HB 809

RELATING TO EMPLOYMENT.

LAB, JUD

HB809 (?)

Submit Testimony

Measure Title:	RELATING TO EMPLOYMENT.
Report Title:	Employment Practices; Discriminatory Practices
Description:	Clarifies the grounds under which an employer may take employment action without committing a discriminatory practice. Takes effect on 1/1/2018.
Companion:	
Package:	None
Current Referral:	LAB, JUD
Introducer(s):	JOHANSON, HOLT, KEOHOKALOLE, NAKASHIMA

Sort by Date		Status Text
1/23/2017	H	Pending introduction.
1/25/2017	H	Pass First Reading
1/27/2017	H	Referred to LAB, JUD, referral sheet 4
2/10/2017	H	Bill scheduled to be heard by LAB on Tuesday, 02-14-17 8:30AM in House conference room 309.

S = Senate | **H** = House | **D** = Data Systems | **$** = Appropriation measure | **ConAm** = Constitutional Amendment

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HOUSE OF REPRESENTATIVES
TWENTY-NINTH LEGISLATURE, 2017
STATE OF HAWAII

H.B. NO. 809

A BILL FOR AN ACT

RELATING TO EMPLOYMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the employment
2 practices laws under sections 378-2, 378-2.3, 378-2.5, and
3 378-2.7, Hawaii Revised Statutes, relate respectively to
4 discriminatory practices, unequal pay, criminal conviction
5 records, and credit history. These sections were enacted to
6 prohibit employment discrimination against individuals based
7 upon protected categories, but were not intended to prevent
8 employers from taking employment action for reasons unrelated to
9 the categories protected by the legislature in those sections.
10 The purpose of this Act is to clarify that Hawaii's anti-
11 discrimination law, as set forth in part I of chapter 378 of the
12 Hawaii Revised Statutes, does not prohibit refusals to hire,
13 refusals to refer, or discharges that are unrelated to
14 discriminatory practices in section 378-2, unequal pay in
15 378-2.3, criminal conviction records in 378-2.5, and credit
16 history in 378-2.7, Hawaii Revised Statutes.

1 SECTION 2. Section 378-3, Hawaii Revised Statutes, is
2 amended to read as follows:
3 "**§378-3 Exceptions.** Nothing in this part shall be deemed
4 to:
5 (1) Repeal or affect any law, ordinance, or government
6 rule having the force and effect of law;
7 (2) Prohibit or prevent the establishment and maintenance
8 of bona fide occupational qualifications reasonably
9 necessary to the normal operation of a particular
10 business or enterprise, and that have a substantial
11 relationship to the functions and responsibilities of
12 prospective or continued employment;
13 (3) Prohibit or prevent an employer, employment agency, or
14 labor organization from refusing to hire[~~,~~] or
15 refer[~~,~~] or [~~discharge~~] discharging any individual for
16 reasons [~~relating to the ability of the individual to~~
17 ~~perform the work in question,~~] unrelated to section
18 378-2, 378-2.3, 378-2.5, or 378-2.7;
19 (4) Affect the operation of the terms or conditions of any
20 bona fide retirement, pension, employee benefit, or
21 insurance plan that is not intended to evade the

1 purpose of this chapter; provided that this exception
2 shall not be construed to permit any employee plan to
3 set a maximum age requirement for hiring or a
4 mandatory retirement age;
5 (5) Prohibit or prevent any religious or denominational
6 institution or organization, or any organization
7 operated for charitable or educational purposes, that
8 is operated, supervised, or controlled by or in
9 connection with a religious organization, from giving
10 preference to individuals of the same religion or
11 denomination or from making a selection calculated to
12 promote the religious principles for which the
13 organization is established or maintained;
14 (6) Conflict with or affect the application of security
15 regulations or rules in employment established by the
16 United States or the State;
17 (7) Require the employer to execute unreasonable
18 structural changes or expensive equipment alterations
19 to accommodate the employment of a person with a
20 disability;

1 (8) Prohibit or prevent the department of education or
2 private schools from considering criminal convictions
3 in determining whether a prospective employee is
4 suited to working in close proximity to children;
5 (9) Prohibit or prevent any financial institution in which
6 deposits are insured by a federal agency having
7 jurisdiction over the financial institution from
8 denying employment to or discharging from employment
9 any person who has been convicted of any criminal
10 offense involving dishonesty or a breach of trust,
11 unless it has the prior written consent of the federal
12 agency having jurisdiction over the financial
13 institution to hire or retain the person;
14 (10) Preclude any employee from bringing a civil action for
15 sexual harassment or sexual assault and infliction of
16 emotional distress or invasion of privacy related
17 thereto; provided that notwithstanding section 368-12,
18 the commission shall issue a right to sue on a
19 complaint filed with the commission if it determines
20 that a civil action alleging similar facts has been
21 filed in circuit court; or

H.B. NO. 809

1 (11) Require the employer to accommodate the needs of a
2 nondisabled person associated with or related to a
3 person with a disability in any way not required by
4 title I of the Americans with Disabilities Act."
5 SECTION 3. This Act does not affect rights and duties that
6 matured, penalties that were incurred, and proceedings that were
7 begun before its effective date.
8 SECTION 4. Statutory material to be repealed is bracketed
9 and stricken. New statutory material is underscored.
10 SECTION 5. This Act shall take effect on January 1, 2018.
11

INTRODUCED BY: ______________________

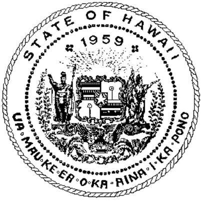
JAN 23 2017

H.B. NO. 809

Report Title:
Employment Practices; Discriminatory Practices

Description:
Clarifies the grounds under which an employer may take employment action without committing a discriminatory practice. Takes effect on 1/1/2018.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



HAWAIʻI CIVIL RIGHTS COMMISSION

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

February 14, 2017
Rm. 309, 8:30 a.m.

To: The Honorable Aaron Ling Johanson, Chair
Members of the House Committee on Labor and Public Employment

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

Re: H.B. No. 809

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. 809. The stated intent of the bill seems innocuous: "…to clarify that Hawaii's anti-discrimination law, as set forth in part I of chapter 378 of the Hawaii Revised Statutes, does not prohibit refusals to hire, 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 has serious concerns over both the intent of the bill and unintentional consequences H.B. No. 809 will have, if enacted.

H.B. No. 809 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. 809 statutory change can and must be technical and complex, encompassing the legal standard for summary judgment, the analytical framework for proof of discrimination by circumstantial evidence, shifting burdens of production or going forward as distinct from burdens of proof or persuasion.

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

H.B. No. 809 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;~~] 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 *Shoppe v. Gucci Am., Inc.*, 94 Hawai‘i 368 (2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

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

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

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

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

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

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

language:

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

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

(emphasis added).

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

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

* * * * *

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

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

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

articulated reason is true or correct. *Id*., at 23.

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

DISCUSSION

The amendment to HRS 378-3(3) proposed in H.B. No. 809, 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 H.B. No. 809.

The Twenty-Ninth Legislature
Regular Session of 2017

THE HOUSE
Committee on Labor & Public Employment
Representative Aaron Ling Johanson, Chair
Representative Daniel Holt, Vice Chair
State Capitol, Conference Room 309
Tuesday, February 14, 2017; 8:30 a.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 809
RELATING TO EMPLOYMENT

The ILWU Local 142 **opposes** H.B. 809, which clarifies the grounds under which an employer may take employment action without committing a discriminatory practice. The bill would take effect on 1/1/2018.

On the face of it, this proposal simply seems to clarify what employers are permitted to do—that hiring, refusing to refer, or discharging an applicant or an employee should be the legal right of an employer as long as Hawaii's anti-discrimination law is not violated.

However, the problem lies in what is being deleted from and added to the statute. The section in question states that "Nothing in this part shall be deemed to…Prohibit or prevent an employer, employment agency, or labor organization from refusing to hire or refer or discharging any individual for reasons unrelated to sections 378-2, 378-2.3, 378-2.5, or 378-2.7."

The current statute allows for the employment action to be taken only for reasons "relating to the ability of the individual to perform the work in question." The statute was specific—that the employer may hire, discharge of refuse to hire only if the individual is not able to perform the work for which he/she is to be hired or was hired.

However, H.B. 809 proposes to broaden the reasons for an employment action as long as it does not discriminate against protected classes. This will allow the employer greater latitude to take an employment action and will place the burden onto the applicant or employee to prove that a discriminatory practice was committed.

The ILWU respectively urges that H.B. 809 be held. Thank you for considering our views on this measure.

HB 809

Late Testimony

LATE

LATE

LATE

Testimony to the House Committee on Labor & Public Employment
Tuesday, February 14, 2017 at 8:30 A.M.
Conference Room 309, State Capitol

RE: HOUSE BILL 809 RELATING TO EMPLOYMENT

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

The Chamber of Commerce Hawaii ("The Chamber") **strongly supports** HB 809, which clarifies the grounds under which an employer may take employment action without committing a discriminatory practice; takes effect on 1/1/2018.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 1,600+ 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.

1132 Bishop Street, Suite 2105 • Honolulu, Hawaii 96813 • Phone: (808) 545-4300 • Facsimile: (808) 545-4369

Ocean Tourism Coalition

The Voice for Hawaii's Ocean Tourism Industry
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(808) 537-4308 Phone (808) 533-2739 Fax
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COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Rep. Aaron Ling Johanson, Chair
Rep. Daniel Holt, Vice Chair

LATE

LATE

Rep. Jarrett Keohokalole
Rep. Mark M. Nakashima
Rep. Roy M. Takumi
Rep. Kyle T. Yamashita
Rep. Lauren Kealohilani Matsumoto

NOTICE OF HEARING

LATE

DATE: Tuesday, February 14, 2017
TIME: 8:30 AM
PLACE: Conference Room 309

TESTIMONY OF THE OCEAN TOURISM COALITON IN SUPPORT OF HB 809

Aloha Chair Johanson, Vice Chair Holt, Members of the LAB Committee:

My name is James E. Coon, President of the Ocean Tourism Coalition (OTC). The OTC represents over 300 small ocean tourism businesses state wide. Most of these are family businesses which are locally owned and operated. Many of them have been in business for several decades and are an important and valued part of their respective communities. Most of these businesses operate from State Boating Facilities. Our industry is labor intensive with many entry level positions.

OTC supports HB 809 which clarifies Hawaii's anti-discrimination law.

Please pass HB 809

Sincerely,

James E. Coon, President OTC

LATE LATE LATE

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 14, 2017 11:39 AM
To: LABtestimony
Cc: jackie@fair-wind.com
Subject: Submitted testimony for HB809 on Feb 14, 2017 08:30AM

HB809
Submitted on: 2/14/2017
Testimony for LAB on Feb 14, 2017 08:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Jackie Moore-Andresen, PHR	Fair Wind Cruises	Support	No

Comments: Fair Wind Cruises Supports HB 809 which clarifies Hawaii's anti-discrimination law.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 14, 2017 10:25 AM
To: LABtestimony
Cc: lho@hawaiipublicpolicy.com
Subject: *Submitted testimony for HB809 on Feb 14, 2017 08:30AM*

HB809
Submitted on: 2/14/2017
Testimony for LAB on Feb 14, 2017 08:30AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
John Knorek	SHRM Hawaii	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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

LATE

LATE

LATE

February 14, 2017
Rm. 309, 8:30 a.m.

To: The Honorable Aaron Ling Johanson, Chair
Members of the House Committee on Labor and Public Employment

From: Elizabeth Jubin Fujiwara, Senior Partner,
Fujiwara & Rosenbaum, LLLC

Re: **H.B. No. 809--Strong Opposition**

I have specialized in civil rights and employment law as a plaintiff's attorney since 1986, representing workers, managerial employees, and citizens whose rights have been violated.

Our law firm strongly opposes H.B. No. 809. As the HCRC has testified the stated intent of the bill seems innocuous: "…to clarify that Hawaii's anti-discrimination law, as set forth in part I of chapter 378 of the Hawaii Revised Statutes, does not prohibit refusals to hire, 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 has serious concerns over both the intent of the bill and unintentional consequences H.B. No. 809 will have, if enacted.

H.B. No. 809 is intended to legislatively reverse the decision of the Hawai'i Supreme Court in *Adamsv. CDM Media USA, Inc.*, 135 Hawai'i 1 (2015). Basically, it would repudiate some of the liberal protections that have been in place for many decades. There is no compelling reason to do so. At this time our rights are already being attacked by Donald Trump and the Republicans in Washington. There is no reason to follow suit in Hawai'i.

Moreover, as explained at length in the HCRC's excellent analysis, which we adopt herein, the discussion of the *Adams* decision and the proposed H.B. No. 809 statutory change can and must be technical and complex, encompassing the legal standard for summary judgment, the

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analytical framework for proof of discrimination by circumstantial evidence, shifting burdens of production or going forward as distinct from burdens of proof or persuasion.

I will not be able to attend the hearing, but please feel free to contact me if you have any questions and/or need additional information.

Thank you for your consideration.