

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

'94 JAN -4 P1:41

Civil Rights Commission  
HONOLULU, HAWAII

In the Matter of	)	DR 93-009
_____ ,	)	
Petitioners,	)	HEARINGS EXAMINER'S
-----	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
	)	AND RECOMMENDED
	)	ORDER; EXHIBITS A-C
LINDA C. TSEU, as Executive	)	
Director of the Hawaii Civil	)	
Rights Commission; JANE DOE,	)	
Complainant,	)	
	)	
Respondents.	)	
_____	)	

HEARINGS EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

On March 12, 1992 Complainant Jane Doe filed a complaint with this Commission alleging that Petitioners created an offensive work environment and terminated her because of her husband's arrest and court record. She claims that such actions constitute unlawful discrimination based on her marital status and her association with a person who has an arrest and court record.

On September 16, 1993 Petitioners filed a Petition For Declaratory Relief contending that H.R.S. § 378 does not protect individuals who associate with members of a protected class, particularly individuals who associate with persons who have arrest and court records. Accordingly, Petitioners ask the Commission to dismiss this claim.

On October 15, 1993 the Executive Director filed a Memorandum In Opposition To Petition For Declaratory Ruling arguing that discrimination because of association with any protected class, including association with a person who has an arrest and court record, is prohibited under H.R.S. Chapters 368 and 378.

Oral arguments on the petition were held on December 6, 1993. The parties filed supplemental memoranda on December 20, 1993.

Having reviewed and considered the petition, memoranda filed and the arguments presented, this Hearings Examiner hereby renders the following findings of fact, conclusions of law and recommended order.

## II. FINDINGS OF FACT

For the limited purposes of this petition, the relevant findings of fact are as follows:

1. Complainant was employed by Petitioners as a school business manager. She does not have an arrest or court record.

2. Complainant's husband was also employed by Petitioners. During the course of their employment, Complainant's husband was arrested and subsequently pleaded guilty to a criminal charge.

3. Some time after her husband's arrest and guilty plea, Complainant was terminated by Petitioners.

4. On March 12, 1992 Complainant filed a complaint with this Commission alleging that Petitioners created an offensive work environment and terminated her because of her marriage to and association with a person who has an arrest and court record. The

investigation of this case is pending and no determination of reasonable cause has been made.

### III. CONCLUSIONS OF LAW

H.R.S. § 378-2(1)(A) (L. 1991) states:

It shall be an unlawful discriminatory practice:

(1) Because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record:

(A) For any 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...

Petitioners argue § 378-2 only protects individuals who suffer discrimination because of those individuals' own race, sex, sexual orientation, etc. They contend that unlike the Fair Housing Act Amendments of 1988 (FHA)<sup>1</sup> and the Americans With Disabilities Act (ADA)<sup>2</sup>, which expressly prohibit discrimination against individuals

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<sup>1</sup> 42 U.S.C. §§ 3604(f)(1)(C), (f)(2)(C) state:  
... it shall be unlawful-

...  
(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of-

...  
(C) any person associated with that buyer or renter.

(f)(2) To discriminate against any person in the terms, condition, privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with such dwelling, because of a handicap of-

...  
(C) any person associated with that person.

<sup>2</sup> 42 U.S.C. § 12112(b)(4) states in relevant part:  
... the term "discriminate" includes

...  
(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is know to have a relationship or association . . .

who associate with persons with disabilities,<sup>3</sup> H.R.S. § 378-2 does not contain specific provisions which protect individuals who associate with members of a protected class.

The Executive Director argues that the plain language of H.R.S. § 378-2 can be read to include individuals who associate with members of any protected class. She contends that unlike Title VII,<sup>4</sup> the section makes no reference to "such individual's" own race, sex, sexual orientation, etc., and therefore includes discrimination based on an associate's protected status.

A court or an agency's duty in interpreting a statute is to ascertain and give effect to the legislature's intention and to implement that intention to the fullest degree. State v. Briones, 71 Haw. 86, 92 (1989); State v. Tupuola, 68 Haw. 276 (1985). Such intention is primarily obtained from the language of the statute itself. Briones, supra; State v. Eline, 70 Haw. 597 (1989). However, when the language of a statute is susceptible to more than one interpretation, legislative history may be considered. Kam v. Noh, 70 Haw. 321, 325 (1989)

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<sup>3</sup> See also, H.R.S. § 515-16(6), infra, which contains specific language that prohibits discrimination in housing against persons who associate with members of a protected class.

<sup>4</sup> 42 U.S.C. § 2000e(2)(a)(1) states:  
It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin. (Emphasis added.)

Based on the language and legislative history of H.R.S. § 378-2, as well as federal caselaw, I conclude that § 378-2 confers standing only to those individuals who fall within one of the enumerated protected classes. This can include individuals who associate with persons of a different race, sex, sexual orientation, age, religion, color, ancestry or marital status. However, it does not include individuals who associate with persons who have an arrest or court record.

A. Language and Legislative History of § 378-2

The original language and legislative history of § 378-2 show that the legislature intended to limit protection to persons who fall within one of the enumerated protected bases.

Chapter 378 was enacted in 1963. The original § 378-2 states in relevant part:

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;
- (b) For an employer to discriminate against any individual in compensation or in the terms, conditions or privileges of employment because of race, sex, age, religion, color or ancestry . . .

Act 180, L. 1963 (emphasis added). By specifically referring to an individual's ("his") race, sex, age, religion, color or ancestry, the legislature intended to protect only those persons who fell within one of the listed classes. This intent is confirmed in

Senate Standing Committee Report No. 399, which states, "[t]he purpose of this bill is to make it unlawful for an employer to refuse to employ, to pay less wages than other employees, to discharge an employee because of, or to otherwise discriminate against a person by reason of his race, color, sex, national origin...." 1963 Senate Journal at 810.

In 1973, § 378-2 was amended to include arrest and court record as a protected basis. Again, the statute limited standing only to those individuals who had an arrest or court record. It stated:

It shall be unlawful employment practice or unlawful discrimination:

- (1) 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, ancestry, or arrest and court record which does not have a substantial relationship to the functions and responsibilities of the prospective or continued employment, 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;
- (2) For the employer to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment because of race, sex, age, religion, color, ancestry, or arrest and court record

. . . .

Act 54, L. 1973 (emphasis added). Again, this intent was confirmed in the accompanying House Standing Committee Report No. 376 which states, "[y]our Committee agrees that discrimination in employment because a person has been arrested or involved in court proceedings should not be permitted . . ." 1973 House Journal at 912 (emphasis added).

In 1981 § 378-2 was amended to delete the word "his" to read:

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 . . .

Act 94, L. 1981. However, the purpose of this amendment was not to expand § 378-2 to include individuals who associate with members of a protected class, but to combine what was formerly subsections (1) and (2). See, testimonies of Joshua C. Agsalud, Director, Department of Labor and Industrial Relations, on H.B. 741 dated February 26, 1981 and March 24, 1981 (certified copies attached hereto as Exhibit A). Nowhere in the legislative history or in the testimonies presented is there any mention of conferring standing to persons who associate with members of all protected classes. See also, House Standing Committee Report No. 549, 1981 House Journal at 1166; Senate Standing Committee Report No. 653, 1981 Senate Journal at 1195; Senate Standing Committee Report No. 1109, 1981 Senate Journal at 1363.<sup>5</sup>

In contrast, the legislature amended H.R.S. Chapter 515 in 1992 to specifically extend standing to persons who associate with members of all protected classes. § 515-16(6) states in relevant

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<sup>5</sup> In 1991, § 378-2 was amended to its present form. However, the purpose of such amendment was to add sexual orientation as a protected basis, and to make nonsubstantive technical changes for clarity and style. See, Act 2, L. 1991; Senate Standing Committee Report No. 506, 1991 Senate Journal at 956.

part:

It is a discriminatory practice for a person . . .

- (6) To threaten, intimidate or interfere with persons in their enjoyment of a housing accommodation because of the race, sex, color, religion, marital status, familial status, ancestry, disability, age or HIV infection of . . . associates of such person.

This section was added to conform state law to the Federal Fair Housing Amendments Act of 1988. See, Act 171, L. 1992; Conf. Comm. Rep. No. 49, 1992 Senate Journal at 752. The Federal Fair Housing Amendments Act of 1988 was enacted, in part, to expand protection to individuals who associate with persons with disabilities. See, 42 U.S.C. §§ 3604(f)(1)(C), (f)(2)(C) cited in note 1, supra; U.S. House Report (Judiciary Committee) No. 100-711 at 24, 100th Cong. 2nd Sess. 5 USCAAN 2184 (1988).

In 1992, a bill was introduced to similarly expand § 378-2 to include persons who associate with all protected classes. See, House Bill No. 2810 (L. 1992) (certified copy attached hereto as Exhibit B). This Commission itself apparently recognized that without such an amendment, all associational rights might not be protected. See, testimony of Amefil Agbayani, Chairperson, Hawaii Civil Rights Commission on H.B. 2810 dated February 18, 1992 (certified copy attached hereto as Exhibit C). House Bill No. 2810 was not passed.

Therefore, the legislature has yet to extend standing under Chapter 378 to include individuals who associate with members of all protected classes.

B. Title VII Analysis

The above reading of H.R.S. § 378-2 does not mean that all individuals who associate with members of a protected class lack protection from discrimination. Title VII does not contain language which specifically prohibits discrimination based on association. Yet, federal courts have granted standing to plaintiffs who associate with persons of a different race, sex and national origin on the basis of those plaintiffs' own race, sex and national origin because these protected characteristics were also reasons for the adverse actions taken. For instance, in Parr v. Woodmen of the World Life Insurance Co., the Eleventh Circuit held that a white man who was not hired by an insurance company because his wife was black had standing to sue under Title VII. 791 F.2d 888, 41 EPD 36,531 at 44,378 (11th Cir. 1986). The court reasoned that

Title VII prohibits racially discriminatory employment practices. The statute has been held to prohibit discrimination against white as well as black persons. (citations omitted)

Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race.

41 EPD 36,532 at 44,380.

In Reiter v. Center Consolidated School Dist. No. 26-JT, a woman whose employment contract was not renewed because she associated with the Hispanic community had standing to sue on the basis of her own race and national origin. 618 F. Supp. 1458, 1460 (C. Col. 1985). The court concluded that because plaintiff's race

and national origin were different from those of the community she associated with, they were factors affecting the conduct of the defendant. Id.

In Nicol v. Imagematrix Inc., a man who was terminated because his co-worker wife had become pregnant had standing to sue on the basis of his own sex. 773 F. Supp. 802, 57 EPD 41,067 at 68,724 (D. Vir. 1991). The court, in also discussing the Parr case states:

. . . In other words, a white employee who is discharged because his spouse is black is discriminated against on the basis of his race, even though the root animus for the discrimination an anti-black prejudice. Similarly, the root animus here may be an anti-pregnancy prejudice, but the resulting discrimination is against Mr. Nichol's gender, for only males can have pregnant spouses.

Id. However, the court specifically disallowed derivative standing based on Mr. Nichol's wife's pregnancy, stating:

Defendants contend that Mr. Nichol is asserting third party standing on the basis of his wife's pregnancy and that such derivative standing is not contemplated under Title VII. This Court agrees; third party standing is not adequate for a prima facie Title VII claim. But this argument misses the point, for Mr. Nichol is asserting standing on the basis of his own sex. Thus, in recognizing Mr. Nichol's standing, this Court has not opened the door to other derivative suits under the Pregnancy Discrimination Act.

Id., at 68,725 (emphasis added).

Similarly, under H.R.S. § 378-2, an individual who is subject to a discriminatory practice because of his or her association with a person of a different race, sex, sexual orientation, age, religion, color, ancestry or marital status has standing to file a complaint based on that individual's own race, sex, sexual orientation, age, religion, color, ancestry or marital status. The

same analysis applies to these bases since they are protected characteristics held by all persons<sup>6</sup> which can affect the conduct of an employer. Thus, a heterosexual complainant who is fired because she associates with homosexuals has standing based on her own sexual orientation; a young job applicant who is not hired because he lives with his elderly parents has standing based on his own age; a Christian who is fired because she associates with Muslims has standing based on her own religion; a married woman who is not promoted because she associates with single males has standing based on her own marital status.

However, the above legal analysis is inapplicable to individuals who associate with persons that have arrest or court records. The protected basis of having an arrest and court record is not a characteristic held by all persons. As defined in § 378-1, it does not include individuals who don't have arrest or court records. The parties agree that § 378-2 prohibits discrimination against persons who have arrest or court records and does not protect individuals with no records. Thus, individuals with no arrest or court records who associate with persons who do, are not

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<sup>6</sup> Like race, sex and national origin, the terms "sexual orientation", "age", "religion" and "marital status" encompass characteristics held by all persons. Under § 378-1, the term "sexual orientation" means having a preference for heterosexuality, homosexuality or bisexuality; the term "marital status" means the state of being married or single. The term "age" means the period of a person's lifetime and is not restricted to persons over the age of forty. Senate Standing Committee Report No. 573, 1963 Senate Journal at 867; Administrative Rules 12-46-131, 12-46-134. Administrative Rule 12-46-1 defines "religion" to include all aspects of religious observance, practice and belief. This is the same definition used in Title VII, which has been interpreted to include atheism, as well as moral and ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. See, Young v. Southwestern Savings & Loan Assn. 509 F.2d 140, 9 EPD 9995 (5th Cir. 1975); EEOC Regulations on Religion Discrimination, 29 CFR Part 1605 (1985).

covered by the general prohibitory language of § 378-2. Such individuals must be specifically protected under some other statutory provision.<sup>7</sup> Presently, H.R.S. Chapter 378 does not do this.

#### IV. RECOMMENDED ORDER

I do sympathize with Complainant Doe and any other individual who may be a victim of discrimination based on their association with a person who has an arrest and court record. I also recognize the important public policy reasons for prohibiting such discrimination under Chapter 378. Unfortunately, the legislature has yet to amend the statute to afford this protection.<sup>8</sup> Furthermore, under the Title VII analysis discussed above, Complainant can neither assert standing based on her own lack of an

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<sup>7</sup> Similarly, the protected basis of having a "disability" is not a characteristic held by all persons. § 378-1 defines "disability" to mean the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment. It does not include people who are not disabled. § 378-2 therefore does not protect persons who are not disabled. See, Ortner v. Paralyzed Veterans of America, 59 BNA 1361, 59 EPD 41,807 (Sup. Ct. D.C. 1992) (D.C. Human Rights Act does not protect non disabled person who was terminated and replaced by a disabled person).

Thus, non disabled individuals who associate with disabled persons are specifically protected by other statutory provisions. See, 42 U.S.C. § 12112 (ADA employment provisions, supra, note 2); 42 U.S.C. § 3604 (FHA provisions, supra, note 1); H.R.S. § 515-6(6) (housing discrimination, supra); see also, Code of Ala. § 24-8-4(6) (housing); Co. RS § 24-34-502.2 (housing); Conn. GS § 46a-64c(6)(A) (housing); Fla. St. Ann. § 760.23(7)(c) (housing); Ind. St. Ann. §§ 22-9-5-7(4) (employment), 22-9.5-5-5(a)(3) (housing); Mont. Code Ann. § 49-2-305(4) (housing); Okl. St. Ann. 25 § 1452(A)(15) (housing); Tenn. Code Ann. § 4-21-601(7) (housing); Code of Va. § 36-96.3(8), (9) (housing).

<sup>8</sup> As pointed out in the Executive Director's Supplemental Memorandum, Minnesota has a specific statutory provision in its Human Rights Act which protects individuals who associate with members of all protected classes. See, Minn. St. Ann. § 363.03 subd. 7(2).

arrest and court record, nor assert derivative standing based on her husband having an arrest and court record.

I therefore recommend that the Commission conclude that an individual who associates with a person of a different race, sex, sexual orientation, age, religion, color, ancestry or marital status has standing to assert a claim under H.R.S. § 378-2 on the basis of that individual's own race, sex, sexual orientation, age, religion, color, ancestry or marital status.

I also recommend that the Commission conclude that an individual who associates with a person who has an arrest and court record does not have standing to assert a claim under H.R.S. § 378-2.

I accordingly recommend that the Commission direct the Executive Director to dismiss Complainant's claim based on this theory. The dismissal of this claim, however, does not affect Complainant's standing to assert claims based on her marital status or any other theories.

Dated: Honolulu, Hawaii, January 4, 1994.

HAWAII CIVIL RIGHTS COMMISSION

  
LIVIA WANG  
Hearings Examiner

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