HAWAIʻI CIVIL RIGHTS COMMISSION

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February 5, 2016
Rm. 309, 9:30 a.m.

To: The Honorable Mark Nakashima, Chair
Members of the House Committee on Labor & Public Employment

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawaiʻi Civil Rights Commission

Re: H.B. No. 2209

The Hawaiʻi Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawaiʻi's laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services. The HCRC carries out the Hawaiʻi constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

The HCRC opposes H.B. No. 2209. The stated intent of the bill seems innocuous: "…to clarify the scope of Hawaii's anti-discrimination law by specifying that employers, employment agencies, and labor organizations may refuse to hire, refer, or discharge for reasons other than those protected under Hawaii's discrimination law." However, the HCRC has serious concerns over both the intent of the bill and unintentional consequences H.B. No. 2209 will have, if enacted.

H.B. No. 2209 is intended to legislatively reverse the decision of the Hawaiʻi Supreme Court in *Adams v. CDM Media USA, Inc.*, 135 Hawaiʻi 1 (2015).

The discussion of the *Adams* decision and the proposed H.B. No. 2209 statutory change can and will be technical and complex, encompassing the legal standard for summary judgment, the analytical framework for proof of discrimination by circumstantial evidence, shifting burdens of production or going forward as distinct from burdens of proof or persuasion.

In simple terms, the *Adams* decision makes it easier for plaintiffs in employment discrimination cases brought under state law, HRS chapter 378, part I, to overcome motions for summary judgment and have a decider of fact (jury or judge) make the ultimate factual determination of whether there was unlawful intentional discrimination in circumstantial evidence cases, based on evidence presented at trial. The Court relied on statutory language dating back to the initial enactment of the Hawai‘i fair employment law, providing that nothing in the law "prohibits or prevents an employer … from refusing to hire, refer, or discharge any individual for reasons relating to the ability of the individual to perform the work in question …"

H.B. No. 2209 would amend HRS § 378-3, by amending paragraph (3) to read:

> 378-3 Exceptions. Nothing in this part shall be deemed to:
>
> * * * * *
>
> (3) Prohibit or prevent an employer, employment agency, or labor organization from refusing to hire, refer, or discharge any individual for reasons [~~relating to the ability of the individual to perform the work in question;~~] other than those protected under sections 378-2, 378-2.5, and 378-2.7;

The HCRC's concerns are at least two-fold: 1. The proposed amendment could alter the analytical framework for circumstantial evidence cases, and arguably creates an affirmative defense where there is none under current state or federal law; and, 2. The proposed amendment could alter the analysis of mixed-motive cases, diminishing or eliminating employer responsibility where discrimination is a factor, but not the only factor, in an adverse employment action or decision. There is no analogous or similar language to the proposed amended statutory language in the federal Title VII law.

What is *Adams v. CDM Media USA, Inc*.?

The Court in *Adams* addressed the analytical framework that applies on summary judgment in state employment discriminations involving proof/inference of discriminatory intent by circumstantial evidence.

The Court reviewed the analytical framework applied in state employment discrimination cases based on circumstantial evidence, citing *Shoppe v. Gucci Am., Inc.*, 94 Hawai‘i 368 (2000) (citing *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792 (1973)).

The basic *Shoppe* / *McDonnell Douglas* three-step analysis is simplified here:

First step: The plaintiff has the burden of establishing a prima facie discrimination case by a preponderance of the evidence, these elements: 1) that plaintiff is a member of a protected class; 2) that plaintiff is qualified for the position applied for (or otherwise in question); 3) that plaintiff was not selected (or subjected to other adverse employment action); and, 4) that the position still exists (filled or continued recruitment).

Second step: Once the plaintiff has established a prima facie discrimination case, the burden of production then shifts to the employer, who must proffer a legitimate, nondiscriminatory reason for the adverse employment action or decision. This does not shift the burden of proof to the employer.

Third step: If the employer proffers a legitimate, nondiscriminatory reason for the adverse employment action or decision, the burden then shifts to the plaintiff to demonstrate that the employer's proffered reason(s) are pretextual (*i.e.*, a pretext for discrimination). The burdens of persuasion and proof of this ultimate question of fact, whether the employer was more likely than not motivated by discrimination or the employer's proffered reason is not credible, lie with the plaintiff.

The *Adams* Court focused on the second step of the *Shoppe* / *McDonnell Douglas* analysis, exploring and discussing what constitutes a **legitimate**, nondiscriminatory reason. The Court held: that the employer's proffered reason must be legitimate, and that the articulated reason/explanation must be based on admissible evidence; if not, the employer has not met its burden of production.

The Court reviewed the legislative history of the HRS chapter 378 fair employment law prohibition against employment discrimination, looking back to the 1963 enactment of Act 180 (which predated the enactment of the federal law, Title VII of the Civil Rights Act of 1964), which included this statutory language:

> (1) It shall be unlawful employment practice or unlawful discrimination:
>
> (a) For an employer to refuse to hire or employ or to bar or discharge from employment, any individual because of his race, sex, age, religion, color or ancestry, provided that an employer may

refuse to hire an individual ***for good cause relating to the ability of the individual to perform the work in question*** …

(emphasis added).

The legislature included similar language when it recodified and reorganized the statutory anti-discrimination prohibitions and exceptions in 1981, into what became HRS §§ 378-2 and 378-3. HRS § 378-3(3) continues to provide:

§ 378-3 Exceptions.
Nothing in this part shall be deemed to:

* * * * *

(3) Prohibit or prevent an employer, employment agency, or labor organization from refusing to hire, refer, or discharge any individual for reasons relating to the ability of the individual to perform the work in question …

Citing the legislative history of the original 1963 Act 180, which provides that employers may refuse to hire, bar, or discharge for "good cause relating to the ability of the person to perform the work in question," its continuing effect based on the 1981 recodification of the exception in HRS § 368-3(3), and rules of statutory construction, the Court held that a "legitimate, non-discriminatory reason" proffered in the second step of the *Shoppe* / *McDonnell Douglas* analysis "**must be related to the ability of the individual to perform the work in question**." *Adams v. CDM Media USA, Inc.*, 135 Hawai'i 1 (2015), at 22.

This employer's burden to articulate a legitimate, work-related reason for its action is not a burden of proof. The legitimacy of the articulated explanation is distinct from proving that the articulated reason is true or correct. *Id*., at 23.

The *Adams* Court also held that on summary judgment, an employer's proffer of a legitimate, non-discriminatory reason for its action must be based on admissible evidence. *Id*., at 28-29.

DISCUSSION

The amendment to HRS 378-3(3) proposed in H.B. No. 2209, ostensibly intended to clarify or correct the meaning of a "legitimate, nondiscriminatory reason" in the *Shoppe* / *McDonnell Douglas* analysis, could be interpreted to result in the following unintended consequences:

1) Eliminating the requirement in the *Shoppe* / *McDonnell Douglas* analysis that requires an employer's proffered articulated reason for its action be both **legitimate** and nondiscriminatory. This would allow employers to carry their burden by articulating virtually any reason other than a discriminatory reason for their actions, even explanations that are illegitimate and not worthy of credence.
2) Arguably create an affirmative defense for employers that does not exist, where an employer can overcome circumstantial evidence discrimination claim by showing any plausible reason for its action that is not based on a prohibited bases, regardless of the circumstantial evidence of discriminatory intent.
3) Possibly undermine and diminish employer responsibility for adverse acts that are partly, but not wholly, motivated by discriminatory intent, a departure from state and federal law on mixed motive cases.

The *Shoppe* / *McDonnell Douglas* analytical scheme was created to help plaintiffs, allowing them to prove claims of unlawful discrimination in cases where there is no direct evidence of discriminatory intent. But the *Shoppe* / *McDonnell Douglas* shifting burden analysis has evolved in formalistic application to make it difficult for plaintiffs to overcome summary judgment, with courts requiring plaintiffs to prove pretext, and often the ultimate factual issue of whether the preponderance of the evidence establishes that unlawful discrimination occurred, at that pre-trial stage.

The *Adams* decision changes that, making it easier for the plaintiff to have her day in court, to present evidence of discrimination to the fact-finder, whether jury or judge. However, the plaintiff bears the ultimate burden of proof and persuasion, and is required to prove the ultimate fact of discrimination by a preponderance of evidence. *Shoppe v. Gucci America, Inc.*, 94 Hawai‘i 368

(2000), at 379.

CONCLUSION

The HCRC opposes H.B. No. 2209

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the House Committee on Labor & Employment
Friday, February 5, 2016 at 9:30 A.M.
Conference Room 309, State Capitol

RE: HOUSE BILL 2209 RELATING TO EMPLOYMENT

Chair Nakashima, Vice Chair Keohokalole, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **strongly supports** HB 2209, which specifies that employers may take adverse employment action for reasons other than those currently protected under Hawaii's anti-discrimination law.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

In the past, because Hawaii is an at-will employment state, an employer could take an adverse employment action (*e.g.*, firing, demotion, refusal to hire) for *any* non-discriminatory reason. The new rule stated by the State Supreme Court in a 3-2 decision imposes far greater restriction, *i.e.*, that the adverse action must be related to the person's ability to perform the job. Justice Pollack explicitly stated that "the nondiscriminatory reason articulated by the employer for the adverse employment action must be related to the ability of the individual to perform the work in question." While most hiring's or adverse actions are based on those reasons, there are workplace related issues such as level of performance level or team performance that are factors. The court's ruling creates prohibitions for employers to act on these matters.

There are several other aspects of *Adams* that are troubling. One is that the Court stated that undisclosed hiring criterion creates an inference that the reason for not hiring an employee is discriminatory. In other words, if an employer ends up not hiring an applicant for a reason that is not stated in the job posting, the employer is on the hook for a discrimination claim.

Another troubling aspect is that the Court stated that the decision maker for a hiring decision must have personal knowledge of the issues/reasons for not hiring a candidate. This is often impractical for any employer, large or small, who rely on HR reps or office managers to conduct all the interviews, while a senior management person makes the ultimate hiring decision.

In short, *Adams* is a decision that if read broadly, could destroy decades of settled law. We ask for your support on moving this bill forward.

Thank you for the opportunity to testify.

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LATE

Testimony to the House Committee on Labor & Public Employment
Friday, February 5, 2016, 9:30 a.m.
State Capitol - Conference Room 309

RE: HB2209, Relating to Employment

Aloha Chair Nakashima, Vice Chair Keohokalole, and members of the committee:

I am John Knorek, the Legislative Committee chair for the Society for Human Resource Management – Hawaii Chapter ("SHRM Hawaii"). SHRM Hawaii represents more than 800 human resource professionals in the State of Hawaii.

We are writing to respectfully SUPPORT HB 2209, relating to employment, which clarifies the scope of Hawaii's anti-discrimination law by specifying that employers, employment agencies, and labor organizations may refuse to hire, refer, or discharge for reasons other than those protected under Hawaii's anti-discrimination law.

Human resource professionals are keenly attuned to the needs of employers and employees. We are the frontline professionals responsible for businesses' most valuable asset: human capital. We truly have our employers' and employees' interests at heart. We respectfully support this measure and hope to be an ongoing part of the dialogue concerning it.

Thank you for the opportunity to testify.

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SHRM Hawaii, P. O. Box 3175, Honolulu, Hawaii (808) 447-1840

The Twenty-Eighth Legislature
Regular Session of 2016

HOUSE OF REPRESENTATIVES
Committee on Labor and Public Employment
Rep. Mark M. Nakashima, Chair
Rep. Jarrett Keohokalole, Vice Chair
State Capitol, Conference Room 309
Friday, February 5, 2016, 9:30 a.m.

LATE

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 2209
RELATING TO EMPLOYMENT

The ILWU Local 142 **opposes** H.B. 2209, which specifies that employers may take adverse action for reasons other than those currently protected under Hawaii's anti-discrimination law.

This bill apparently was carefully crafted to avoid public scrutiny, but our understanding of H.B. 2209 is that it would allow employers far more discretion to hire and fire without proper consideration of anti-discrimination laws.

The ILWU urges that H.B. 2209 be HELD. Thank you for the opportunity to share our views.