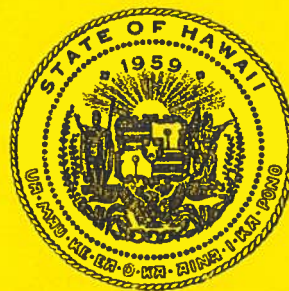


Annual Report

July 1, 2000 — June 30, 2001

Hawaii Civil Rights Commission



Benjamin Cayetano,
Governor

Leonard Agor,
Director, Department of Labor & Industrial Relations

Harry Yee,
Commission Chair

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Mission Statement

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

Overview: Fair and Effective Enforcement



The laws of the State of Hawaii reflect a strong commitment to protecting the civil rights of all its citizens. Article I, Section 5 of the Hawaii Constitution provides that "no person shall ... be denied the enjoyment of ... civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." The legislature gave meaning to this commitment by creating the Hawaii Civil Rights Commission (HCRC), through enactment of Act 219 in 1988 and Acts 386 and 387 in 1989.

The HCRC was organized in 1990 and officially opened its doors in January 1991. For over ten years the HCRC has enforced state 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. Section 368-1.5). The HCRC receives, investigates, conciliates, and adjudicates complaints of discrimination.

AN EFFECTIVE AND UNIFORM ENFORCEMENT SCHEME

Prior to the HCRC, jurisdiction over state anti-discrimination laws was scat-

tered among several state agencies. Enforcement was limited and sporadic. Litigation by the state to enforce fair practices laws was virtually non-existent. Nearly all aggrieved complainants had to file individual lawsuits to the extent that the laws at that time provided for private causes of action and individual remedies. Few discrimination cases brought under state laws were adjudicated on the merits, and there was little case law interpreting these laws. For those who could not afford private attorneys to seek remedies in court, there was no administrative forum or process to determine their claims.

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 to establish a uniform procedure "...designed to provide a forum which is accessible to any one who suffers an act of discrimination."²

A FAIR ADMINISTRATIVE PROCESS

The HCRC is committed to, and is structured to ensure fairness to both complainants and respondents. The HCRC is headed by a five-member Commission. The HCRC is divided into two separate and distinct sections: the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and the adjudication section which hears, issues orders and renders final decisions on complaints.

The Commissioners have delegated HCRC's enforcement duties to the Executive Director, who directs the activities of the enforcement section. The Commissioners retain the authority to adjudicate and issue final decisions on contested cases based on the recommendations of their appointed Hearings Examiner. The Commissioner's Chief Counsel oversees the adjudication section. The Commissioners, Hearings Examiner and Chief Counsel 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, Hearings Examiner or Chief Counsel regarding any contested case docketed for hearing.

The HCRC enforcement section investigates complaints of discrimination as a neutral fact-gatherer, without predisposition to any party to a complaint. At the conclusion of an investigation, the Executive Director determines whether or not there is reasonable cause to believe unlawful discrimination has occurred. These determinations are based on the facts and applicable law, consistent with the HCRC's commitment to fairness to all parties.

The law requires a complaint to be filed with the HCRC before a discrimination suit can be filed in state court. This requirement prevents the courts from being overburdened with non-jurisdictional and non-meritorious cases, or with cases that can be closed or settled in the HCRC administrative process. The great majority of cases filed with the HCRC are resolved or

closed without resort to the courts.

THE HCRC TODAY

During FY 2000-2001, the HCRC continued to improve all aspects of its operations - refining its system of priority charge processing and specialization among its investigators, and expanding its public outreach and preventative education efforts. We are also proud of the continuing success of the HCRC mediation program, as well as the development of the HCRC website as an accessible resource for the public. Maintenance of a manageable case inventory has allowed for more timely investigation of complaints and dedication of resources for investigation of complex and meritorious complaints.

In two cases currently on appeal to the Hawaii Supreme Court, the HCRC faces significant legal challenges to its administrative process and to the strong state laws against disability discrimination. In addition, as we face uncertain and difficult times in the wake of the September 11, 2001 tragedy, the HCRC must be prepared to process and address the increased number of complaints by distressed workers that

inevitably follow layoffs caused by the economic downturn. The HCRC must also redouble its efforts to eliminate discrimination on the basis of religion and ancestry.

The HCRC Commissioners and staff will continue to advance our mission - to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education. We will renew our commitment to fair and effective enforcement, so that no person shall be denied his or her civil rights under Hawaii law.

ACTION PLANS FOR THE FUTURE:

1. Maintain case inventory at a level that allows for timely investigation of complaints and commitment of resources to complex and meritorious complaints.
2. Expand the HCRC voluntary mediation program to offer mediation in more cases.
3. Continue to focus on the largely unfunded priority of HCRC public education activities, working with fed-

eral, state, business, labor, and
community partners to expand
Neighbor Island outreach.

The accompanying report is submit-
ted pursuant to H.R.S. §§ 368-4 and

515-9.

¹1989 House Journal, Standing Committee Re-
port 372.

²Id.

Mediation Program



HCRC's voluntary mediation program successfully completed its second fiscal year on June 30, 2001. Complainants, respondents, and the HCRC, with the strong support of the commissioners, want quick and fair resolutions to discrimination complaints. To help accomplish this goal, the HCRC developed its voluntary mediation program, in which neutral third parties (usually a team of two mediators) help the parties discuss, clarify, and settle complaints.

Mediators do not take sides or rule on the merits of a complaint. Instead, the HCRC provides them with the basic facts of each case needed to understand the dispute. The mediators then assist parties in reaching agreements such as simple apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation saves time, money and resources, and reduces stress by allowing the parties to explain their side of the case and to control the process of resolving their dispute.

HCRC works with trained senior mediators from the Mediation Centers

of Hawaii (MCH), a statewide network of community non-profit mediation centers. There are mediation centers on Oahu, Maui, Hawaii, and Kauai. MCH mediators are trained in civil rights laws by HCRC staff on a regular basis. An HCRC mediation coordinator facilitates the process by explaining mediation to the parties and how it benefits them. The mediation centers charge minimal fees for the sessions, which can be waived or reduced where there is financial hardship.

Mediation can occur at any stage of the complaint process. Mediation is first offered when the complaint is accepted, because disputes are often easier to resolve while the facts are fresh and before damages accumulate and the positions of the parties become rigid. For FY 2000-2001, all mediated settlements occurred prior to reasonable cause determinations. As settlements in reasonable cause cases tend to be larger than in earlier stage cases, the figures for this fiscal year were comparatively less than FY 1999-2000, in which two cause cases settled just prior

to administrative hearings. It should be noted that affirmative action was included in virtually every mediated case and, even in cases which did not reach agreement in mediation, issues were clarified which later led to settlements between the parties. The monetary value of these early-stage mediations exceeded \$25,000.

Approximately 58% of all cases referred to mediation were successfully resolved by the mediation centers. Two cases were referred to private mediation by request of the parties and neither was resolved. Approximately 55% of referred complainants opted for mediation and approximately 40% of offered respondents opted for mediation. The mediation coordinator and HCRC staff will work towards increased participation.

Satisfaction with our mediators remains high. Evaluations are sent to the parties in all mediated cases, successful or otherwise. Approximately 40% of the evaluations are returned. Of those returned, the average rating of the mediators' neutrality (with 5 "strongly agree" and 1 "strongly disagree") was a

4.2. Regarding whether the parties "understood the requirements and goals of the mediation program", the average rating was the same, 4.2. Regarding whether the parties "would recommend the program to others", the rating was a 4.1.

Comments from the evaluation forms underscore the program's effectiveness. One party commented, "[The mediator] made us aware of issues the other side was contemplating -- so we could negotiate." Another said, "Mediator was sensitive to the fact that some of the discussion needed to take place without the employee present."

The following are examples of cases that were successfully mediated:

- A short-time hire customer service employee of a video chain earning \$5.50/hour alleged race discrimination (Caucasian) and then was transferred to an inconvenient store location allegedly in retaliation for her complaints to her supervisor. She alleged unfair and unequal hours, poor training, errors on paychecks and wrongful termination. The employer settled the case for

\$3,000.

- A security officer earning \$6.00/hour alleged national origin/ancestry discrimination (Filipino) when he was fired for allegedly sleeping on the job, while a non-Filipino officer allegedly slept constantly on the job without any reprimand. The company agreed to provide the complainant with a positive reference and counseled the complainant's supervisor.
- A submersible pilot technician with a marine engineering company alleged discrimination based on race (African-American) and retaliation. He alleged he was terminated in retaliation for objecting to a poor job performance evaluation. He was replaced by two non African-Americans. After three extensive mediation sessions, an agreement was reached awarding the complainant \$7,500 in addition to a neutral job reference.
- Two disabled individuals alleged they were denied full and equal enjoyment of public accommodations at a restaurant. They alleged they

were initially refused seating and then denied assistance in reading the menu. They believed the poor service was due to the presence of their service animal. The restaurant agreed to sensitivity and disability training for its staff and to have the menu recorded on tape for sight-disabled persons.

- A golfer alleged he was denied access to a golf course due to his disability. He allegedly was told he could not use his own golf cart or access roped-off fairways and was denied other accommodations which would make it easier for him to traverse the course. The golf course apologized for the asserted misunderstanding and altered its policy to provide disabled golfers access to restricted fairways on designated pathways.
- An airport operations controller alleged he was suspended and not promoted because of his ancestry (Hawaiian). A portion of the suspension was rescinded and the employee's pay for that period was restored, amounting to over \$1,000.

- A disabled individual alleged she was denied access to a spa at a hotel where she was a guest. The hotel agreed to counsel the employee who denied her access, to institute staff training in disability rights, and settled the case for \$3,000.
- A 7-year employee at a small business alleged that his employer denied his request for temporary disability leave and terminated him on the same day. Although the complainant had relocated to Florida, the case was mediated by teleconference, made possible by a private grant to the mediation center. The employer agreed to settle the dispute for \$10,000.

Other cases involving alleged age, ancestry, and religion discrimination were successfully mediated for affirmative relief. Examples of non-monetary relief included:

- 1) training of employers and employees on the Americans with

- Disabilities Act;
- 2) training on Hawaii civil rights laws and means of detecting, preventing and remedying possible violations;
- 3) restoring employee benefits;
- 4) providing neutral or positive references for former employees;
- 5) increasing hours for part-time employees;
- 6) developing and adopting new policies on various types of discrimination;
- 7) deleting inappropriate negative comments in employee records;
- 8) adding reasonable accommodations for the disabled;
- 9) clarifying communications between employer and employee; and
- 10) thorough and honest discussion of issues, under mediator supervision, which can lead to a settlement of the dispute between the parties directly.

Public Education & Outreach



In addition to enforcing state anti-discrimination laws, the HCRC is committed to preventing and eliminating discrimination through public education. The HCRC Commissioners and staff have maintained a number of public education efforts, working with partners in the civil rights, business, labor, professional, and broader communities on new initiatives.

FY 2000-2001 highlights included:

- By June 30, 2001, the HCRC website (www.state.hi.us/hcrc) received over 8,000 "hits" per month, a new record. These hits were in addition to over 3,300 telephone and walk-in inquiries during the year plus approximately 260 email inquiries. The website was continually enhanced and updated during the year. It became compliant ("Bobby Compliant") with federal disability standards for websites. For the first time, all HCRC brochures and literature were posted in downloadable and printable form. "News Advisories" highlighting significant developments were posted. The entire annual report was added. Re-

lated links, including those to the business, labor and government communities, were added and updated. ¹

- The HCRC continued to provide speakers and trainers for conferences, workshops, schools, employers, labor organizations, businesses, landlord and tenant organizations, government agencies, and community groups on rights and responsibilities under anti-discrimination laws, pregnancy discrimination, sexual harassment, and diversity issues.
- The HCRC continued to work with the U.S. Department of Housing and Urban Development, the state and counties, and community fair housing organizations to co-sponsor fair housing training on all islands.
- Among other events, the HCRC co-sponsored a "You and the Law" 90-minute segment on Olelo television; a series of televised forums on every day prejudice entitled, "A Place at the Table"; and a series of community homebuyers fairs and

fair housing/landlord tenant workshops.

- HCRC co-sponsored and participated in a number of Rev. Martin Luther King, Jr. Holiday events, including a Proclamation Ceremony hosted by Governor and Mrs. Cayetano at Washington Place, a holiday program co-sponsored by the U.S. National Weather Service, and the annual King Day Parade in January.

SPECIAL ADVISORY COMMITTEE ON DIVERSITY

The HCRC recognizes that discrimination cannot be eliminated through law enforcement alone. In 1999 the HCRC convened a Special Advisory Committee on Diversity, comprised of HCRC Commissioners and staff members, educators, representatives of the Department of Education, the Hawaii State Teachers Association, commu-

nity and civil rights organizations, and concerned individuals. The mission of the Diversity Committee is to ensure student safety, equity, and respect for diversity, by working primarily with schools in partnership with community groups.

During FY 2000-2001, the Diversity Committee met on a quarterly basis. The Committee finalized a flyer on diversity and fairness in education, and planned for its distribution and follow up activities during FY 2001-2002. Plans for future activities include: developing a speakers bureau; sharing diversity education resources on the HCRC website; and sponsoring a diversity awareness essay/poster contest in the public schools.

¹ The HCRC again thanks Dr. William Puette, Executive Director of the Center for Labor Education and Research ("CLEAR") at the University of Hawaii - West Oahu, for his continuing service as voluntary webmaster and technical advisor to the HCRC website and on many of its public presentations.

Caseload Statistics



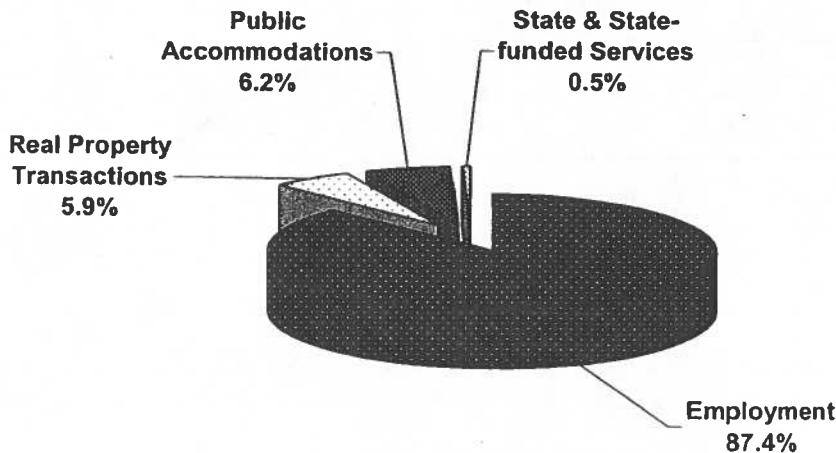
INTAKE

During FY 2000-2001, the HCRC received approximately 3300 telephone and walk-in inquiries, and 906 intakes were completed by HCRC investigators.

612 charges of discrimination were filed with HCRC, or an average of 51 cases a month. These consisted of 436 complaints originating with HCRC investigators (averaging 36 per month), and another 176 more cases originating with and to be investigated by the federal Equal Employment Opportunity

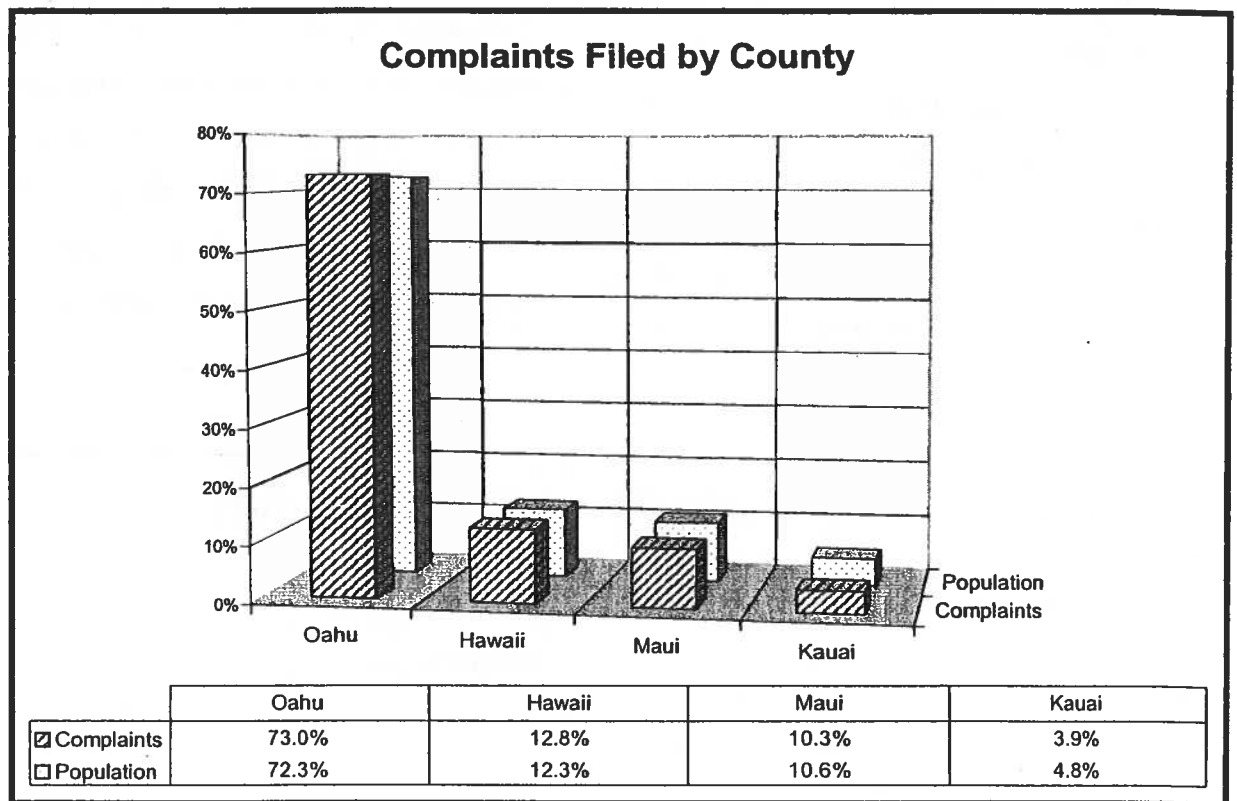
Commission ("EEOC"), and dual-filed under state law with HCRC. The 612 cases included 535 employment cases, 38 public accommodations cases, 36 housing cases, and 3 cases involving state and state-funded services. Other inquiries did not lead to filed charges due primarily to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected basis or bases; or c) a complainant's decision not to pursue the complaint.

Complaints Filed FY 2000-2001



The 612 charges accepted by HCRC consisted of 447 Oahu complaints, 78 complaints from Hawaii County, 63 Maui County complaints, and 24 complaints

from Kauai County. The number of complaints filed from each county was consistent with its portion of resident population.



CLOSURES

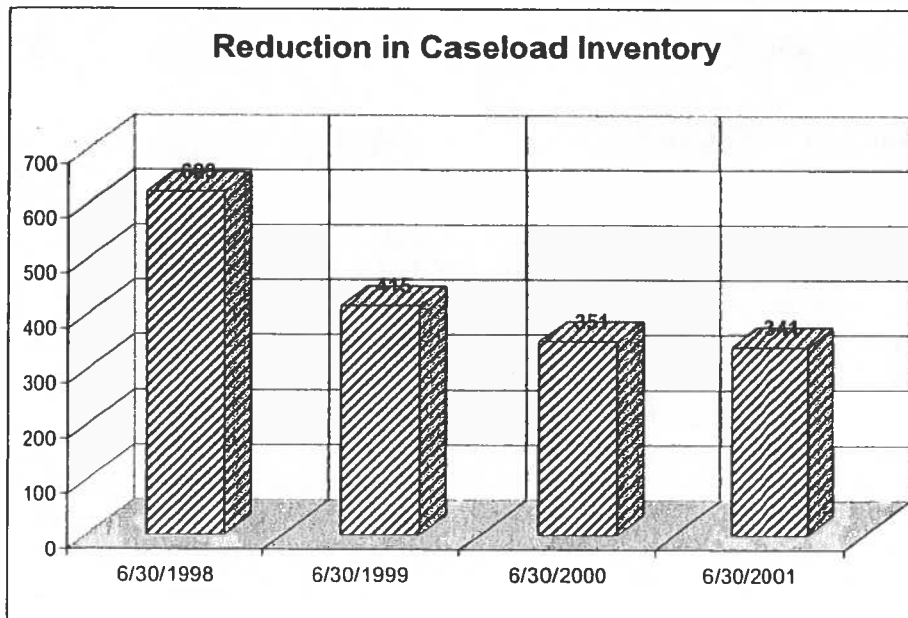
HCRC investigators closed 433 cases during FY 2000-2001, for an average closure rate of 36 cases per month. There were 18 cause determinations during the fiscal year.

As of June 30, 2001, the inventory of cases pending with HCRC investigators had been reduced to 341 cases. Three years ago, HCRC investigators had operated with a case inventory of more than 600 cases, which included a substantial backlog of unresolved older cases. Through its prioritized charge processing system and specialization in investigation, HCRC reduced this inventory to 351 cases at the end of the FY 1999-2000, and has maintained this re-

duced inventory throughout FY 2000-2001.¹

Maintaining this reduced case inventory brings the HCRC closer to the optimum caseload of 30 cases per investigator, as recommended by the Legislative Auditor in "A Study on Implementation of the Civil Rights Commission for the State of Hawaii" (Report No. 88-9, January 1989). In order to maintain the case inventory at this level, however, HCRC must continue to close about 450 cases each fiscal year.

¹ HCRC investigators closed 3 fewer complaints than they opened during FY 2000-2001, but the overall caseload inventory was reduced by 10 during the fiscal year, due to a number of complaints being transferred to the EEOC for investigation.



The average period for case closure was 336 days, as compared to 303 days in the previous fiscal year. This increase reflects a concerted effort to complete investigation of older cases.

In the future the HCRC will strive to maintain an average closure period of 11 months or less. A review of this fiscal year shows the following reasons for closures:

	No. of Cases	% of Subtotal	% of Total
Merit Closures			
Resolved by Parties	33	10.6%	7.6%
Pre-Determination Settlements	9	2.9%	2.1%
Cause Determinations	18	5.8%	4.2%
No Cause Determinations	<u>252</u>	<u>80.7%</u>	<u>58.2%</u>
Subtotal	312	100.0%	72.1%
Non-merit Closures			
Complainant Elected Court Action	62	51.2%	14.3%
No Jurisdiction	10	8.3%	2.3%
Complaint Withdrawn	7	5.8%	1.6%
Complainant Not Available	19	15.7%	4.4%
Complainant Failed to Cooperate	22	18.2%	5.1%
No Significant Relief Available	<u>1</u>	<u>.8%</u>	<u>0.2%</u>
Subtotal	121	100.0%	27.9%
Total Number of Closures	433		100%

ANALYSIS AND EXPLANATION OF CLOSURE DATA

During FY 2000-2001, 28% (121) of all investigations closed were dismissed on the basis of the complainant electing court action or other administrative closure. These are "non-merit" closures.

The remaining cases (312), were closed on the basis of a completed investigation or a settlement prior to a cause determination. In 80% (252) the Executive Director found no cause and dismissed the complaint; 19+% (60) were closed on the basis of a cause determination (6%) or a settlement/resolution between parties (13+%). Typically, closures on the basis of cause determinations and settlement/resolution between parties constitute between 15-25% of all "merit" closures.

EMPLOYMENT CASES

H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, assignment of income for child support obligations, National Guard participation, or breast feeding/expressing milk. Examples of such practices are outlined in H.R.S. § 378-2.

The HCRC has a work share agreement with EEOC. Where there is concurrent jurisdiction, a case is filed with both agencies, but only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year a total of 535 employment cases were accepted by the HCRC. HCRC was the intake agency for 359 of these cases, and HCRC dual-filed another 176 cases originating with EEOC. Of the HCRC-originated cases, 81% were also filed with EEOC.

Of the 535 employment cases accepted in FY 2000-2001, sex was the

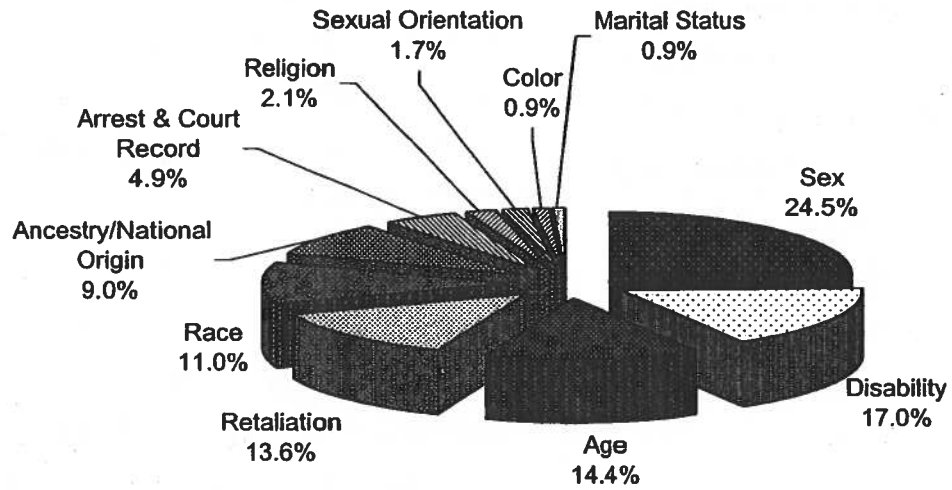
basis cited most often, with 131 cases, accounting for 24.5% of all employment discrimination cases. Within the sex category, 51 cases alleged sexual harassment (39% of all sex cases) and 29 cases were based on pregnancy (22% of all sex cases).

Disability was the second most common basis with 91 cases, representing 17.0% of all employment cases. Age discrimination was next with 77 cases, representing 14.4% of accepted employment cases, followed by retaliatory conduct with 73 cases (13.6%).

There were 59 race discrimination cases (11.0%); 48 cases of ancestry/national origin discrimination (9.0%); 26 cases based on arrest & court record (4.9%); 11 cases based on religion (2.1%); 9 cases based on sexual orientation (1.7%); 5 cases based on color (.9%); and 5 cases based on marital status (0.9%).

Case closures averaged 363 days for the 359 employment cases that were closed by HCRC investigators during FY 2000-2001.

Employment Complaints Filed



HOUSING CASES

H.R.S. Chapter 515 is Hawaii's fair housing law. It prohibits discriminatory housing practices based on race, sex, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection. Examples of such unlawful practices are listed in H.R.S § 515-3 and include actions such as refusing to rent, sell, or grant loans to an individual because of one or more of the above protected bases.

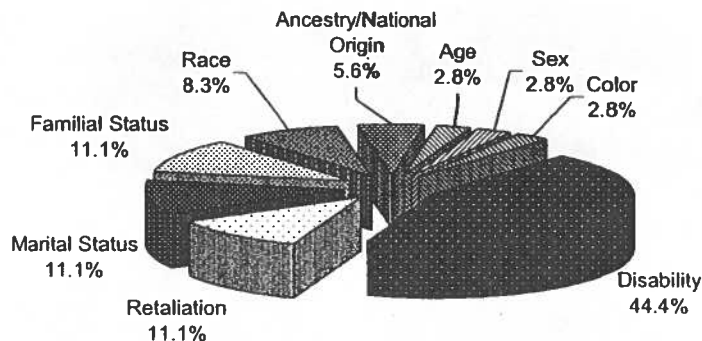
The HCRC has a work share agreement with the federal Department of Housing & Urban Development (HUD). HUD refers most of the complaints it receives to the HCRC for investigation.

During FY 2000-2001, the HCRC accepted 36 cases of housing discrimination. Of these, 16 cases alleged discrimination based on disability status (44.4%). There were also 4 cases each (11.1%) alleging retaliatory conduct, discrimination due to marital status, and discrimination due to familial status.

There were 3 cases filed based on race (8.3%); 2 cases based on ancestry/national origin (5.6%), and 1 case each (2.8%) based on age, sex, and color.

Housing case closures averaged 273 days for the 31 cases closed during FY 2000-2001.

Housing Complaints Filed

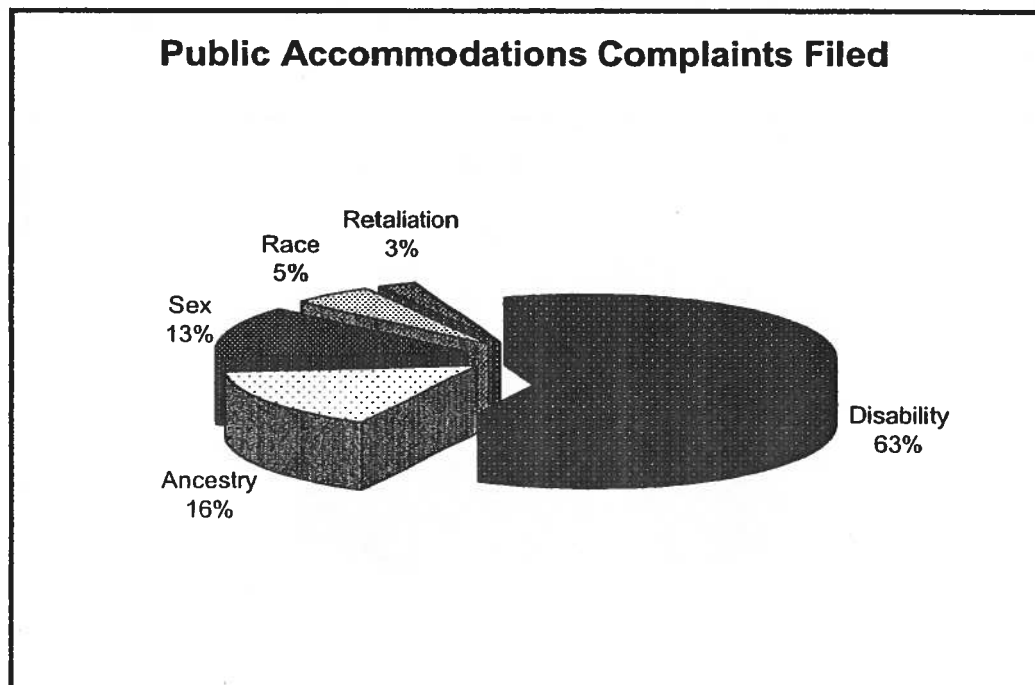


PUBLIC ACCOMMODATIONS CASES

H.R.S. Chapter 489 prohibits unfair discriminatory practices which 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, 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, 38 new cases of public accommodations discrimination were accepted. There were 24 cases based on disability discrimination, accounting for 63.2% of the all accommodations cases; 6 cases alleging ancestry discrimination (15.8%); 5 cases based on sex discrimination (13.2%); 2 cases based on race (5.3%); and 1 case alleging retaliatory conduct (2.6%);

Public accommodations case closures averaged 164 days for the 41 cases closed during FY 2000-2001.



ACCESS TO STATE & 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 the fiscal year, there were 3 cases filed under § 368-1.5. Two cases were closed during FY 2000-2001, averaging 60 days for closure.

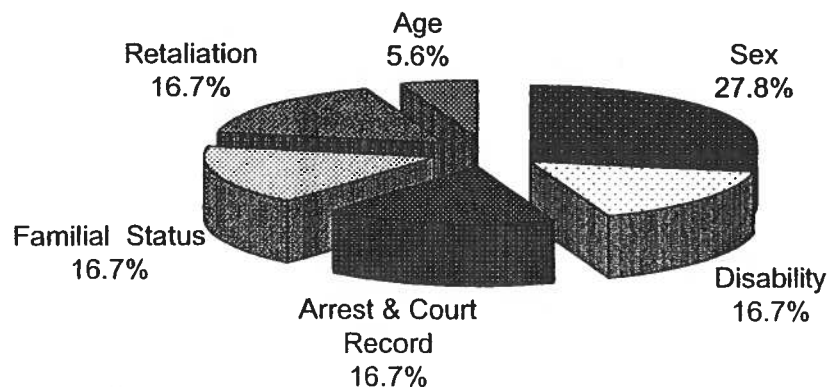
CAUSE CASES

When the investigation section has determined that there is "reasonable cause" to believe that discrimination has occurred, cases are assigned to HCRC enforcement attorneys for legal action. In FY 2000-2001, the enforcement attorneys received 18 cause determinations. Of these, 12 (67%) were employment cases, 5 (28%) were housing cases, and 1 (5%) was a public accommodations case.

Of the 18 new cases, 5 or 28% involved discrimination on the basis of sex, primarily sexual harassment charges. There were also 3 cases each (17%) involving discrimination based on disability, arrest and court record, familial status, and retaliatory conduct. One case alleged discrimination based on age (5%).

During FY 2000-2001, enforcement attorneys closed 23 cases, including 18 cases (78%) resolved by negotiated settlements.

Cause Determinations



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 2000-2001 the monetary relief obtained through settlements was more than \$325,000. In 18 cases, settlements obtained after a finding of reasonable cause exceeded \$261,700. In 42 cases settled prior to an investigative finding, monetary relief totaled more than \$64,800.¹

In addition to monetary relief, significant affirmative relief was also obtained. The HCRC seeks affirmative relief for four main 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 include various types of af-

firmative relief, including developing and implementing anti-discrimination policies, employee and supervisor training on anti-discrimination policies, posting policies, and publishing notices informing the public of HCRC's role in enforcing state anti-discrimination laws.

In some instances, non-monetary relief can be an important element of a settlement. For example, in FY 2000-2001 several complainants received letters 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 are resolved when an employer, housing provider, or public accommodation corrects an unlawful discriminatory policy or practice after notice of the violation. During FY 2000-2001, 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 cases conciliated and relief obtained

during FY 2000-2001:

- Complainant was allegedly terminated because she was pregnant. The employer claimed that complainant's termination was "well intentioned" and an attempt to "protect" her (and her baby) from the work.² The Commission's investigation revealed that the employment application contained unlawful inquiries into applicants' disabilities and pregnancy status. The employer also admitted that it screened out applicants with infants or young children. The employer agreed to eliminate these unlawful selection procedures and policies, to adopt and institute a general non-discrimination policy and a pregnancy non-discrimination and leave policy, to train its managers, and to pay Complainant \$25,000.
- An employer agreed to revise its employment application to eliminate unlawful pre-employment inquiries based on arrest and court record; to adopt a written anti-harassment/anti-discrimination policy; train its

managers and to pay Complainant \$500.

- An employee of a school was allegedly harassed on the basis of his sexual orientation. A settlement with the employer included providing Complainant paid professional development leave for one year; reimbursement of sick leave; and a payment of \$75,000. The employer also conducted training for its staff and students.
- A pregnant health care employee, whose request for light duty to accommodate her lifting restriction was denied, alleged discrimination on the basis of sex (failure to accommodate pregnancy-related disability). Settlement included revising the employer's anti-discrimination policies and existing work modification program to treat employees with pregnancy-related disabilities the same as employees with work-related injuries who are similar in their ability or inability to work, and paying Complainant \$17,500.

- In settlement of a housing complaint, the owner of a condominium was given a reserved parking stall as a reasonable accommodation for his disability. The Respondent also agreed to adopt a non-discrimination policy and to provide training to its Board about housing laws.
- An applicant for a position in food services was allegedly subjected to pre-employment inquiries into his arrest and court record on the employer's standard application form. The case was settled for payment of \$700 to the complainant, adoption of and training on anti-discrimination policies, and revision of the employment application to eliminate unlawful inquiries based on arrest and court record.
- A patient was allegedly subjected to sexual harassment by a dentist while she was undergoing a dental procedure. The case was settled for a \$10,000 payment to Complainant. Respondents also agreed to adopt a written anti-harassment/anti-discrimination policy; to post

the policy; and to provide training to its staff.

- A visually impaired customer was allegedly denied taxi service because the taxi drivers would not agree to transport his seeing-eye dog. In settlement, Respondent paid \$12,000 to Complainant and agreed that it would provide transportation to all disabled customers and their seeing-eye dogs or other service animals. Respondent also agreed to adopt a non-discrimination policy specifying that customers with disabilities will not be denied equal access to its taxi service and to provide training on the policy to all of its dispatchers and taxi drivers. To assist with public education, Respondent agreed to underwrite up to \$500 to produce a revised HCRC public accommodation brochure that includes a specific warning that taxis, as public accommodations, must allow disabled customers to be accompanied by a seeing-eye dog or other service animal.
- A carpet retail store allegedly failed to reinstate Complainant to her for-

mer or a comparable position following pregnancy leave. Respondent agreed to provide Complainant with a letter of reference; to revise its existing policies regarding its leave policy for pregnancy related disability; to post its policy; to provide training to its staff; and to pay Complainant \$7,000.

- A member of a health club alleged sex discrimination because of differential access hours for males and females. Respondent agreed to provide equal hours of access for both males and females at all of its facilities, as well as other affirmative relief.
- An employee alleged discrimination on the basis of his arrest and court record after Respondent terminated him because of his answers to unlawful inquiries on Respondent's employment application. The Respondent agreed to revise its application to eliminate unlawful inquiries; to maintain and follow its written anti-harassment/anti-discrimination policies; to provide training to its managers; and to pay

Complainant \$3,000.

- Complainant was terminated from her sales position at a retail store for an alleged "no show, no call" absence. The HCRC investigation found that Complainant did call and presented a doctor's note for her absence due to a pregnancy-related health condition. Employer agreed to post its non-discrimination policy, conduct training, and pay Complainant \$7,000.
- A landlord refused to show the parent of a minor child a rental unit. The case was settled for payment of \$1,000 to Complainant, plus the owner's adoption, implementation and dissemination to tenants and prospective tenants of an anti-discrimination policy, and attendance at a public seminar on fair housing laws.
- An employee in the food industry alleged discrimination on the basis of his arrest and court record after Respondent terminated him for "falsifying" information on his application. Respondent agreed to revise its application to eliminate

unlawful inquires; to maintain and follow its written anti-harassment/ anti-discrimination policies; to provide training to its managers; and to pay Complainant \$13,000.

- An employee of an airline was allegedly terminated based on his age pursuant to a provision of a collective bargaining agreement. The employer agreed to \$90,000 in damages for Complainant. In addition, the employer and the employee's union agreed to change the layoff provisions of the collective

bargaining agreement to remove the discriminatory provision.

¹ Pre-cause determination settlement figures do not include monetary relief recovered through confidential agreements between the parties or confidential mediated agreements, which were entered in 33 of the 42 settlements.

² Patronizing and protective attitudes toward pregnant employees have uniformly been rejected as sex discrimination under both state and federal law. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc., 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) (Title VII prohibits fetal protection policies; employer concerns about a woman's existing or potential offspring not legitimate bases for employment decisions since they have historically been used to deny women equal employment opportunities).

Case Decisions

CONTESTED CASE HEARINGS

During FY 2000-2001, six cases were docketed for hearing; two cases were consolidated and later enjoined by the First Circuit Court¹; in one case the complainant requested a right to sue; and one case settled. Two administrative hearings were pending at year's end.

On November 22, 2000, the Commissioners issued a final decision in Ho-shijo on behalf of the Complaint filed by Bruce Pied, and Bruce Pied vs. Aloha IslandAir, Inc., Docket No. 98-007-E-D. This case involved a pilot with monocular vision (sight in one eye) who alleged that Aloha IslandAir refused to hire him because of his disability.

The Commissioners found that Complainant Pied is a person with a disability because he has reduced peripheral vision, lacks stereopsis, or the ability to see three-dimensionally, and is therefore substantially limited in his ability to see. The Commissioners alternatively found that Aloha IslandAir regarded Complainant as being substantially limited in his ability to see. The Commissioners also found that

Complainant was qualified to be a pilot for Aloha IslandAir because he had an Air Transport Pilot license, a FAA medical waiver for his monocular vision, and had flown the same type of plane for another airline. The Commissioners found that Aloha IslandAir had a policy against hiring monocular pilots and refused to hire Complainant because he was monocular. The Commissioners concluded that Aloha IslandAir discriminated against Complainant because of his disability and tried to cover-up its discriminatory practices. The Commissioners ordered Aloha IslandAir to hire Complainant and awarded him back-pay, damages for lost earning capacity and emotional distress, punitive damages and attorneys' fees and costs.²

¹ In SCI Management Corp vs. Yee, Civil No. 01-1-0776-03, Respondent SCI Management Corporation challenged the constitutionality of H.R.S. Section 368-12, which allows complainants to request a notice of right to sue from the HCRC, but does not authorize the issuance of such a notice to respondents. The First Circuit Court enjoined the HCRC proceedings in that case, holding that the statute denied Respondent equal protection of the law. The HCRC has filed an appeal of the Court's decision.

² Respondent Aloha IslandAir appealed this decision to the First Circuit Court. On August 9, 2001, the First Circuit reversed the Commissioners' decision, concluding that Complainant Pied was not a person with a disability and that he did not timely file his complaint. The Commissioners are appealing the First Circuit Court's decision.

Legislation

The Legislature passed a hate crimes law to combat crimes motivated by bigotry and hatred against a victim's actual or perceived race, religion, disability, ethnicity, national origin, or sexual orientation. Act 240 creates a system to track and report on the number of hate-motivated crimes and allows enhanced prison sentences for crimes against persons and property that stem from hostility towards the victim's actual or perceived race, religion, disability, ethnicity, national origin, or sexual orientation.

The Legislature also passed Act 262 to create a study group on issues concerning access and use of criminal history record information for employment and licensing purposes. The HCRC enforces the employment discrimination law that prohibits discrimination because of arrest and court record but allows employers to consider a person's conviction record for crimes that are rationally related to job duties and responsibilities. The HCRC will participate in the study group.

Appendix

OVERVIEW

The Hawaii 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, 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 laws under HCRC jurisdiction.

The HCRC exercises jurisdiction over Hawaii'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. 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. The HCRC has a staff of twenty-nine (29) persons who are divided into separate enforcement and adjudication sections.

ADMINISTRATIVE PROCEDURE

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

- 1) she or he has been subjected to unlawful discrimination¹ because of a "protected basis,"² and,
- 2) the unlawful discrimination occurred within the previous 180 days.³

After a **complaint** is filed with HCRC, in certain cases the parties are offered an opportunity to voluntarily **mediate** the

complaint. 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**. As neutral fact-finders, HCRC investigators favor neither party, and gather evidence to allow the Executive Director to make a determination in each case. The HCRC investigator collects, reviews, and analyzes **documents**, and contacts and **interviews** witnesses. Some witnesses questioned 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 investigation. In many cases, the investigator also attempts to settle the complaint prior to a determination (**pre-determination settlement**).

After an HCRC investigation is com-

pleted, 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 Director dismisses the complaint and issues a right to sue letter to the complainant. Where a determination of reasonable cause is made, the Executive Director assigns the complaint to an HCRC enforcement attorney. The HCRC enforcement attorney attempts to **conciliate** or settle the complaint.⁴

If conciliation is unsuccessful, the complaint is docketed for a **contested case hearing**. An HCRC enforcement attorney presents the case in support of the complainant before an impartial hearings examiner. The respondent (represented by themselves or by counsel or representative of their choice) presents its case at the hearing. Generally, a complainant may intervene in the contested case process as a party and be represented by counsel or other representative of their choice.

After the completion of the contested case hearing, the hearings examiner is-

sues 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.⁵

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

cation 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-judicial or non-meritorious complaints, or with complaints that can be closed or settled in HCRC's administrative process. In fact, the great majority of complaints filed with HCRC are resolved or disposed of without resort to the courts.

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 by civil rights laws, and give guidance to employers,

landlords, and businesses on how to prevent and eliminate discrimination.

¹ "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 dis-

qualifying a large number women, or men, or any other protected basis.

² "Protected basis" is the criteria that it is unlawful for a respondent to discriminate upon. Protected bases vary depending on the statute involved:

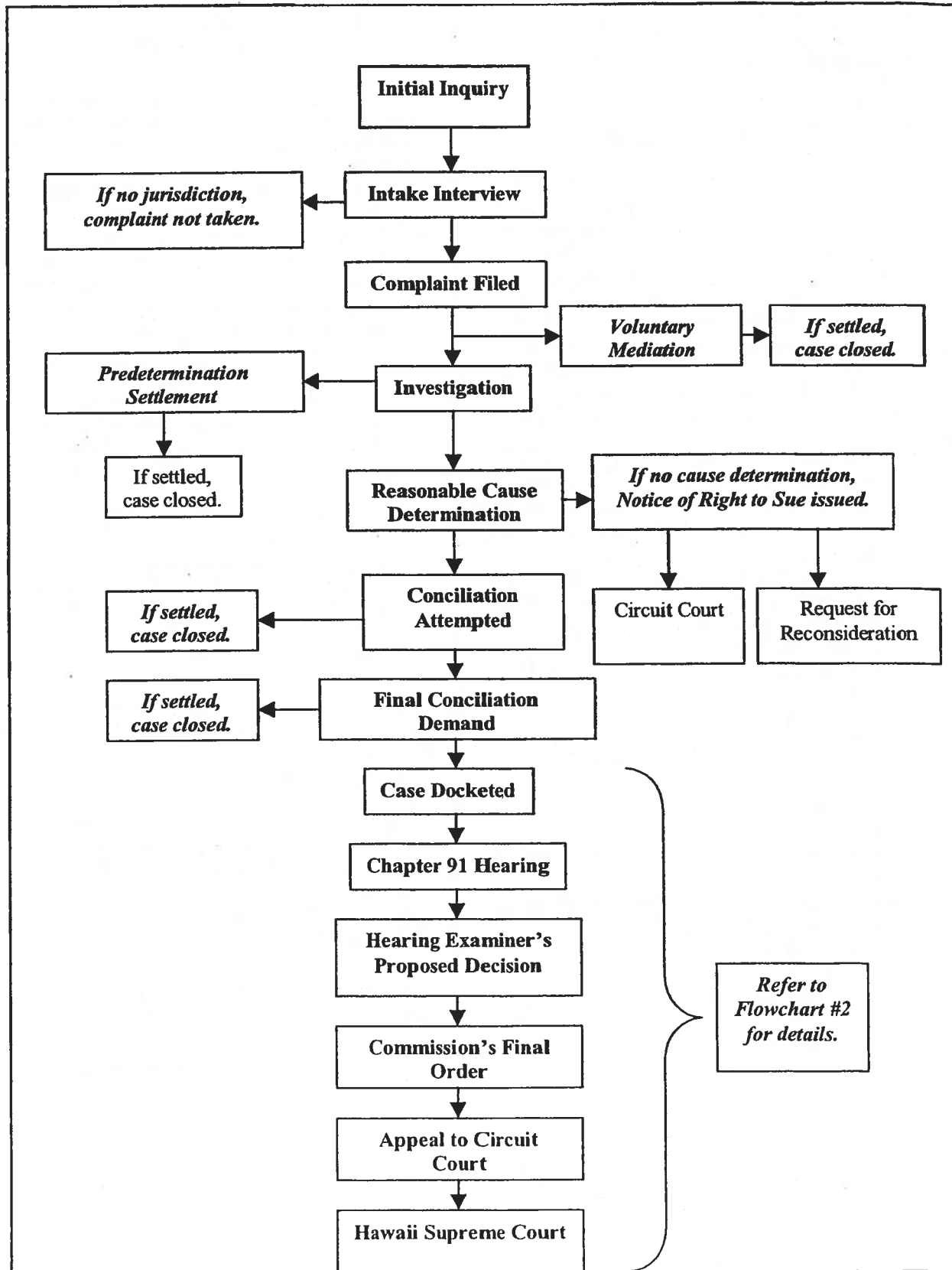
- a. **State Funded Services (H.R.S. Chapter 368)** The only protected basis is disability.
- b. **Employment (H.R. S. Chapter 378, Part I)** The protected bases that an employer, employment agency, or labor organization may not discriminate on are: race, sex, sexual orientation, age, religion, color,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

³ Complaints filed with HCRC usually involve a discrete act – such as termination, eviction, demotion, etc. – 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 action.

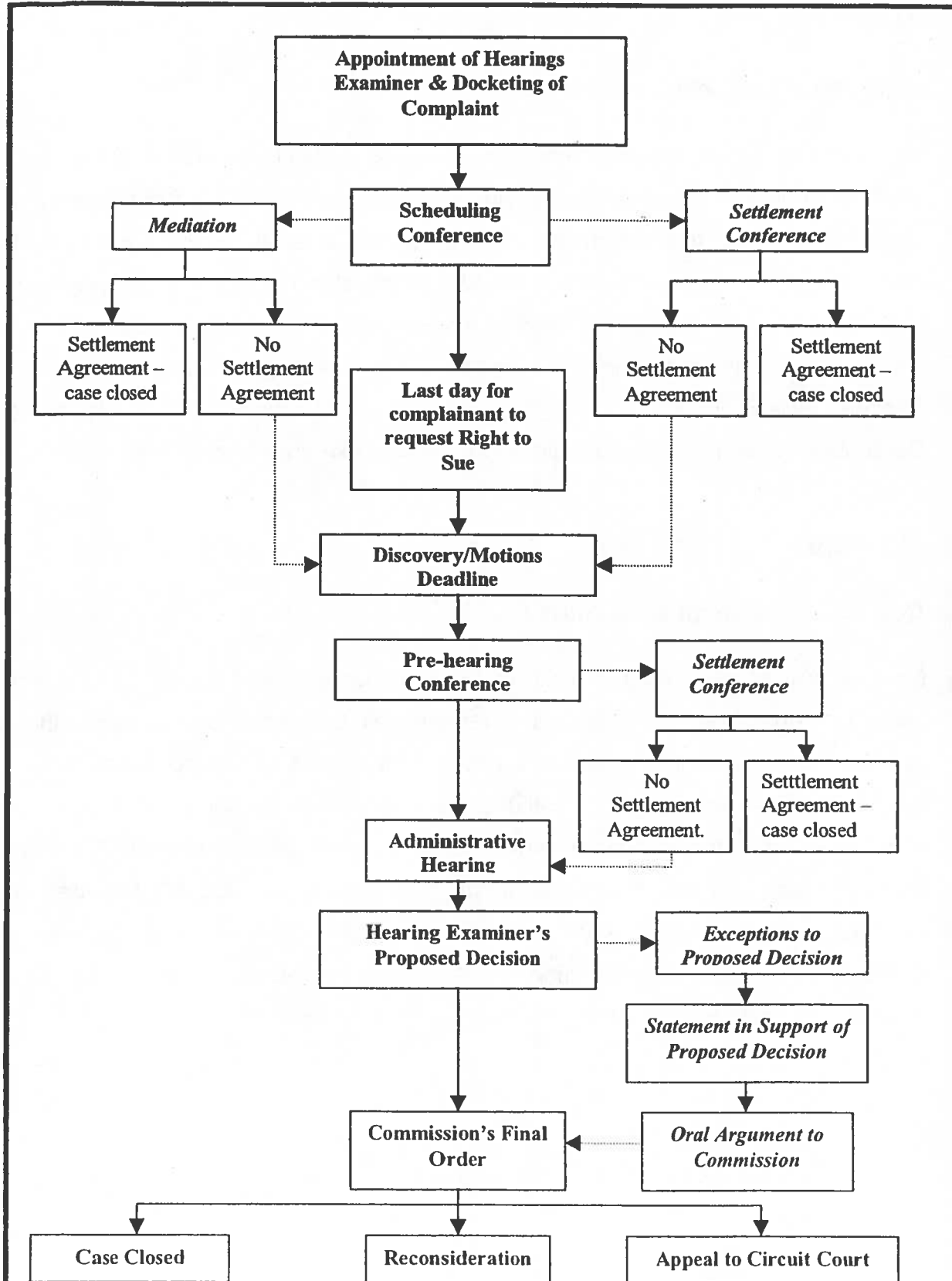
⁴ The HCRC administrative procedure and appeal process is illustrated in Flowchart # 1.

⁵ HCRC contested case hearing procedures are illustrated in Flowchart # 2.

HCRC Procedural Flowchart # 1



**HCRC Contested
Case Flowchart # 2**



HCRC COMMISSIONERS

HARRY YEE

Chair (term 1997-2001, 2001-2005)

Mr. Yee is an attorney in private practice in Honolulu. He is President of the Federal Bar Association Hawaii Chapter and is on the board of the National Asian Pacific American Bar Association. Mr. Yee has served as an Assistant Attorney General with the Civil Rights Division of the Massachusetts Office of the Attorney General and managing attorney for Greater Boston Legal Services Chinatown Office. He has also been a member of the Greater Boston Civil Rights Coalition and the George Lewis Ruffin Society. Mr. Yee was appointed Chair of the Commission in December 1998. He was reappointed for another four year term in 2001.

JACK LAW

Commissioner (term 1996-2002)

Mr. Law arrived in Honolulu in 1966 to attend the University of Hawai'i. In 1973 he became licensed real estate broker. Presently, Mr. Law is a businessman in the entertainment industry. His operations include Hula's Bar & Lei Stand, a gay club opened in 1974, and the Wave Waikiki, a rock-n-roll club opened in 1980. Mr. Law was one of the founding board members of the Life Foundation, the AIDS Foundation of Hawai'i, and served on its board for over 9 years. In 1990, Mr. Law began the Adam Baran Honolulu Gay Film Festival which has evolved into the Honolulu Gay & Lesbian Cultural Foundation, a not-for-profit Hawai'i corporation, which sponsors the film festival, and the Gay & Lesbian Cultural Festival.

FAYE KENNEDY

Commissioner (term 1997-2001, 2001-2003)

Ms. Kennedy is a former New York social worker and author. She is a past member of the Martin Luther King, Jr. Commission and the Commission on the Status of Women. She is also member of the U.S. Civil Rights Commission's Hawai'i Advisory Committee and the board of the American Civil Liberties Union of Hawai'i. Appointed in 1995 to serve out the remaining term caused by a vacancy on the Commission, she was appointed to her second term in 1997. Ms. Kennedy coordinates the Commission's participation in Martin Luther King, Jr., Holiday Commemoration events and activities. She was reappointed for another two year term in 2001.

ALLICYN HIKIDA TAsAKA

Commissioner (term 2000-2004)

Ms. Tasaka is the Executive Director of the Hawaii State Commission on the Status of Women. She is serving her second four year term as a commissioner. Formerly she was the chair of the Hawaii State Commission on the Status of Women and the first woman president of the Honolulu Chapter Japanese American Citizens League (JACL), and continues to serve on the board of the JACL. She also serves as a director on the boards of the National Association of Commissions for Women, Hawaii Women's Political Caucus, Awareness Foundation, Violence Prevention Consortium, and Business and Professional Women.

JUNE MOTOKAWA

Commissioner (term 1999-2003)

Ms. Motokawa is a special education teacher at Kaimuki Middle School and has been a teacher in Hawaii public schools for 30 years. She is a past president of the Hawai'i State Teachers' Association and a current trustee of the board of directors of the Hawai'i Education Association and Civic Forum on Public Schools. She served on the Commission on the Handicapped in the 1980's and formerly served as Congresswoman Patsy T. Mink's Big Island liaison. Ms. Motokawa was appointed in October 1998 to serve the remainder of Commissioner Claudio R. Suyat's term. She was appointed to her second term in 1999. Ms. Motokawa chairs the HCRC Special Advisory Committee on Diversity.

HCRC STAFF

The HCRC staff consists of 29 individuals in the following positions:

- Executive Director

- Enforcement Staff:

Deputy Executive Director

Enforcement Attorneys (4)

Administrative Services Asst.

Investigator-Supervisors V (2)

Investigator III-IV (11)

Secretary III

Legal Stenographer I

Clerk Typists (4)

- Adjudication Staff:

Chief Counsel

Hearings Examiner

Secretary II



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