SB 675, SD1

RELATING TO EMPLOYMENT

LAB, JUD

SB675 SD1 (?)

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 1/7/2059. (SD1)
Companion:	HB809
Package:	None
Current Referral:	LAB, JUD
Introducer(s):	KEITH-AGARAN, Wakai

Sort by Date		Status Text
1/20/2017	S	Introduced.
1/23/2017	S	Passed First Reading.
1/23/2017	S	Referred to JDL.
2/15/2017	S	The committee(s) on JDL has scheduled a public hearing on 02-22-17 9:00AM in conference room 016.
2/22/2017	S	The committee(s) on JDL deferred the measure until 02-27-17 9:00AM in conference room 016.
2/27/2017	S	The committee(s) on JDL recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in JDL were as follows: 4 Aye(s): Senator(s) Keith-Agaran, K. Rhoads, L. Thielen; Aye(s) with reservations: Senator(s) Kim ; 0 No(es): none; and 1 Excused: Senator(s) Gabbard.
3/2/2017	S	Reported from JDL (Stand. Com. Rep. No. 619) with recommendation of passage on Second Reading, as amended (SD 1) and placement on the calendar for Third Reading.
3/2/2017	S	Report adopted; Passed Second Reading, as amended (SD 1).
3/2/2017	S	48 Hrs. Notice 03-07-17.

3/7/2017	S	Passed Third Reading, as amended (SD 1). Ayes, 25; Aye(s) with reservations: none . Noes, 0 (none). Excused, 0 (none). Transmitted to House.
3/7/2017	H	Received from Senate (Sen. Com. No. 231) in amended form (SD 1).
3/9/2017	H	Pass First Reading
3/9/2017	H	Referred to LAB, JUD, referral sheet 27
3/13/2017	H	Bill scheduled to be heard by LAB on Thursday, 03-16-17 9:00AM in House conference room 309.

THE SENATE
TWENTY-NINTH LEGISLATURE, 2017
STATE OF HAWAII

S.B. NO. 675 S.D. 1

A BILL FOR AN ACT

RELATING TO EMPLOYMENT.

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

SECTION 1. The legislature finds that the employment practices laws under sections 378-2, 378-2.3, 378-2.5, and 378-2.7, Hawaii Revised Statutes, relate respectively to discriminatory practices, unequal pay, criminal conviction records, and credit history. These sections were enacted to prohibit employment discrimination against individuals based upon protected categories, but were not intended to prevent employers from taking employment action for reasons unrelated to the categories protected by the legislature in those sections.

The purpose of this Act is 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.

SECTION 2. Section 378-3, Hawaii Revised Statutes, is amended to read as follows:

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

(1) Repeal or affect any law, ordinance, or government rule having the force and effect of law;

(2) Prohibit or prevent the establishment and maintenance of bona fide occupational qualifications reasonably necessary to the normal operation of a particular business or enterprise, and that have a substantial relationship to the functions and responsibilities of prospective or continued employment;

(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 section 378-2, 378-2.3, 378-2.5, or 378-2.7 or pursuant to an employee agreement policy that is applied in a nondiscriminatory fashion;

(4) Affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan that is not intended to evade the purpose of this chapter; provided that this exception shall not be construed to permit any employee plan to set a maximum age requirement for hiring or a mandatory retirement age;

(5) Prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or denomination or from making a selection calculated to promote the religious principles for which the organization is established or maintained;

(6) Conflict with or affect the application of security regulations or rules in employment established by the United States or the State;

(7) Require the employer to execute unreasonable structural changes or expensive equipment alterations

to accommodate the employment of a person with a disability;

(8) Prohibit or prevent the department of education or private schools from considering criminal convictions in determining whether a prospective employee is suited to working in close proximity to children;

(9) Prohibit or prevent any financial institution in which deposits are insured by a federal agency having jurisdiction over the financial institution from denying employment to or discharging from employment any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, unless it has the prior written consent of the federal agency having jurisdiction over the financial institution to hire or retain the person;

(10) Preclude any employee from bringing a civil action for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto; provided that notwithstanding section 368-12, the commission shall issue a right to sue on a complaint filed with the commission if it determines

that a civil action alleging similar facts has been filed in circuit court; or

(11) Require the employer to accommodate the needs of a nondisabled person associated with or related to a person with a disability in any way not required by title I of the Americans with Disabilities Act."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect on January 7, 2059.

S.B. NO. 675 S.D. 1

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 1/7/2059. (SD1)

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

March 16, 2017
Rm. 309, 9:00 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: S.B. No. 675, S.D.1

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.

Earlier HCRC testimonies on S.B. No. 675 and its companion H.B. No. 809 were lengthy and emphasized the technical and complex legal consequences of the bills. That discussion is certainly relevant and necessary for your deliberations, and the HCRC's full testimony follows. **However, the issues and what is at stake are at their heart simple and compelling, and are laid out in the Summary of HCRC Testimony on these first two pages**, with the full testimony following on pages 3-8.

SUMMARY OF HCRC TESTIMONY

S.B. No. 675, S.D.1, would amend HRS §378-3(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 or pursuant to an employee agreement policy that

is applied in a nondiscriminatory fashion;

Effect: In circumstantial evidence cases, eliminates requirement that an employer's proffered reason for an adverse employment action be legitimate and supported by evidence, as well as nondiscriminatory, allowing employers to carry their burden by articulating even explanations that are illegitimate (untrue) and not worthy of credence; arguably undermines and diminishes employer responsibility for adverse employment actions based on mixed motive (partly motivated by discriminatory and nondiscriminatory intent); arguably undermines and eliminates employer responsibility for facially neutral policies that have a discriminatory impact (*e.g.*, 6' height requirement for fire fighters that has disparate impact on Asians and women); arguably creates an affirmative defense for employers that does not exist, allowing an employer to overcome circumstantial evidence discrimination claim by showing any plausible reason for its action that is not based on a prohibited bases, regardless of circumstantial evidence of discriminatory intent.

Note: At trial, a plaintiff always carries the 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.

Who is hurt by S.B. No. 675, S.D.1?
Workers and victims of workplace discrimination.

Historical context and big picture perspective
S.B. No. 675, S.D.1, transforms Hawaii's state fair employment law, from being stronger than federal fair employment law to being weaker than federal law. There is no analogous or similar language to the proposed amended statutory language in federal Title VII law. If this bill is enacted, federal law will no longer be the "floor" beneath which state law does not fall; our state law protection for victims of discrimination will be the "basement."

It is astounding that the Hawai'i legislature is considering the abandonment of democratic principles and values that made enactment of Hawaii's fair employment law in 1963 an integral and important part of a legislative platform protecting the rights and dignity of Hawaii's workers, pre-dating the enactment of the Civil Rights Act of 1964.

Is S.B. No. 675, S.D.1, better than the original S.B. No. 675?
No, S.D. 1 is even worse.
The S.D.1 adds language that expressly allows employers to discharge an employee "pursuant to an employee agreement policy that is applied in a nondiscriminatory fashion …" This allows employers to take action against employees based on employer policies, handbooks, or contracts that are "agreed" to by employees, without regard to state fair employment law, HRS chapter 378, part I. For example, an employer could terminate an employee for violation of an attendance policy in an employee handbook that all employees are required to sign for. The policy might state that the employee is subject to progressive discipline, up to and including termination, for *x* days of absence over a period of *y* days/weeks/months, regardless of the reason for the absences or whether the leave was earned and accrued. Under the S.D.1 language, termination for violation of such an attendance policy would not be prohibited under HRS chapter 378, part I, regardless of whether it would constitute a denial of leave as a reasonable accommodation for a worker with a disability or a pregnant worker. This would render state fair employment law inconsistent with and fundamentally weaker than the Americans with Disabilities Act (ADA) federal standard.

HCRC Full Testimony

The HCRC opposes S.B. No. 675, S.D.1. 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 S.B. No. 675, S.D.1, will have, if enacted.

S.B. No. 675, 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 S.B. No. 675, S.D.1, 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. 675, 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;~~] unrelated to sections 378-2, 378-2.5, or 378-2.7 or pursuant to an employee agreement policy that is applied in a nondiscriminatory fashion;

The HCRC's concerns are at least four-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; 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; 3. The proposed amendment arguably eliminates employer liability for facially neutral policies that have a discriminatory disparate impact on racial minorities and women; and, 4. The proposed amendment would allow employers to take action against employees based on employer policies, handbooks, or contracts that are "agreed" to by employees, without regard to state fair employment 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 S.B. No. 675, 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 under current law, 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.
4) Arguably undermine and eliminate employer liability for facially neutral policies that have a discriminatory disparate impact based on race, sex, or other prohibited discriminatory basis.

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. 675, S.D.1.

Chamber of Commerce HAWAII
The Voice of Business

Testimony to the House Committee on Labor & Public Employment
Thursday, March 16, 2017 at 9:00 A.M.
Conference Room 309, State Capitol

RE: SENATE BILL 675 SD1 RELATING TO EMPLOYMENT

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

The Chamber of Commerce Hawaii ("The Chamber") **strongly supports** SB 675 SD1, which clarifies the grounds under which an employer may take employment action without committing a discriminatory practice. We ask that **amendments** be made to the bill.

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 hirings 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.

We respectfully ask the Committee to amend Section 2 of the bill. We would like to amend the language in 378-3 by deleting "an employee agreement policy" and replacing it with "a business reason."

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

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.

LGBT CAUCUS

FORMED IN 2001

THE FIRST CAUCUS OF THE
DEMOCRATIC PARTY
OF HAWAI'I

March 14, 2017

House's Committee on Labor
Hawai'i State Capitol
415 South Beretania Street, Room 309
Honolulu, HI 96813

Hearing: Thursday, March 16, 2017 – 9:00 a.m.

RE: **STRONG OPPOSITION for Senate Bill 675 SD 1** – RELATING TO EMPLOYMENT

Aloha Chairperson Johanson, Vice Chair Holt and fellow committee members,

I am writing in STRONG OPPOSITION to Senate Bill 675 Senate Draft 1 on behalf of the LGBT Caucus of the Democratic Party of Hawai'i. SB 675 SD 1 will clarify the grounds under which an employer may take employment action without committing a discriminatory practice.

The LGBT Caucus views this bill as harmful to employees. We have since our founding advocated for robust protections by the State's non-discrimination policies. SB 675 SD 1 will turn the clock back on those protections.

We hope you all will oppose this dangerous piece of legislation.

Mahalo nui loa,

Michael Golojuch, Jr.
Chair and SCC Representative
LGBT Caucus for the DPH

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, March 14, 2017 6:20 AM
To: LABtestimony
Cc: debrannan@gmail.com
Subject: Submitted testimony for SB675 on Mar 16, 2017 09:00AM

SB675
Submitted on: 3/14/2017
Testimony for LAB on Mar 16, 2017 09:00AM in Conference Room 309

Submitted By	Organization	Testifier Position	Present at Hearing
Lisa Ellen Smith	Individual	Oppose	No

Comments: To: The Honorable Gilbert Keith-Agaran, Chair Members of the Senate Committee on Judiciary and Labor From: Lisa Ellen Smith I oppose this bill as I have serious concerns on the intent of this bill would lead to a plaintiff's responsibility to disprove a discriminatory employment termination. The Hawaii Civil Rights Commission currently has jurisdiction to enforce the prohibition of discriminatory practices and acts. Thank you for your time in considering my opposition to this rights relinquishing bill.

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

SB 675, SD1

Late Testimony

HAWAII
STATE
COMMISSION
ON THE
STATUS
OF
WOMEN

Chair
LESLIE WILKINS

COMMISSIONERS:

SHERRY CAMPAGNA
CYD HOFFELD
JUDY KERN
MARILYN LEE
AMY MONK
LISA ELLEN SMITH

Executive Director
Cathy Betts

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235 S. Beretania #407
Honolulu, HI 96813
Phone: 808-586-5758
FAX: 808-586-5756

LATE LATE LATE

March 15, 2017

To: Representative Aaron Ling Johanson, Chair
Representative Daniel Holt, Vice Chair
Members of the House Committee on Labor and Public Employment

From: Cathy Betts, Executive Director
Hawaii State Commission on the Status of Women

Re: Testimony in Strong Opposition, SB 675, SD1, Relating to Employment

The Hawaii State Commission on the Status of Women strongly opposes SB 675, SD1 which would significantly roll back employment law and anti-discrimination protections for workers, under the guise of "clariyfing the grounds under which an employer could take various employment actions without committing a discriminatory practice." This measure, if passed, would have severely detrimental effects on workers and victims of workplace discrimination harkening back to the 1980s, when the United States Supreme Court rolled back substantial protections under Title VII. The result of that rollback: it became increasingly difficult for victims of employment discrimination to sustain complaints of discrimination.

Currently, the statute provides for employment action to be taken only for reasons "relating to the ability of the individual to perform the work in question". The language of SB 675, SD1, proposes to broaden the reasons for an employer taking an employment action, so long as it does not relate back to discrimination connected to protected class. Additionally, SD1 goes even further, by including language that allows employers to discharge an employee "pursuant to an employee agreement policy that is applied in a nondiscriminatory fashion." For example, there may be a standard employment policy that requires new employees to agree to an employee handbook that contains a mandatory arbitration policy. Under the bill's current language, even an employee who has experienced workplace discrimination but could not afford or did not feel protected undergoing mandatory arbitration regarding the underlying discrimination claim, could be terminated.

SB 675, SD1 is dangerous to Hawaii's workers. If enacted, this policy would undermine employer responsibility for acts partly motivated by discriminatory intent, would undercut decades of employment law, and would make Hawaii state law significantly weaker than federal law. The Commission opposes SB 675, SD1 and respectfully requests that this Committee hold this measure. Thank you for this opportunity to provide testimony on this measure.

LATE

LATE

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The Twenty-Ninth Legislature
Regular Session of 2017

HOUSE OF REPRESENTATIVES
Committee on Labor and Public Employment
Representative Aaron Ling Johanson, Chair
Representative Daniel Holt, Vice Chair
State Capitol, Conference Room 309
Thursday, March 16, 2017; 9:00 am

STATEMENT OF THE ILWU LOCAL 142 ON S.B. 675 SD 1
RELATING TO EMPLOYMENT

The ILWU Local 142 **strongly opposes** S.B. 675 SD 1, 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 statutory language. 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 relating to the ability of the individual to perform the work in question."

The current statute allows 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 for. S.B. 675 SD 1 would change this language by deleting "relating to the ability of the individual to perform the work in question" and adding "or pursuant to an employee agreement policy that is applied in a nondiscriminatory fashion".

By making these changes in the statutory language, S.B. 675 SD 1 broadens the reasons for an employment action against the employee and lessens the burden of proof for the employer. Hawaii's current law is stronger than its federal counterpart, however, these changes would in effect, make Hawaii's fair employment law weaker than the federal fair employment law.

The ILWU respectively urges that S.B. 675 SD 1be held. Thank you for considering our views on this measure.

LATE
LATE
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Testimony to the House Committee on
Labor & Public Employment
March 16, 2017 at 9:00 a.m.
State Capitol - Conference Room 309

RE: SB 675, SD1, Relating to Employment

Aloha members of the Committee:

We are Cara Heilmann and John Knorek, the Legislative Committee co-chairs 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 support SB 675, SD 1, although we prefer the original version of this measure which clarifies the grounds under which an employer may take employment action without committing a discriminatory practice. As originally drafted, this bill would help to address a new rule articulated by the State Supreme Court which imposes significant restrictions on at-will employment. We believe that this measure is an important step toward clarifying the grounds under which an employment may take employment action.

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 will continue to review this bill and, if it advances, request to be a 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

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

March 16, 2017
Conference Room 309

To: Representative Aaron Ling Johanson, Chair
Representative Daniel Holt, Vice Chair
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

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

Re: **S.B. No. 675, SD1--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 S.B. No. 675. SD1. S.B. 675 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). This amendment is a huge step backward and will make employment discrimination cases more likely to be dismissed at the summary judgment stage.

When a lawsuit is filed, employers routinely file to have cases dismissed at summary judgment before a trial is ever held. Throughout the years I have opposed hundreds of employers' Motions for Summary Judgment. Quite often an employer argues it has made a decision to not hire, demote, fire or otherwise affect the terms of our client's employment, based on vague assertions of "unfitness" or "inexperience," without ever having to explain how these vague criteria relate to the work in question, when **the real reason is blatant discrimination** based on the person's sex or race or ethnicity or age or religion or sexual orientation or a combination, especially when it's an older woman who is the wrong minority. *See* for example, ***Lam v. U.H.***, a 9th circuit case. It is even more troubling when the discrimination is out and out retaliation for trying to protect the employee's own civil rights or another employee's.

The Hawai'i Supreme Court, studying the legislative history of the **original 1963 Act 180**, made it clear in ***Adams*** that Hawaii's anti-discrimination law does **not allow** employers to offer **just any "plausible" excuse** for not hiring, demoting, firing or otherwise affecting the terms of someone's employment. These decisions of hiring, demotion, firing, etc., **must be based on and related to the requirements of the actual job in question.** Thus, since 1963 to this day, employers in Hawai'i **cannot just make up excuses.** ***Adams*** has continued to require employers to articulate a legitimate, work-related reason for its action.

The proposed amendment would allow employers to pick reasons/excuses that have absolutely nothing to do with the person's ability to do the work in question, such as: (1) non-English accent; (2) physical stature or weight; (3) "personality;" (4) neighborhood of residence; or (5)

vague assertions of "unfitness" or "inexperience." None of these are expressly protected per se by HRS § 378-2.

Moreover, the proposed amendment would **leave employees unprotected in other ways**. For instance, an employer should not be able to terminate an employee, if the employee engages in off-duty support of civil rights issues, such as, protesting against the Muslim ban, or supporting equal pay for women or supporting reproductive rights, because such activities are not related to the employees' ability to do the job at work.

There is no compelling reason to reverse our rights under the law. 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, where we are known for our protection of civil rights. Here in Hawaii, we are a **community that believes -- fundamentally** -- that each person is the **equal of every other**. This belief cuts across race, sex, sexual orientation, ability status, nationality, immigration history, religion, gender identity, economic means, language, and age. For example,

•Hawai'i passed the civil rights laws giving women & minorities protection in employment before the federal civil rights law --Title VII --was enacted.
• In 1970 Hawai'i gives a woman a right to abortion without any onerous restrictions.
•In 1972 Hawai'i was the first state to pass the ERA in our constitution. There is still no federal ERA.
• In 1978 Hawai'i again showed its strong commitment to the protection of civil rights. Article I, Section 5 of the Hawai'i 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."
•In 1978 Hawai'i passed the Right to Privacy in our constitution with greater expectations of privacy than other states.

Adams reaffirms that employers can only have cases dismissed when they establish the reason was directly related to the work, not a made up reason that can be used to mask discrimination. To adopt the proposed amendment would overrule **Adams**. Adopting this bill will lead to the dismissal of employees' discrimination suits based on fabrication and employers hiding improper motives. Valid cases will be dismissed for pretextual reasons. Workers will suffer prohibited discrimination without a remedy.

When we are **at our best**, we celebrate diversity, embrace our differences, and build on each others' strengths. **With Hawai'i's history,** delineated above, it is clear that **we believe strongly in social justice**. It is now more critical than ever for us to remember our core values and draw on them collectively, with a sense of pride and continue to enact such laws and oppose those that oppress Hawai'i's citizens.

We respectively urge that S.B. 675, SD1 be held. Thank you for your consideration.