation-related events throughout FY 2020, 24 cases were referred into mediation, and 27 mediations were completed (dispositions). Of the 27 dispositions, 15 resulted in mediated settlements (55.6%), and 12 cases resulted in no agreement (44.4%). Of the mediated settlements, 10 were in employment cases, and 8 of those were dual-filed with the EEOC. There were also 4 mediated settlements of housing cases, all of which were dual-filed with HUD. Finally, 1 public accommodations case resulted in a mediated agreement.

The total disclosed monetary value of mediated agreements was \$62,930 with a wide variety of affirmative relief as well. Of the 15 settlements, 4 were mediated by HCRC's program; Mediation Center of the Pacific had 8 settlements; and West Hawai'i Mediation Center had 1 settlement. There were also 2 settlements with private mediators.

The primary bases of discrimination of the 15 settlements were as follows: Disability - 8; Retaliation - 3; Age - 1; Ancestry - 1; Marital Status - 1; and Sex - 1. Many of the completed mediations also included charges on other protected bases.

Although monetary settlements were achieved in most agreements, almost all mediated agreements also involved some form of non-monetary affirmative relief. Examples of non-monetary relief (here, in an employment context) include:

- 1) frank discussion of disputes, which often lay the groundwork for eventual settlement or restoration of the prior employment relationship;
- 2) reinstatement and/or restoration of employee benefits;
- 3) formal or informal apologies (by either or both sides);
- 4) increasing hours for part-time employees;
- 5) providing neutral or positive references for former employees;
- 6) removal of inappropriate negative comments in employee records;
- 7) provision of reasonable accommodations;
- 8) changing shifts when practicable;
- 9) policy revisions and postings; and
- 10) clarification of communications between employer and employee, leading to more productive working environments.

Public Education & Outreach

In addition to enforcing anti-discrimination laws, the HCRC is committed to preventing and eliminating discrimination through public education. The HCRC Commissioners and staff maintained or assisted in a number of civil rights public education efforts, working with civil rights, business, labor, professional, and non-profit organizations, on new and continuing initiatives.

On November 20, 2019, the HCRC, in collaboration with the EEOC, presented a public training entitled, "Civil Rights at Work: Worker Rights & Employer Best Practices," at the Consolidated Ward Theaters. The training featured speakers from the HCRC, EEOC, University of Hawai'i Center for Labor Education and Research (CLEAR), American Savings Bank, One Shared Future, Mediation Center of the Pacific, Marr Jones & Wang, Hawai'i State Commission on the Status of Women, and UNITE HERE Local 5.

During FY 2020 the HCRC continued to be an active participant in the fair housing committee, comprised of representatives from the housing departments of each county and the State, HUD Honolulu Field Office, Hawai'i Housing Authority, Hawai'i Housing Finance and Development Corporation, Legal Aid Society of Hawai'i, Hawai'i Disability Rights Center, and other housing-related private and public entities. The committee met to learn and discuss the latest fair housing cases, legal issues, and recent developments in fair housing from a federal, state and local perspective, to corroborate on local fair housing issues and concerns, and to work together to promote fair housing throughout the islands.

During FY 2020 the HCRC continued to work with HUD, state and county housing agencies, community fair housing organizations, non-profit and for-profit organizations, and businesses to co-sponsor fair housing trainings on the Islands of Hawai'i, Kauai, Maui, and Oahu. Representative trainees in the housing area have included members of the Board of Realtors, Property Managers Association, National Association of Residential Property Managers, Community Associations Institute (CAI) Hawai'i, Hawai'i Center for Independent Living (HCIL), landlords, tenants, homeless veterans, emergency shelter and transitional housing management/staff, case management staff, housing assistance/referral management/staff, and various property management companies and community associations. Unfortunately, due to the COVID-19 pandemic emergency, all of the housing trainings and housing-related events that normally take place in April for National Fair Housing Month were cancelled. The HCRC is in the process of rescheduling at least some of those trainings, to be conducted remotely.

During FY 2020 the HCRC also conducted outreach and/or participated in the following:

- Pro Bono Fair and Pro Bono Panel at the William S. Richardson School of Law, University of Hawai'i
- Annual Martin Luther King, Jr. Holiday Parade and Festival
- Annual Honolulu Pride Parade and Festival
- Labor Information Fair held by the Hawai'i Department of Labor and Industrial Relations to commemorate its 80th anniversary
- Housing seminar held by Community Associations Institute – Hawai'i Chapter
- Community Roundtable: Combating Sexual Harassment in Housing – hosted by the U.S. Attorney's Office, District of Hawai'i

- Fair Housing Training for Emergency and Transitional Shelter Providers and Professionals
- National Expungement Week Clinic and Information Fair at the William S. Richardson School of Law, University of Hawai'i, and co-sponsored by the HCRC.

The HCRC website is part of a consolidated website that includes all divisions of the Department of Labor & Industrial Relations. The HCRC relies on the DLIR webmaster for maintenance and updating of the HCRC website, as well as ongoing efforts to improve user-friendliness of the site. The webmaster's detailed monthly index indicates that the site continues to attract broad public interest, particularly to those pages on administrative rules, case decisions, and the mediation program.

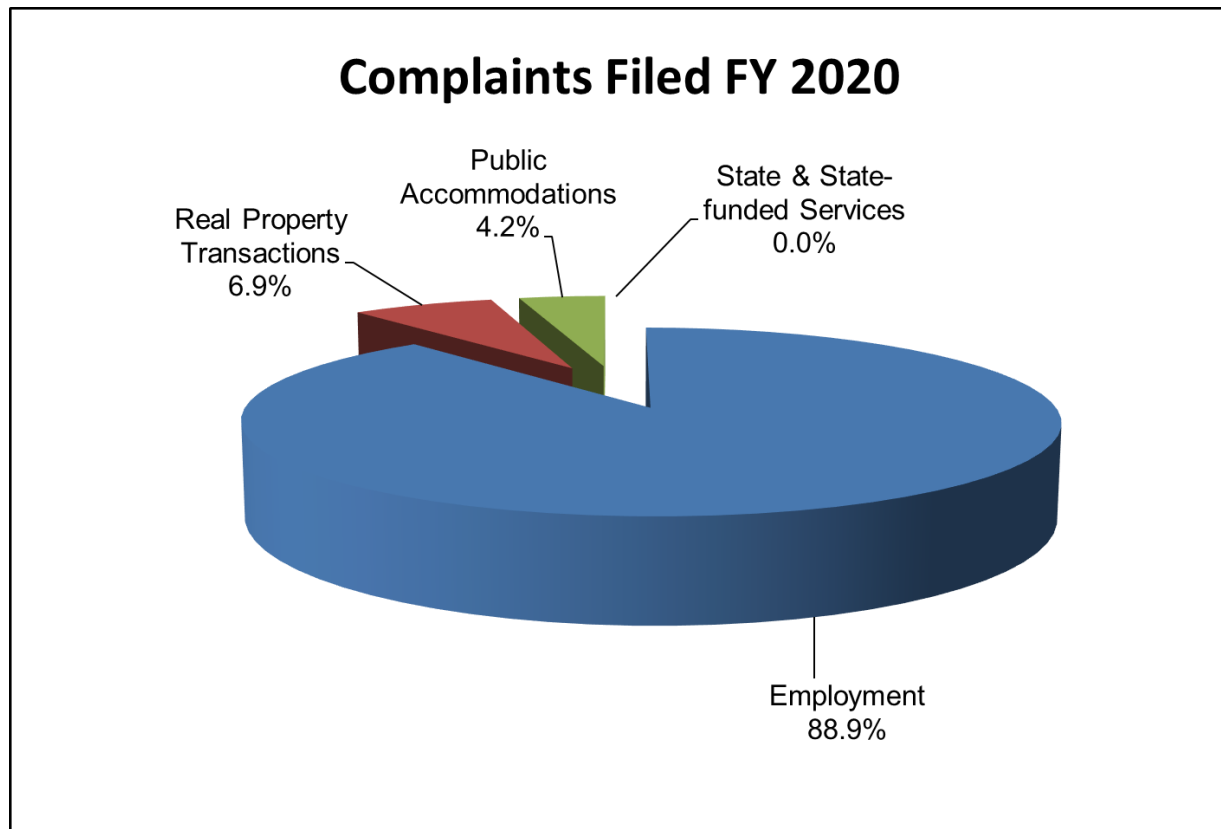
Caseload Statistics

Intake

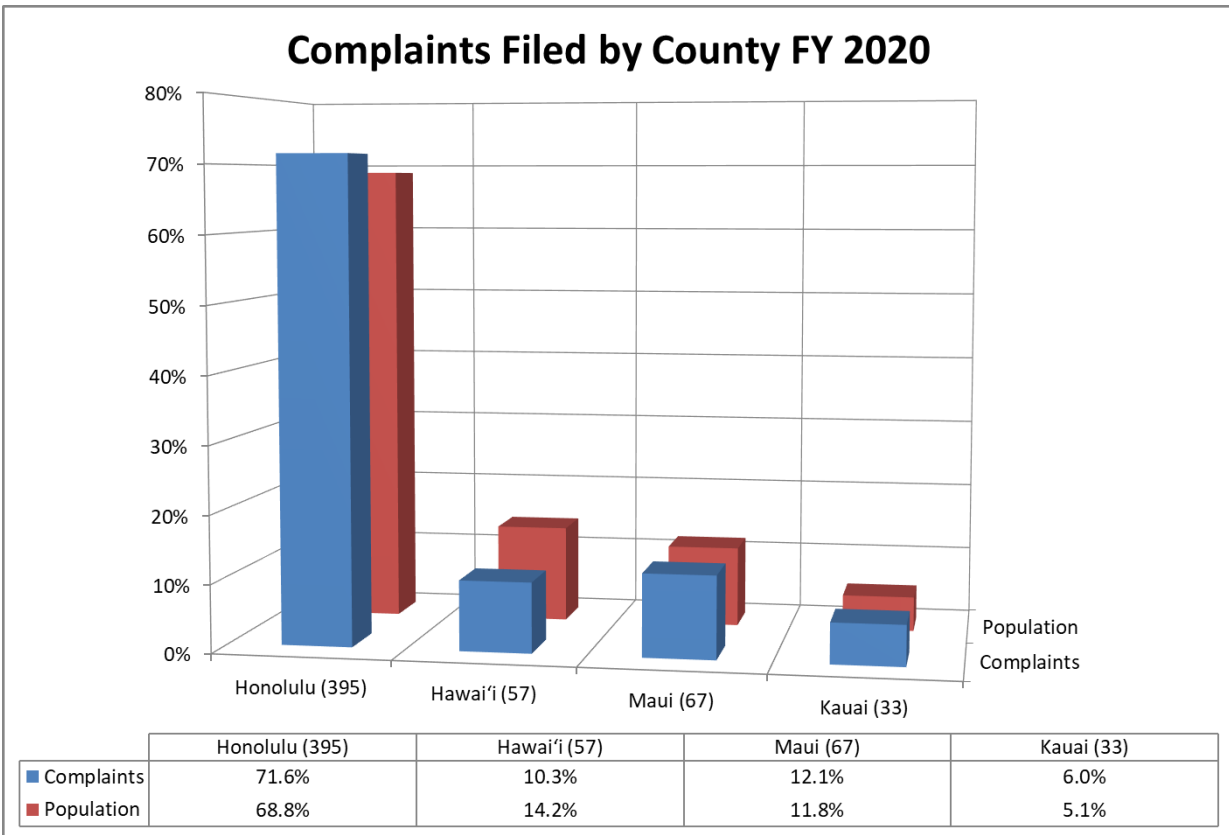
During FY 2020, the HCRC received 2964 telephone and walk-in inquiries. HCRC investigators completed 637 intakes, and 552 discrimination complaints were filed with the HCRC, an average of 46.0 complaints a month.

Of the 552 complaints that were filed with the HCRC, 284 complaints originated with HCRC investigators (averaging 23.7 per month), and another 268 cases originated with the federal EEOC or HUD. These 268 cases were dual-filed under state law with the HCRC.

The 552 cases included 491 employment cases, 23 public accommodations cases, 38 real property transactions (housing) cases, and 0 access to state and state-funded services complaints. The other inquiries and intake interviews did not lead to filed charges due primarily to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected bases; or c) the complainant's decision not to pursue the complaint.

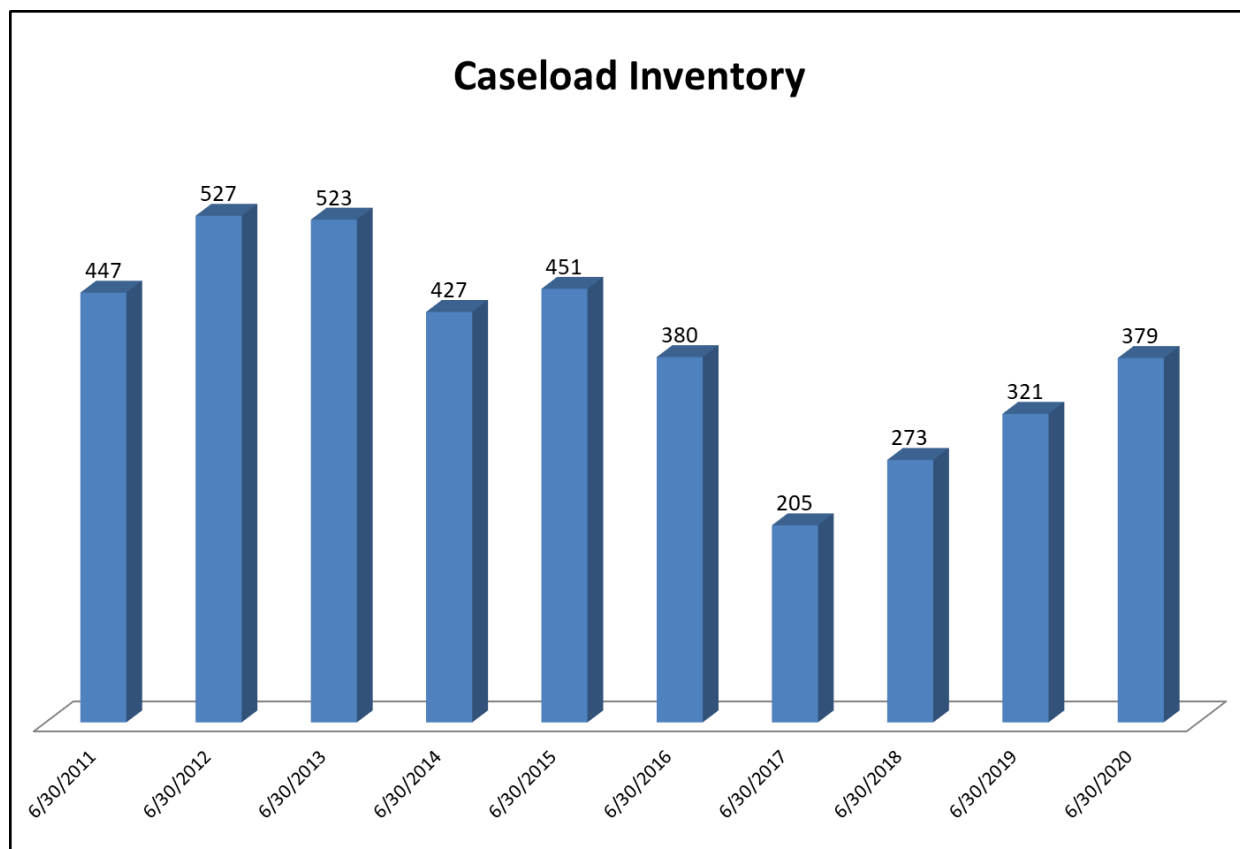


The 552 complaints accepted by the HCRC consisted of 395 Honolulu County complaints, 57 Hawai'i County complaints, 67 Maui County complaints, and 33 Kauai County complaints. The number of complaints filed from each county was consistent with its proportion of resident population in the state (Honolulu County 68.8%; Hawai'i County 14.2%; Maui County 11.8%; and Kauai County 5.1%).



Closures⁴

HCRC investigators and attorneys closed 207 cases during FY 2020 (a significant decrease from 260 cases in FY 2019) for an average closure rate of 17.3 cases per month, down from 21.7 cases per month in FY 2019. HCRC investigations resulted in cause determinations in 7 cases, down from 10 cause determinations in FY 2019. As of June 30, 2020, there were 379 cases pending with HCRC investigators; on June 30, 2019, there were 321 pending cases.



The average period for case closure by investigators was 319 days, as compared to 341 days for FY 2019, 329 days for FY 2018, and 405 days for FY 2017. A review of this fiscal year shows the following reasons for investigative closures:

4 ANALYSIS AND EXPLANATION OF CLOSURE DATA

This closure data does not reflect the number of completed investigations that result in cause determinations. Generally, the reason for this distinction is that cases are not closed upon issuance of a notice of cause, but are conciliated, and, if conciliation fails, are docketed for hearing.

Historically, there is a relationship between the number of cause cases and predetermination settlements/resolutions between parties—the larger the number of notices of cause, the smaller the number of settlements/resolutions, and vice versa. Typically, cause determinations and settlements/resolutions constitute between 15-25% of the total of those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties.

During FY 2020, HCRC investigations resulted in 7 cause determinations, and 37 cases were closed on the basis of pre-determination settlement or resolution between parties. 142 cases were closed on the basis of no-cause determinations upon completion of investigation. The ratio of cause determinations and predetermination settlements/resolutions (44) to those cases that are either investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties (186) for this fiscal year is 23.7%.

Merit Closures	No. of Cases	% of Subtotal	% of Total Closures
Resolved by Parties	24	12.90%	11.59%
Pre-Determination Settlements	13	6.99%	6.28%
Cases Resolved by Attorneys	7	3.76%	3.38%
No Cause Determinations	<u>142</u>	<u>76.34%</u>	<u>68.60%</u>
Subtotal	186	100.0%	89.86%
Non-merit Closures	No. of Cases	% of Subtotal	% of Total Closures
Complainant Elected Court Action	9	42.86%	4.35%
No Jurisdiction	1	4.76%	0.48%
Complaint Withdrawn	2	9.52%	0.97%
Complainant Not Available	1	4.76%	0.48%
Complainant Failed to Cooperate	6	28.57%	2.90%
No Significant Relief Available	1	4.76%	0.48%
Administratively Closed	<u>1</u>	<u>4.76%</u>	<u>0.48%</u>
Subtotal	21	100.00%	10.14%
Total Number of Closures	207		100.00%

Employment Cases

H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex (including gender identity or expression), sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, reproductive health decision, domestic or sexual violence victim status, credit history or credit report, assignment of income for child support obligations, National Guard participation, and breastfeeding/expressing milk. Examples of such practices are outlined in H.R.S. §378-2. A complaint can contain more than one basis for the alleged discriminatory conduct, but for statistical purposes each complaint is identified by only one designated “primary basis”.

The HCRC has a work-share agreement with the EEOC. Under the work-share agreement, a case is filed with both agencies where there is concurrent jurisdiction. However, only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 491 employment cases were accepted by the HCRC. The HCRC was the intake agency for 227 of these cases, and the HCRC dual-filed another 264 cases originating with EEOC. Of the HCRC-originated cases, 84.1% were also filed with EEOC.

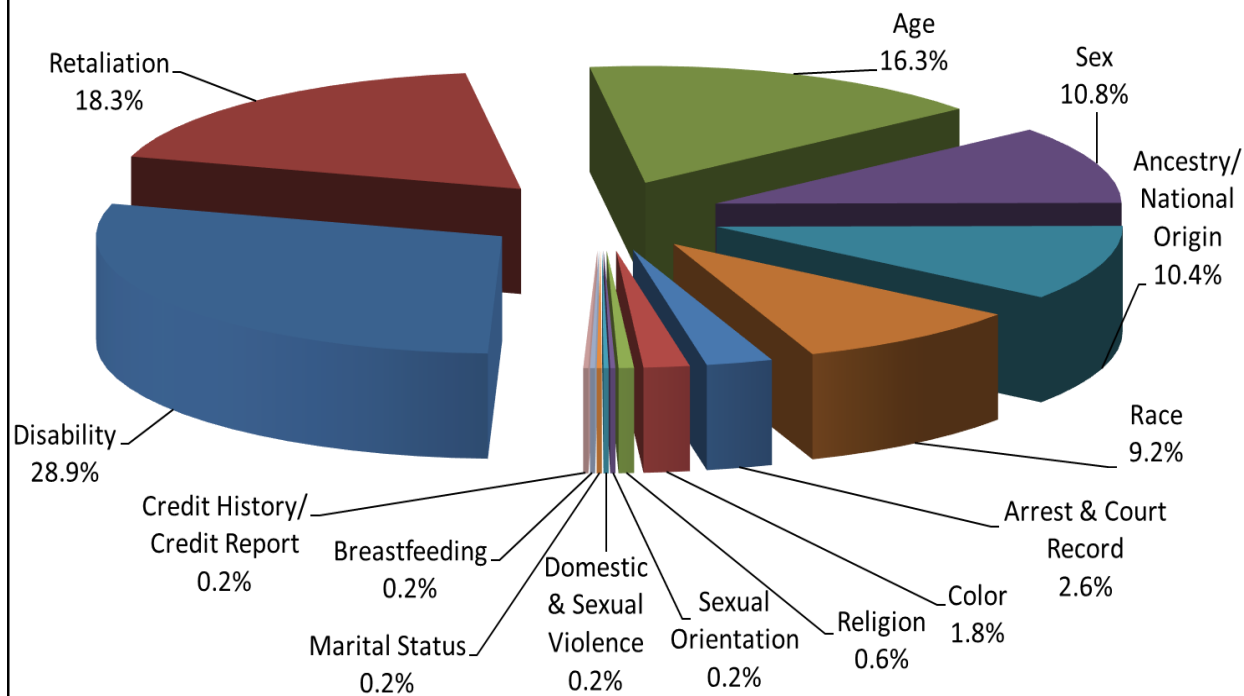
Of the 491 employment complaints filed, the primary bases most cited were disability, in 142 cases (28.9%); retaliation, in 90 cases (18.3%); age, in 80 cases (16.3%); and sex, in 53 cases (10.8%). Of the sex discrimination complaints, 15 (28.3% of all sex cases) alleged sexual harassment as the primary basis, and 7 (13.2% of all sex cases) were primarily based on pregnancy.

The next most cited primary bases were ancestry/national origin, in 51 cases (10.4%); race, in 45 cases (9.2%); arrest and court record, in 13 cases (2.6%); color, in 9 cases (1.8%); religion, in 3 cases (0.6%); and breastfeeding, credit history or credit report, domestic or sexual violence victim status, marital status, and sexual orientation, in 1 case each (0.2%). There were no cases primarily based on child support obligations, National Guard participation, or reproductive health decision.

The case closure period averaged 320 days for the 171 employment cases that were closed or caused by HCRC investigators during FY 2020.

[See chart on page 23]

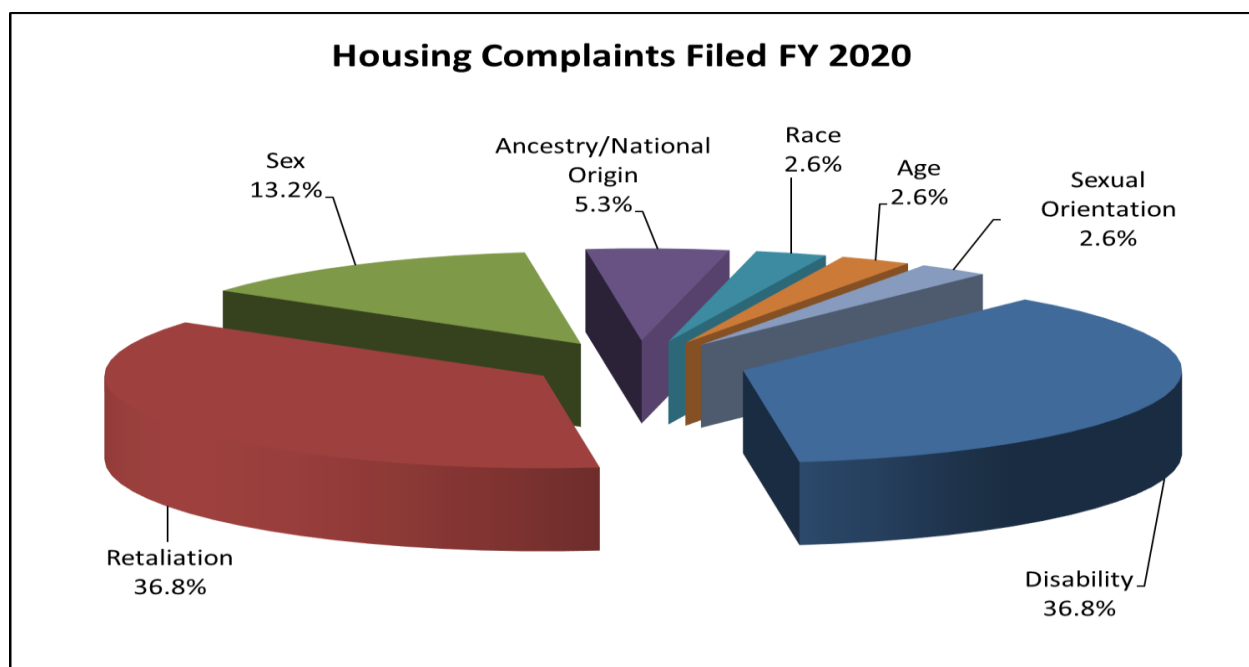
Employment Complaints Filed FY 2020



Real Property Transactions (Housing) Cases

During FY 2020, the HCRC accepted 38 cases of housing discrimination. The primary bases most cited were disability and retaliation, in 14 cases each (36.8%); followed by sex, in 5 cases (13.2%); ancestry/national origin, in 2 cases (5.3%); and age, race, and sexual orientation, in 1 case each (2.6%). There were no cases primarily based on color, familial status, HIV infection, marital status, or religion.

Housing case closures averaged 334 days for the 23 cases closed or caused during FY 2020.



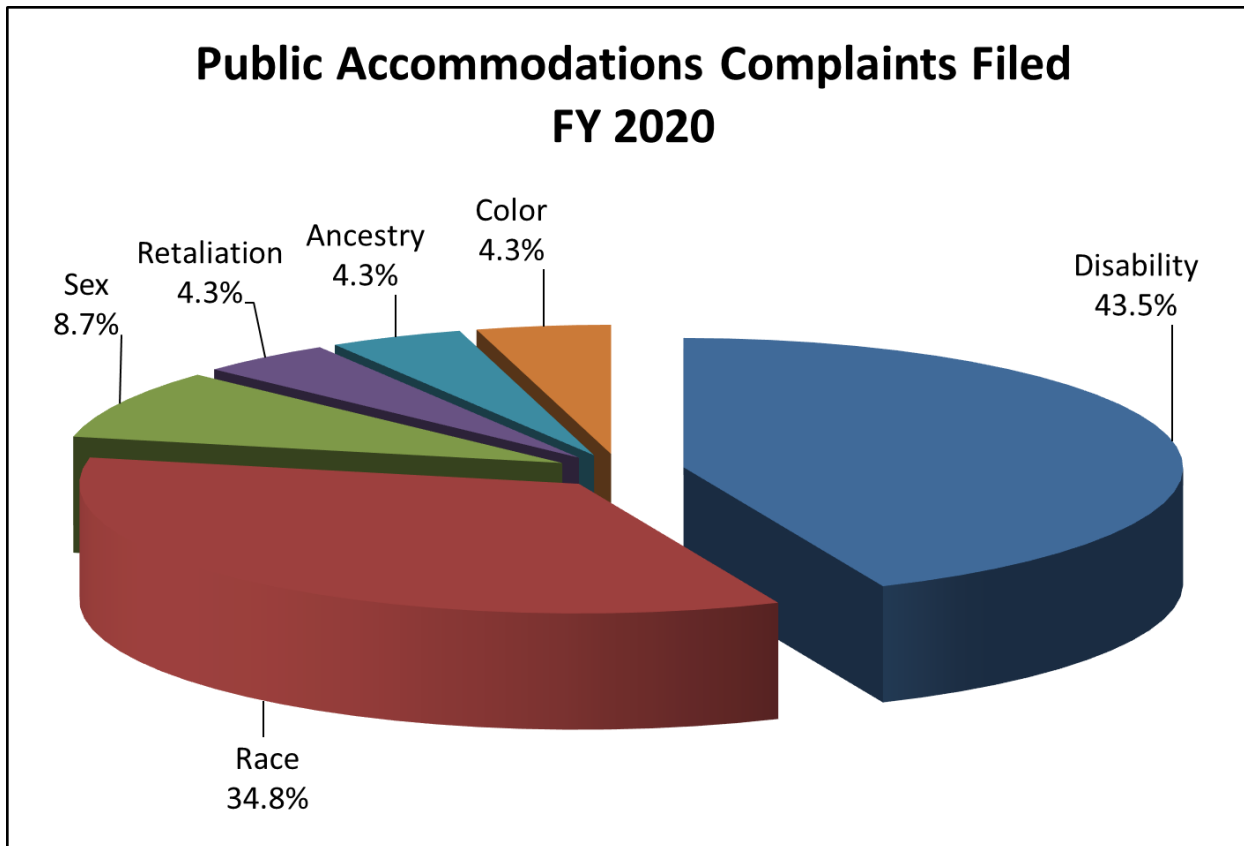
Public Accommodations Cases

H.R.S. Chapter 489 prohibits unfair discriminatory practices that deny, or attempt to deny a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation on the basis of race, sex, sexual orientation, color, religion, ancestry, or disability. Public accommodations include retail stores, restaurants, theaters, sports arenas, public transportation, healthcare providers, hotels, and banks.

During the fiscal year, 23 new cases of public accommodations discrimination were accepted. Of these, the primary basis most cited was disability, in 10 cases

(43.5%); followed by race, in 8 cases (34.8%); sex, in 2 cases (8.7%); and ancestry, color, and retaliation, in 1 case each (4.3%). There were no cases primarily based on religion or sexual orientation.

Public accommodations case closures averaged 274 days for the 23 cases closed or caused during FY 2020.



Access to State and State-Funded Services Cases

H.R.S § 368-1.5 prohibits state agencies, or any program or activity receiving state financial assistance from excluding from participation, denying benefits or otherwise discriminating against persons with disabilities (the only protected class under this statute).

During FY 2020, there were no cases filed under § 368-1.5. There also were no cases filed under § 368-1.5 that closed during the fiscal year.

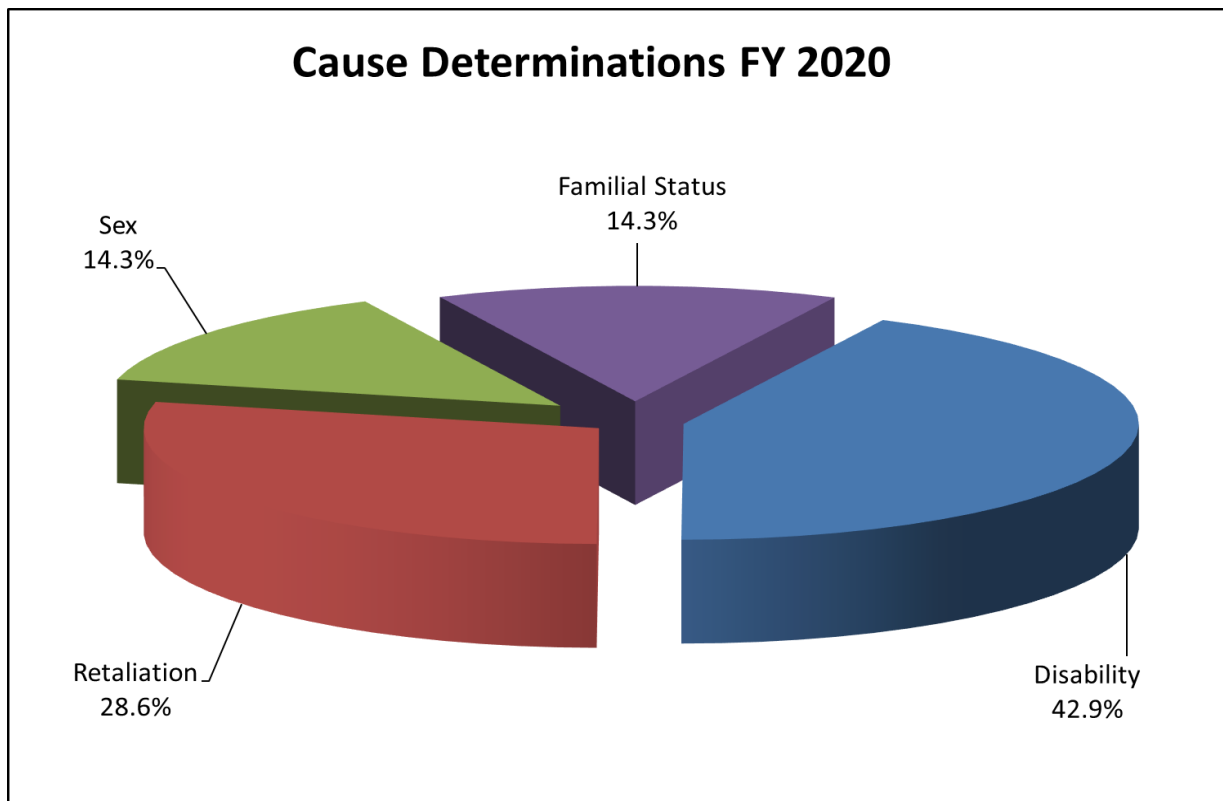
The HCRC has jurisdiction over few cases in this category based on the decision 2017 decision, *Hawaii Technology Academy and the Department of Education v. L.E. and Hawaii Civil Rights Commission*, 141 Hawaii 147, 407 P.3d 103 (2017), which held that the legislature did not intend the HCRC to have jurisdiction over

disability discrimination claims under section 368-1.5, Hawaii Revised Statutes, if protections under federal law, section 504 of the Rehabilitation Act, P.L. 93-112, are applicable.

Cause Cases

When an investigation results in a recommendation that there is reasonable cause to believe that discrimination has occurred, the case is assigned to an HCRC enforcement attorney for legal action. In FY 2020, 7 recommendations for cause were brought forward for legal action. Of these cases, 5 (71.4%) were employment cases, and 2 (28.6%) were housing cases.

Of the 7 investigations with a cause recommendation, the primary basis most cited was disability, in 3 cases (42.9%); followed by retaliation, in 2 cases (28.6%); and familial status and sex, in 1 case each (14.3%).



Case Settlements

The HCRC promotes and encourages settlement during all stages of the complaint process. Through pre-determination settlements, mediation, and conciliation, the HCRC obtains relief and resolves complaints while avoiding

unnecessary litigation. These settlements provide closure for the parties and conserve HCRC investigation and litigation resources for complex or precedent setting cases.

During FY 2020 the HCRC continued to successfully obtain monetary relief through settlement of complaints. In the 5 cause cases that were settled, HCRC attorneys obtained monetary settlements totaling \$133,360. Of the 36 cases settled prior to an investigative finding, 16 of those cases involved confidential settlements, the terms of which were not disclosed to the HCRC. Of the remaining 20 cases settled prior to an investigative finding, monetary relief totaled \$115,980. This figure includes pre-determination settlements obtained through HCRC investigators and settlements between the parties (\$53,050), as well as investigative settlements obtained through the HCRC mediation program (\$62,930). Collectively the HCRC's known monetary settlements for FY 2020 totaled \$249,340. Since the settlement terms are unknown for 16 closed cases, the actual total figure for all monetary settlements in FY 2020 is probably significantly higher than \$249,340.

In addition to monetary relief, significant affirmative relief was obtained. The HCRC seeks affirmative relief for four basic reasons: to enforce civil rights laws, stop discriminatory conduct, prevent future harm to complainants, and assist respondents in avoiding future violations. HCRC settlements and conciliation agreements routinely contain various types of affirmative relief including the development and implementation of non-discrimination policies, employee and supervisor training on non-discrimination policies, posting non-discrimination policies, and publishing notices informing the public of the HCRC's role in enforcing state non-discrimination laws.

In some instances, non-monetary relief can be an important element of a settlement. For example, some complainants have received a letter of apology pursuant to the terms of a settlement. A simple apology sometimes goes a long way towards healing the rift between a complainant and respondent, and this form of relief is often not available as a court ordered remedy. Some cases were resolved when an employer, housing provider, or public accommodation corrected an unlawful discriminatory policy or practice after notice of the violation. During FY 2020, a significant number of employers, housing providers, and public accommodations voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following are illustrative of the HCRC cases that were resolved through conciliation or mediation and describe the relief obtained during FY 2020:

- The complainant in an employment case alleged that the respondent employer terminated him due to his arrest and court record. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included a payment of \$10,000 to the complainant,

conversion of the complainant's termination to a resignation, dissemination of the respondent's non-discrimination policy to all employees in Hawai'i, and mandatory non-discrimination training for all of the respondent's managers and supervisors in Hawai'i.

- The complainant in an employment case alleged that the respondent employer constructively discharged her (i.e., forced her to quit) on the basis of her breastfeeding or expressing milk. The complainant asserted that upon returning from maternity leave, she was not granted reasonable break time or a safe and intrusion-free location to express milk. The case was resolved prior to an investigative finding through a pre-determination settlement. The terms included a payment of \$3,000 to the complainant, and posting a notice of the rights of employees who need to breastfeed or express milk on all of the respondent's employee bulletin boards.
- The complainants in a housing case alleged that the respondent housing providers refused to rent to them on the basis of the disability of one of the complainants and her need for an assistance animal. Prior to an investigative finding the case was successfully mediated through the HCRC's housing mediation program. The terms of the mediated settlement included a payment of \$10,000 to the complainants, the respondents' adoption of a non-discrimination policy, the respondents' agreement to provide prospective tenants with an information sheet regarding non-discrimination in housing, and mandatory non-discrimination training.
- The complainants in a public accommodations case alleged that the respondents (a commercial business and its owner) subjected them to discrimination by denying them services, forcing them to leave the premises, and making discriminatory statements. The HCRC investigated the case and issued a Notice of Cause, finding that the respondents had unlawfully denied the complainants the full and equal enjoyment of a place of public accommodation on the basis of disability. Thereafter, the case was settled for a payment of \$10,000 to the complainants, the respondents' adoption and posting of a non-discrimination policy, and mandatory non-discrimination training for all of the respondents' employees.
- The complainant in an employment case alleged that the Respondent employer subjected her to various discriminatory practices. The HCRC investigated the case and issued a Notice of Cause, finding that the respondent had unlawfully subjected the complainant to unequal terms and conditions of employment on the basis of her sex. Thereafter, the case was settled for a payment of \$15,000 to the complainant, review of the respondent's non-discrimination policy, posting of the HCRC's general information flyer on the respondent's employee bulletin boards, and

mandatory non-discrimination training for the respondents' management employees.

- The complainant in an employment case alleged discrimination on the basis of credit history and credit report by Respondent Honolulu Police Department, City and County of Honolulu ("HPD"). The case involved a HPD hiring policy effective in 2016 that considered applicants' financial history, including applicants' credit history and credit reports. The complainant had previously worked for HPD, but upon his request to be reinstated, he was rejected because his credit history and credit reports were found to be unsuitable, despite the lack of relevance between his credit history and his position. The case was settled during conciliation after a HCRC finding of reasonable cause to believe a discriminatory practice occurred, but before a final decision was issued by the Commission and with no admission by the City and County of Honolulu of any wrongdoing. The no-fault settlement provided \$95,860 in monetary relief for the complainant, changes to HPD's hiring policy, and training for supervisors, managers, and other employees involved in the hiring process at HPD's career center.

HCRC Warning Letters

In an effort to prevent future or recurring problems, the HCRC provides respondents with "warning letters" advising them of potentially unlawful practices that the HCRC discovers during the course of its investigation of claims against the respondent. In those instances when the HCRC investigation does not result in a recommendation of reasonable cause on the claims filed, and the HCRC investigator finds evidence of other unlawful practices (such as a discriminatory written policy, employment application, or conduct in the workplace that could rise to the level of unlawful harassment if repeated), the HCRC will advise the respondent of the potential violations and provide the respondent information about how it can correct the possible violation of the law. Warning letters have resulted in policy and application form changes, as well as discrimination prevention training for employees and managers.

Case Decisions

State Court Cases

In FY 2020, the Commission obtained a circuit court judgment enforcing a Commission final decision issued in the prior fiscal year. In *Hoshijo on behalf of the complaint filed by Kiona E. Boyd vs. Jeffrey David Primack*, Docket No. 18-001-H-S, a case in which the Complainant was threatened and evicted from her housing based on her gender identity, the Commission awarded \$95,000.00 in monetary relief for Ms. Boyd, including \$20,000.00 in punitive damages, and ordered mandatory fair housing training as well. Respondent Primack did not

pay the monetary damages awarded, so a special proceeding to enforce the Commission final decision and order was filed, and a lien placed on his real property. After the circuit court judgment was issued, Mr. Primack paid the judgment in full, plus interest.

Legislation

Two bills were passed and enacted into law in 2020 which amended statutes enforced by the Hawai'i Civil Rights Commission.

Act 51, S.B. No. 2193, H.D. 2 Relating to Employment Discrimination, amends H.R.S. § 278-2.5 to limit the convictions that may be used in employment decisions. Previously employers were able to inquire and consider conviction records within the past ten years, if the conviction had a rational relationship to the duties and responsibilities of the employment position. Act 51 amends the lookback period to seven years for felony convictions, and five years for misdemeanor convictions, significantly less than the previous ten years. The Act went into effect September 15, 2020.

Act 17, H.B. No. 2054, H.D. 1, S.D. 1, Relating to Employment Practices, prohibits an employer from requiring an employee to enter into a nondisclosure agreement pertaining to sexual harassment or sexual assault. Act 17, which is not yet codified in H.R.S Chapter 378, also prohibits an employer from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault. The Act went into effect September 15, 2020.

Due to the early closure of the legislative session due to the pandemic, the Legislature was able to hear fewer bills than usual, and did not pass any resolutions this year.

Appendix

Overview

The Hawai'i Civil Rights Commission (HCRC) was established under Act 219, L. 1988, and Acts 386 and 387, L. 1989.

The HCRC's enabling statute, H.R.S. Chapter 368, declares that discrimination because of race, color, religion, age, sex (including gender identity and expression), sexual orientation, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy. Certain bases are not protected under all HCRC laws.

The HCRC exercises jurisdiction over Hawai'i's laws prohibiting discrimination in employment (H.R.S. Chapter 378, Part I), housing (H.R.S. Chapter 515), public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. § 368-1.5). Under its statutory mandate, the HCRC receives,

investigates, conciliates, litigates, and adjudicates complaints of discrimination, providing a uniform procedure for the enforcement of the state's discrimination laws.

The HCRC has five (5) uncompensated volunteer Commissioners (one position is currently vacant) who are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and their commitment to preserve the civil rights of all individuals.

The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes. During FY 2020 the HCRC had 29 positions (24 permanent and 5 temporary), divided into separate enforcement and adjudication sections.

Administrative Procedure

Before the HCRC accepts a complaint of discrimination, a complaining person must allege that:

- 1) She or he has been subjected to unlawful discrimination⁵ because of a protected basis,⁶ and,

⁵ "Unlawful discrimination" may occur in any of the following ways:

- a. Disparate Treatment – this is the usual form of discrimination; it occurs when individuals are treated in an unequal manner because of a "protected basis." Examples of disparate (unequal) treatment include: firing an employee because of her race, her age, or because she is pregnant; refusing to serve a person because of his race or his disability; refusing to rent to a person because of her race; or refusing to rent to a family because it has young children.
- b. Reasonable Accommodation – this is the second most common way that discrimination appears; it occurs when an individual is denied a "reasonable accommodation" designed to allow an individual to have equal access or equal benefits. Examples of failure to accommodate include: refusing to allow a seeing impaired customer into a taxicab because he is accompanied by a seeing-eye dog; refusing to allow a pregnant cashier to sit on a stool so that she can work while pregnant; or refusing to make exceptions to a condominium association's "no pets" house rule to allow a disabled resident to keep a service animal.
- c. Disparate Impact -- the least common way that discrimination appears; however, when discrimination occurs in this form, it may impact the greatest number of people. Disparate impact occurs when a policy, practice, or test that has a "disparate impact" on persons with a particular "protected basis." Examples of disparate impact include: a pre-employment test that includes a number of questions that are not job related but have the effect of disqualifying a large number women, or men, or any other protected basis.

⁶ "Protected basis" is the criteria upon which it is unlawful for a respondent to discriminate. Protected bases vary depending on the statute involved:

2) The unlawful discrimination occurred within the previous 180 days.⁷

Where appropriate, after a complaint is filed with the HCRC, the parties are offered an opportunity to voluntarily mediate the complaint through the HCRC Mediation Program. If the parties agree to mediate, the HCRC mediation coordinator refers the parties to a community mediation center, which schedules and holds mediation sessions. Parties may alternatively choose to hire a private mediator.

In cases not referred to mediation, or those in which mediation is unsuccessful, an HCRC investigator conducts an objective, fact-finding investigation. HCRC investigators are impartial and gather evidence to allow the Executive Director to make a determination in each case. The HCRC investigator collects, reviews, analyzes documents, and contacts and interviews witnesses. Some witnesses may be identified by the complainant or by the respondent, and some are independent witnesses, including experts, who are identified by the investigator, by other witnesses, or are discovered during the course of the investigation. In many cases, the investigator also attempts to settle the complaint prior to an investigative determination (pre-determination settlement).

After an HCRC investigation is completed, H.R.S. 368-13(b)-(c) requires the Executive Director to determine whether reasonable cause exists to believe that discrimination has occurred. Where no reasonable cause is found, the Executive

- a. State Funded Services (HRS Chapter 368) The only protected basis is disability.
- b. Employment (HRS Chapter 378, Part I) The protected bases on which an employer, employment agency, or labor organization may not discriminate are: race, sex (which includes gender identity and expression), sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, domestic or sexual violence victim status, credit history or lactating employees.
- c. Public Accommodations (HRS Chapter 489) The protected bases on which a public accommodation may not discriminate are: race, sex (which includes gender identity and expression), sexual orientation, color, religion, ancestry, or disability.
- d. Housing (HRS Chapter 515) The protected bases on which an owner, a real estate broker or any person engaging in a real estate transaction, may not discriminate are race, sex (which includes gender identity and expression), sexual orientation, color, religion, marital status, familial status, ancestry, disability, age or HIV (human immunodeficiency virus) infection.

⁷ Complaints filed with the HCRC usually involve a discrete act, such as termination, eviction, demotion, or involve acts that are ongoing and constitute a continuing violation. An example of a "continuing violation" is sexual harassment that began more than 180 days before the complaint is filed, but continued or ended less than 179 days before the complaint is filed. When discrimination involves a discrete act, such as termination, the HCRC can only accept a complaint within 180 days of that complained action.

Director dismisses the complaint and issues a right to sue letter to the complainant. Where a determination of reasonable cause is recommended, the complaint is assigned to an HCRC enforcement attorney for legal review and final recommendation to the Executive Director.

Upon the issuance of a finding of reasonable cause to believe that unlawful discrimination has occurred, the HCRC enforcement attorney attempts to conciliate or settle the complaint.⁸ If conciliation is unsuccessful, the complaint is docketed for a contested case hearing. An HCRC enforcement attorney presents the case in support of the complaint before an impartial hearings examiner. The respondent (represented by themselves or by counsel or representative of their choice) is also given the opportunity to present his/her case at the hearing. Generally, a complainant may intervene in the contested case process as a party and also be represented by counsel or other representative of their choice.

After the completion of the contested case hearing, the hearings examiner issues a proposed decision based on the evidence. The five-member Commission Board then reviews the proposed decision and the hearing record. The parties may file written exceptions and support statements and present oral arguments to the Board. The Commission Board then accepts, rejects, or modifies the proposed decision, issues a final decision and order, and awards remedies, if appropriate. This decision is legally binding. If any party disagrees with the decision, she/he has 30 days to file an appeal to the State Circuit Court. Furthermore, a Respondent who appeals a decision of the Commission Board is entitled to a jury trial on any claims that form the basis for an award of common law damages.⁹

The HCRC enforcement and administrative hearing process is more cost effective than litigation in court. It provides for the investigation of complaints and

⁸ During FY 2020, of all 207 investigative and attorney case closures, 4.4% (9) were closed on the basis of the complainant electing court action. The remaining cases (198) were closed on the following bases: in 68.6% of the cases (142), the Executive Director found no cause and dismissed the complaint, 17.9% (37) of the investigation cases were settled prior to a cause determination or were resolved by the parties, 3.4% (7) of the cases were resolved by staff attorneys, and the remaining 5.7% of the cases (12) were closed because the complaint was withdrawn, the complainant failed to cooperate, the complainant was not available, no significant relief was available, or due to administrative closure or lack of jurisdiction.

⁹ The HCRC enforcement, hearing and appeal procedures are illustrated in Flowchart # 1. In *SCI Management Corporation, et. al. v. Darryllyne Sims, et. al.*, 101 Hawai'i 438, 71 P.3d 389 (2003), the Hawai'i Supreme Court held that "a respondent who appeals a final order of the HCRC, pursuant to HRS § 368-16, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the HCRC." This does not apply to respondents in housing cases, who can elect to take the case to circuit court after a finding of reasonable cause under HRS §515-9.

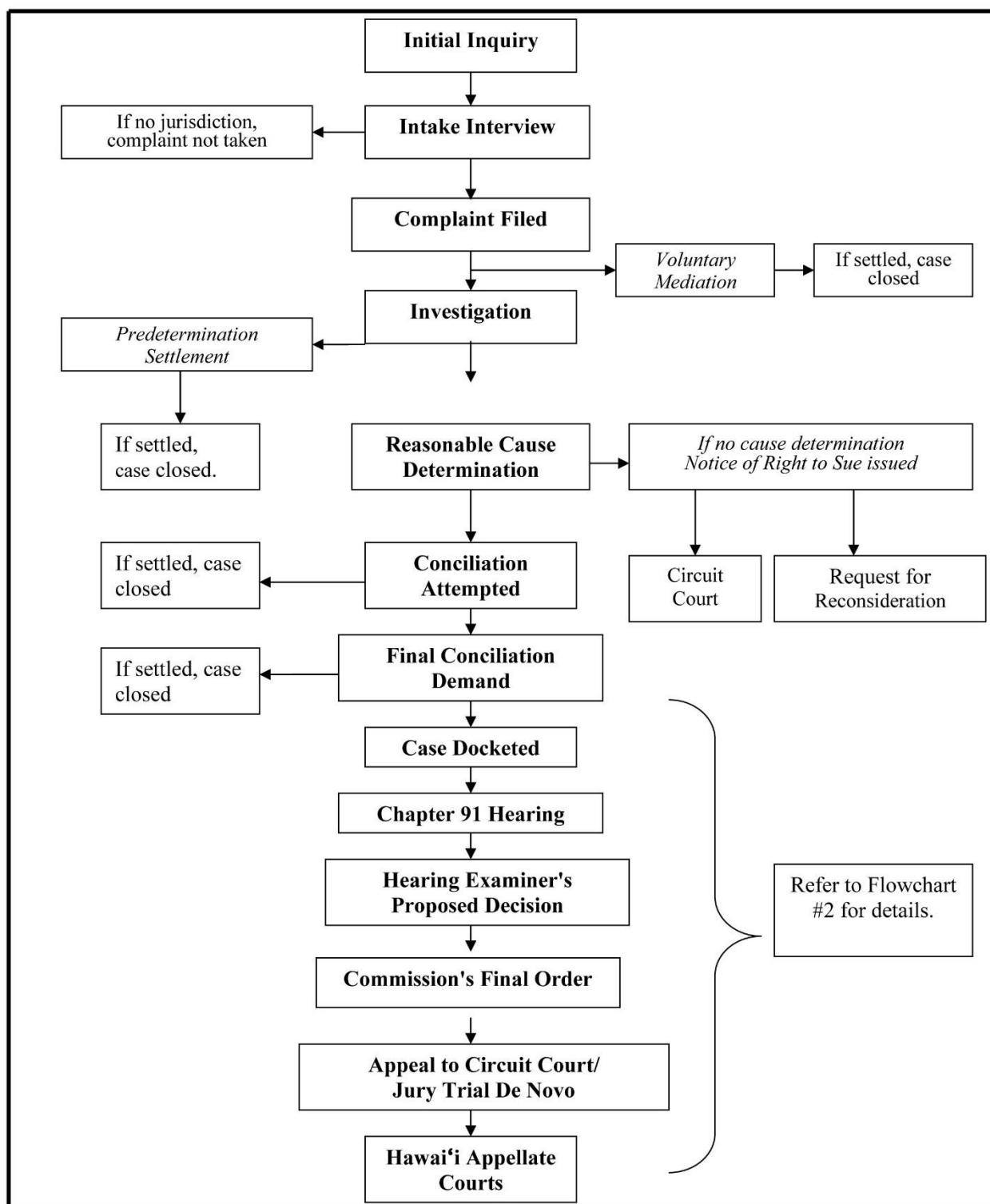
access to justice for those who lack the resources to pursue their claims in court. This is particularly important in employment discrimination cases, where employees have often lost their source of income through termination and have little or no control over the evidence needed to prove discrimination.

The HCRC enforcement and adjudication process also funnels cases away from the courts, saving judicial resources and associated costs. Complainants who file suit in court must first exhaust administrative remedies by filing a complaint with the HCRC. The primary reason for this requirement is to prevent the courts from being overburdened with non-jurisdictional or non-meritorious complaints, or with complaints that can be closed or settled in the HCRC's administrative process. In fact, the great majority of complaints filed with the HCRC are resolved or disposed of without resort to the courts.¹⁰

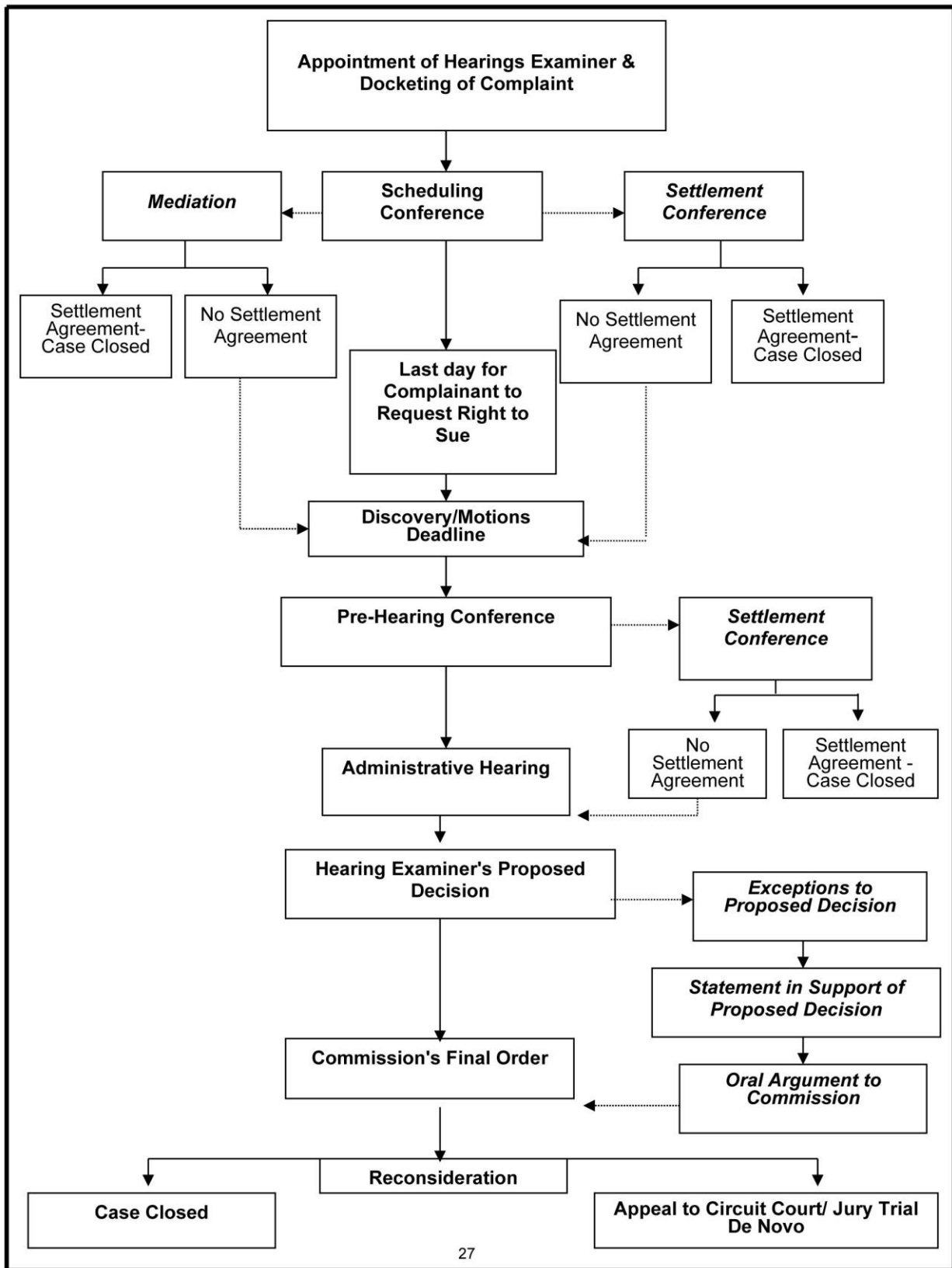
Although only a small number of cases are brought to administrative hearing and result in final Commission decisions, these cases are important because they create a body of legal precedent. Case law precedents, in Hawai'i and across the United States, provide the basis for anti-discrimination principles, such as the doctrine of sexual harassment. Case law also establishes standards that define the rights and protections under civil rights laws, and give guidance to employers, landlords, and businesses on how to prevent and eliminate discrimination.

¹⁰ HCRC contested case procedures are illustrated in Flowchart # 2.

HCRC Procedural Flowchart #1



HCRC Contested Case Flowchart #2



HCRC Commissioners

Liann Ebesugawa

Chair (term: 2017-2024)

Liann Ebesugawa was designated by the Governor to serve as the Chair of the Commission beginning July 1, 2020. She is Assistant General Counsel for Hawaiian Electric Industries, Inc. Previously she served as an Associate General Counsel for Hawaiian Electric Company, Inc. where she provided legal support to personnel and management and advice in obtaining regulatory approvals for various projects. She also served as Executive Director of the Hawai'i State Board of Education, where she provided legal and administrative services for matters before or involving the Board of Education.

Ms. Ebesugawa is currently the Second Vice President of the Honolulu Chapter of the Japanese American Citizens League's Board of Directors. During her tenure as the JACL's past Board President, she addressed issues related to marriage equality, homelessness, Native Hawaiian self-determination, and other civil rights issues that face the community. She also currently serves on the Board of Directors of the National Asian Pacific American Bar Association and has coauthored several academic publications and presentations regarding privacy in the workplace, Japanese American redress, and racial discrimination.

Joan Lewis (term: 2017-2024)

Joan Lewis is a 30 year Hawai'i public school teaching veteran and a long time education advocate. Ms. Lewis has been a part of the teaching staffs of Nānākuli High and Intermediate School and Kapolei High School where her work with Native Hawaiian and Pacific Island students shaped her approach to teaching and learning. Ms. Lewis is one of the founders of the Hō'ola Leadership Academy, a 9-12th grade academy within the Kapolei High School community that provides a safe learning space for students that face many obstacles that can undermine their success. Graduation rates for students in this program have been in the upper 90 percentile.

Ms. Lewis has also served as a school, district and state leader for the Hawai'i State Teachers' Association. Her work as part of the HSTA has provided culturally sensitive training and support for teachers in the Leeward District of the DOE, the development and delivery of courses to support students of diverse economic backgrounds, and the expansion of the teacher voice in support of Hawai'i's students. Ms. Lewis' other experiences include service as: a foster parent for Hale Kipa Inc.; an educational staff member for Palama Settlement's In-Community Treatment Program; a house parent for Child and Family Services Ila Humphrey home for girls recovering from sexual assault; and as a trustee for the Hawai'i Employer-Union Health Benefits Trust Fund. These have been

instrumental in developing Ms. Lewis' belief that we must work together to provide the Aloha that all citizens, but especially the most vulnerable among us, need to survive and thrive. Ms. Lewis earned her Bachelor's degree at Drake University (B.S. in Education) and her Master's degree from the University of Hawai'i at Mānoa.

William J. Puette (term: 2019-2021)

Dr. Puette was recruited from the mainland to teach English at a public school in 1969 just as public sector collective bargaining was enacted. In his first two years of teaching, he became a delegate at the founding convention of the Hawai'i State Teachers' Association, and organizer for the teachers first representation election, and picket captain on Maui in the union's first strike.

He holds an M.A. from the University of Pennsylvania at Edinboro and a Ph.D. from the University of Hawai'i at Mānoa.

He is currently Director of the Center for Labor Education & Research at the University of Hawai'i – West O'ahu in Kapolei. For more than thirty-five years, he has been teaching Labor Studies classes, and is the author of the books: The Hilo Massacre; Through Jaundiced Eyes: How the Media View Organized Labor; A Readers Guide to the Tale of Genji, and the co-author with Dr. Keao NeSmith of Nā Lula Hālāwai: A Parliamentary Guide to Conducting Meetings in Hawaiian. In addition he has written numerous booklets and pamphlets, including *CLEAR Guide to Hawai'i Labor History* and *Pa'a Hui Unions: the Hawai'i State AFL-CIO, 1966-1991*.

Over the years he has worked with the HCRC on many joint educational programs, and was the volunteer webmaster that created the first website for the HCRC (1997-2003) before it was able to afford a professional webmaster. Likewise, he helped the Executive Director and staff at the local office of the EEOC to design PowerPoint presentations used in HCRC public education programs between 2000 and 2008.

Dr. Puette is also a labor arbitrator; a Professional Registered Parliamentarian, a member of the Association of Hawai'i Archivists, and the Hawaiian Historical Society. Winner of Penn State's Lowell-Melletts Award for Outstanding Media Criticism in 1993, he received the George Meany Award for Outstanding Service to Youth by the Hawai'i State AFL-CIO and the Aloha Council of the Boy Scouts of America in 1994; and in 2005 the University of Hawai'i awarded him the Hung Wo and Elizabeth Lau Ching Foundation Award for Faculty Service to the Community.

Jon Matsuoka (term: 2019-2023)

Dr. Jon K Matsuoka completed his graduate studies in social work and psychology at the University of Michigan in 1985 and in the same year assumed a faculty position at the University of Hawai'i Myron B. Thompson School of Social Work. In 2010 he became dean of the school and remained in the position for 10 years until becoming President of Consuelo Foundation. He is currently the Vice Chancellor at Hawai'i Tokai International College. He serves on the boards of Native Hawaiian Legal Corporation, InPeace, Project Dana, Living Treasures of Hawai'i, and Papakolea Community Development Corporation. He has been a resident of Papakolea for 25 years and enjoys backyard farming and raising bees.

HCRC Staff

During FY 2020 the HCRC staff consisted of 29 positions: ¹¹

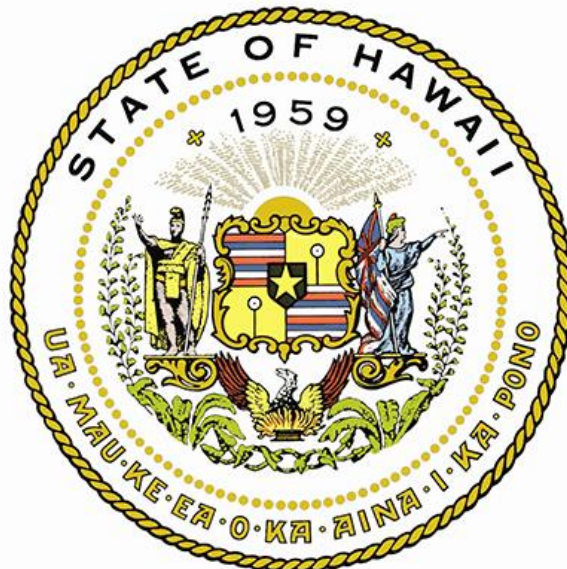
Enforcement Staff:

- Executive Director
- Deputy Executive Director
- Enforcement Attorneys (5)
- Program Specialist – Mediation Coordinator
- Legal Clerk
- Investigator-Supervisors V (2)
- Investigator IV (8)
- Investigator III-IV (temporary) (2)
- Secretary III
- Office Assistants (III-IV) (4)

Adjudication Staff:

- Chief Counsel
- Secretary II

¹¹ Staffing levels reflect permanent (24) and temporary (5) positions which were either filled or vacant during FY 2020. A permanent position was added to the HCRC budget for FY 2020, but was frozen and defunded before it was established.



HAWAI'I CIVIL RIGHTS COMMISSION

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830 Punchbowl Street, Room 411
Honolulu, Hawaii 96813

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E-Mail: DLIR.HCRC.INFOR@hawaii.gov

Oahu

Telephone: 586-8636

TDD: 586-8692

Facsimile: 586-8655

Neighbor Islands call (toll-free)

Kaua'i: 274-3141, ext. 6-8636#

Maui: 984-2400, ext. 6-8636#

Hawai'i: 974-4000, ext. 6-8636#

Lana'i & Moloka'i: 1-800-468-4644, ext. 6-8636#