

A Bill for an Act Relating to Discriminatory Employment Practices.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to extend coverage of Part I of Chapter 378, Hawaii Revised Statutes, to employees of the State and local governments, to provide equal treatment to females in the workforce who are disabled because of pregnancy, childbirth, and related medical conditions, and to spell out policies and procedures in the area of enforcement.

SECTION 2. Chapter 378, Hawaii Revised Statutes, is amended by repealing

Part I in its entirety and by adding a new Part I to read:

“PART I. DISCRIMINATORY PRACTICES

§378-1 Definitions. As used herein:

“Arrest and court record” includes any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to any law enforcement or military authority.

“Because of sex” shall include, but is not limited to, because of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other individuals not so affected but similar in their ability or inability to work.

“Department” means the department of labor and industrial relations.

“Director” means the director of the department of labor and industrial relations.

“Employer” means any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States.

“Employment” means any service performed by an individual for another person under any contract of hire, express or implied, oral or written, whether lawfully or unlawfully entered into. Employment does not include services by an individual employed as a domestic in the home of any person.

“Employment agency” means any person engaged in the business of providing employment information, procuring employment for applicants, or providing employees for placement with employers upon request.

“Labor organization” means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

“Marital status” means the state of being married or being single.

“Person” means one or more individuals, and includes, but is not limited to, partnership, associations, or corporations, legal representatives, trustees, trustees in bankruptcy, receivers, or the State or any of its political subdivisions.

“Physical handicap” means a substantial physical impairment where such handicap is verified by medical finding and appears reasonably certain to continue throughout the lifetime of the individual without substantial improvement.

§378-2 Discriminatory practices made unlawful; offenses defined. It shall be an unlawful discriminatory practice:

- (1) For an employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment because of race, sex, age, religion, color, ancestry, physical handicap, marital status, or arrest and court record;
- (2) For an employment agency to fail or refuse to refer for employment, or to classify or otherwise to discriminate against, any individual because of race, sex, age, religion, color, ancestry, physical handicap, marital status,

- or arrest and court record;
- (3) For any employer or employment agency to print, circulate, or cause to be printed or circulated any statement, advertisement, or publication or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination because of race, sex, age, religion, color, ancestry, physical handicap, marital status, or arrest and court record;
 - (4) For any labor organization to exclude or expel from its membership any individual or to discriminate in any way against any of its members, employer, or employees because of race, sex, age, religion, color, ancestry, physical handicap, marital status, or arrest and court record;
 - (5) For any employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against any individual because he has opposed any practice forbidden by this part or because he has filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practices prohibited under this part;
 - (6) For any person whether an employer, employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the discriminatory practices forbidden by this part, or to attempt to do so;
 - (7) For any employer or labor organization to refuse to enter into an apprenticeship agreement, as defined in section 372-2, because of the race, sex, age, religion, color, ancestry, physical handicap, marital status, or arrest and court record of an apprentice; provided that no apprentice shall be less than sixteen years of age;
 - (8) For any employer to violate the provisions of section 121-43 relating to nonforfeiture for absence by members of the national guard.

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

- (1) Repeal or affect any law or ordinance or government rule or regulation 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 which have a substantial relationship to the functions and responsibilities of the prospective or continued employment;
- (3) Prohibit or prevent an employer, employment agency, or a labor organization from refusing to hire or refer or from discharging any individual for reasons relating to the ability of the individual to perform the work in question;
- (4) Affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan;
- (5) Prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which 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 such selection as is calculated by the organization to promote the religious principles for which it is

established or maintained.

- (6) Conflict with or affect the application of security regulations 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 handicapped person.

§378-4 Enforcement jurisdiction; complaint against unlawful discrimination.

(a) The department shall have jurisdiction over the subject of discriminatory practices made unlawful by this part. Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may file with the department a verified complaint in writing which shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the department. The attorney general, or the department upon its own initiative, may, in like manner, make and file such complaint.

(b) A complaint may be filed on behalf of a class by the attorney general or the department, and a complaint so filed may be investigated, conciliated, and litigated on a class action basis.

(c) No complaint shall be filed after the expiration of ninety days after the date upon which the alleged unlawful discriminatory practice occurred.

§378-5 Power of department to prevent unlawful discrimination. (a) After the filing of any complaint, or whenever it appears to the department that an unlawful discriminatory practice may have been committed, the department shall make an investigation in connection therewith. At any time after the filing of a complaint but prior to the issuance of a determination as to whether there is or is not reasonable cause to believe that this part has been violated, the parties may agree to resolve the complaint through a predetermination settlement.

(b) In the event that the department determines after such investigation that there is reasonable cause to believe that this part has been violated, the department shall immediately endeavor to eliminate any such alleged unlawful discriminatory practice by informal methods of conference, conciliation, and persuasion.

(c) Where the department has been unable to secure from the respondent a conciliation agreement acceptable to the department, the department shall demand that the respondent cease such unlawful discriminatory practice. The department's determination that a final conciliation demand is to be made shall be subject to reconsideration by the department on its own initiative but shall not be subject to judicial review. The department may order appropriate affirmative action including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the department, will effectuate the purpose of this part, and including a requirement for reporting on the manner of compliance.

(d) The department may commence a civil action in circuit court seeking appropriate relief. In a civil action brought pursuant to this subsection:

- (1) The complainant shall have the right to intervene;
- (2) The director may join various complainants in one cause of action;

- (3) The director shall not be required to pay the filing fee or other costs or fees of any nature or to file a bond or other security of any nature in connection with such action or with proceedings supplementary thereto, or as a condition precedent to the availability to the director of any process in aid of such action or proceedings;
- (4) In no event shall any action be brought more than three years after the complaint to which the action relates was filed with the department; provided, that the running of the said three-year period shall be suspended during the life of the conciliation agreement.
- (e) Notice of right to sue.
 - (1) The department may issue a right to sue upon written request of the complainant;
 - (2) Within ninety days after receipt of a notice of right to sue, the complainant may bring a civil action under this part;
 - (3) The department may intervene in a civil action brought pursuant to this subsection if the case is of general importance.
- (f) In an action brought pursuant to section 378-5(d) or section 378-5(e), if the court finds that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this part, the court may enjoin the respondent from engaging in such unlawful discriminatory practice and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement, hiring, or upgrading of employees, with or without back pay, or restoration of membership in any respondent labor organization, or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of the complaint with the department.
- (g) In an action brought pursuant to section 378-5(d) or section 378-5(e), if any judgment obtained by the director or by the complainant against the respondent remains unsatisfied for a period of thirty days, the director or the complainant, may request the circuit court to compel the respondent to comply with the judgment, including, but not limited to, an order directing the respondent to cease doing business until the respondent has complied with the judgment.
- (h) Whenever it appears to the director that a person, employer, labor organization, or employment agency is engaged in any act or practice which constitutes or will constitute a violation of this part, or any related regulation, the director may bring an action, in the circuit court of the circuit in which it is charged the act or practice complained of occurred, to enjoin the act or practice and to enforce compliance with this part or with the regulation, and upon a proper showing, a permanent or temporary injunction or decree or restraining order shall be granted without bond.
- (i) It is an unlawful discriminatory practice for a party to a predetermination settlement or conciliation agreement made pursuant to this part to violate the terms of the settlement or agreement.
- (j) In any action brought under this part, the court shall in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs of action, including costs of fees of any nature, and reasonable attorney's fees, to be paid by the defendant.

§378-6 Inspection; investigation; records. (a) In connection with an investigation of a complaint filed under this part, or whenever it appears to the department that an unlawful discriminatory practice may have been or is being committed, the

director or his authorized representative shall have access to the premises of the parties or persons reasonably connected thereto, records, documents, and other material relevant to the complaint and shall have the right to examine, photograph, and copy such material, and may question such employees and make such investigation to determine whether any person has violated this part or any rule or regulation issued hereunder or which may aid in the enforcement of this part.

(b) Every employer, employment agency, and labor organization shall:

- (1) Make and keep records relevant to this part, and
- (2) Make such reports therefrom, as the department shall prescribe by regulation or order.

§378-7 Oaths; subpoenas; immunities. (a) The director or his authorized representative may administer oaths, require answers to interrogatories, take or cause to be taken the depositions of parties or witnesses, and may issue subpoenas or subpoenas duces tecum to compel the attendance and testimony of witnesses or the production of books, payrolls, records, correspondence, documents, or any other material relating to any matter under investigation.

(b) If a person fails to comply with a subpoena issued under this section, any circuit court, upon application of the director or his authorized representative, may issue an order requiring compliance.

(c) No person shall be excused from attending and testifying or from producing books, payrolls, records, correspondence, documents, or other material in obedience to the subpoena or subpoena duces tecum of the director or his authorized representative, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

§378-8 Rules and regulations. The department shall make such rules and regulations, not inconsistent with this part as in the judgment of the department seem appropriate for the carrying out of this part and for the efficient administration thereof.

§378-9 Penalties. Whoever intentionally resists, prevents, impedes, or interferes with the department or any of its agents or representatives in the performance of duties pursuant to this part, or who in any manner intentionally violates an order of the department, shall be fined not more than \$500, or imprisoned for not more than ninety days, or both."

SECTION 3. This Act shall take effect upon its approval.

(Approved June 2, 1981.)