



**Testimony to the House Committee on Labor & Public Employment and
Committee on Human Services
Friday, March 18, 2016 at 10:00 A.M.
Conference Room 309, State Capitol**

RE: SENATE BILL 3036 SD1 RELATING TO EMPLOYMENT

Chairs Nakashima and Morikawa, Vice Chairs Keohokalole and Kobayashi, and Members of the Committees:

The Chamber of Commerce Hawaii ("The Chamber") **strongly supports** SB 3036 SD1, which clarifies that an employer may refuse to hire or refer, or discharge an individual for reasons relating to the ability of the individual to perform the work in question; provided that the employment policy is applied in a nondiscriminatory manner and unrelated to discriminatory practices, equal pay, criminal conviction records, or credit history.

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.

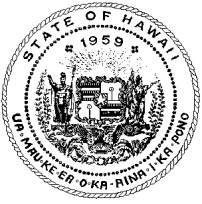


Chamber *of* Commerce HAWAII

The Voice of Business

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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HAWAI‘I CIVIL RIGHTS COMMISSION

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

March 18, 2016
Rm. 309, 10:00 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 Hawai‘i Civil Rights Commission

Re: S.B. No. 3036, S.D.1

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

The HCRC opposes S.B. No. 3036, S.D.1.

The stated intent of the original bill seemed innocuous: “...to clarify that Hawaii’s anti-discrimination law, as set forth in part I of chapter 378 of the Hawaii Revised Statutes, does not prohibit refusals to hire, refusals to refer, or discharges that are unrelated to discriminatory practices in section 378-2, unequal pay in 378-2.3, criminal conviction records in 378-2.5, and credit history in 378-2.7, Hawaii Revised Statutes.” However, the HCRC had serious concerns over both the intent of the bill and unintentional consequences S.B. No. 3036 would have, if enacted.

The Senate, amended S.B. No. 3036, the S.D.1 amending the stated intent of the bill: “... to clarify that Hawaii’s anti-discrimination law, as set forth in part I of chapter 378, Hawaii Revised Statutes, does not prohibit refusals to hire, refusals to refer, or discharges that are for reasons relating to the ability of the individual to perform the work in question; provided that employment policies are applied in a

nondiscriminatory manner unrelated to discriminatory practices in section 378-2, equal pay in section 378-2.3, criminal convictions records in section 378-2.5, and credit history in section 378-2.7, Hawaii Revised Statutes.” The HCRC acknowledges and appreciates the attempt to narrow the statutory exception the bill would affect, but continues to have serious concerns over the intent of the bill and the unintentional consequences S.B. 3036, S.D.1, would have if enacted.

S.B. No. 3036, in both its original form and the S.D.1, is intended to legislatively reverse the decision of the Hawai‘i Supreme Court in *Adams v. CDM Media USA, Inc.*, 135 Hawai‘i 1 (2015).

The discussion of the *Adams* decision and the proposed statutory change can and must be technical and complex, encompassing the legal standard for summary judgment, the analytical framework for proof of discrimination by circumstantial evidence, shifting burdens of production or going forward as distinct from burdens of proof or persuasion.

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

S.B. No. 3036, S.D.1, would amend HRS § 378-3, by amending paragraph (3) to read:

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

* * * * *

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

provided that an employment policy is applied in a nondiscriminatory manner and unrelated to sections 378-2, 378-2.5, or 378-2.7;

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

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

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

The Court reviewed the analytical framework applied in state employment discrimination cases based on circumstantial evidence, citing *Shope v. Gucci Am., Inc.*, 94 Hawai'i 368 (2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

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

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

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

Third step: If the employer proffers a legitimate, nondiscriminatory reason for the adverse

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

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

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

(1) It shall be unlawful employment practice or unlawful discrimination:

(a) For an employer to refuse to hire or employ or to bar or discharge from employment, any individual because of his race, sex, age, religion, color or ancestry, provided that an employer may refuse to hire an individual *for good cause relating to the ability of the individual to perform the work in question* ...

(emphasis added).

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

§ 378-3 Exceptions.

Nothing in this part shall be deemed to:

* * * * *

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

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

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

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

DISCUSSION

The amendmentS to HRS 378-3(3) proposed in S.B. No. 3036 and its S.D.1, 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, through formalistic application, to make it difficult for plaintiffs to overcome summary judgment, with courts requiring plaintiffs to prove pretext, and often the ultimate factual issue of whether the preponderance of the evidence establishes that unlawful discrimination occurred, at that pre-trial stage.

The *Adams* decision changed that, making it easier for the plaintiff to survive summary judgment, to have the opportunity to present evidence of discrimination to a fact-finder at trial, whether jury or judge. However, at trial the plaintiff still bears the ultimate burden of proof and persuasion, and is required to prove the ultimate fact of discrimination by a preponderance of evidence. *Shoppe v. Gucci America, Inc.*, 94 Hawai‘i 368 (2000), at 379.

CONCLUSION

The HCRC opposes S.B. No. 3036, both in its original form and in its S.D.1.