

2018 Hawai'i Access to Justice Conference
"Fighting for Access to Justice for All"
Friday, June 29, 2018

Workshop summary:¹

"Access to Justice for the Low-Income Employee (Workers' Rights)"

Presenters: Louis Erteschik, Executive Director, Hawaii Disability Rights Center (facilitator); Lowell Chun-Hoon, King Nakamura and Chun-Hoon; Glory Gervacio Saure, Director, Honolulu office, U.S. Equal Employment Opportunity Commission; Lindsay Kukona Pakele, Fair Housing and Workers' Rights staff attorney, Legal Aid Society of Hawai'i

Louis Erteschik spoke about the legal services that the Disability Rights Center provides, at no cost, for people with disabilities. These services include representation at Social Security Hearings – often, the process of receiving social security benefits involves applying and being denied repeatedly until a case reaches the administrative hearing level and can finally be argued. Another challenge, which exists for all Medicaid recipients in the State of Hawaii, is that receiving Medicaid creates a disincentive to work – those who choose to do so automatically lose their benefits. Currently present in some states, the Buy-In Program would allow recipients to work while under the Medicaid system, by allowing an "income disregard." Finally, Erteschik discussed the complications underlying the issue of sub-minimum wages for people with disabilities. Under Hawaii and Federal Statute, employers can legally pay disabled employees sub-minimum wages, with the justification that they are legitimately less productive than their non-disabled counterparts. A Hawaii State bill was introduced to disallow this practice last year, but the reality of it is complicated; if employers are not allowed to hire for lower wages, they simply will not hire disabled people, and many will then be unable to find any employment. The real problem with sub-minimum wages lies not in their legality, but in their potential to be abused by employers who will fudge productivity levels in order to justify paying employees less.

Many of the problems faced by low-income workers cannot be solved by lawyers alone, but instead require a broader social, community movement. This is according to Lowell Chun-Hoon, who spoke about the potential for legal decisions to have lasting effects on the greater worker community. Of recent note is the case of Janus v. AFSCME, in which the Supreme Court ruled that non-members of public sector unions cannot be compelled to pay agency fees for collective bargaining services without violating the First Amendment. This ruling comes as a major threat to low-income workers because distribution of wealth is directly correlated to the percentage of unionized workplace. In particular, women of color who are unionized earn on average 15% more than their non-unionized counterparts. The role of labor attorneys is to redistribute this

opportunity. In response to Janus, public sector unions in Hawaii should be prepared to develop other ways to survive and thrive. One idea being considered is the introduction of a tax credit for union dues, to incentivize members.

Chun-Hoon turned to the other hotly contested topic of family separation, the effects of which are known by pediatricians to include learning disorders, post-traumatic stress, and lasting impairment. This issue highlights the need for information-sharing across fields and professions in order to enhance the impact of our work. One group that exemplifies this information-sharing is the Pacific Survivor Center, which engages doctors, lawyers, non-profits, law enforcement, and public health professionals, among others, to combat human trafficking. Chun-Hoon noted that a step in the right direction would be making the Hawaii Worker's Compensation statute applicable to trafficking survivors, thereby entitling them to compensation through the Special Compensation Fund when their "employers" cannot provide it.

In closing, Chun-Hoon introduced the philosophy of Personalism, a way of thinking that sees all people as "open wholes" who find fulfillment in the bond and connection with other people. Accordingly, life's essential questions are not "What" Questions ("What do I do?") but "Who" Questions, such as "Who do I serve?" and "Who do I love?"

Glory Gervacio Saure spoke about the work of the Equal Employment Opportunity Commission ("EEOC"). The EEOC is a bipartisan commission made up of five senate-confirmed Commissioners that enforces the federal laws that prohibit discrimination in the workplace. Under federal law, it is illegal to discriminate against an employee (or job applicant) on the basis of race, color, religion, sex, national origin, age, disability, or genetic information. These anti-discrimination laws apply to most employers and labor unions with 15 or more employees. The EEOC's 2017-2021 Strategic Enforcement Plan is centered on eliminating barriers to recruitment, protecting vulnerable workers, combatting employment discrimination, preventing harassment, and enforcing equal pay laws. The EEOC will investigate a diverse range of claims. Of recent note was the lawsuit filed against the farm labor contractor Global Horizons and five other Hawaii farms, on behalf of the over 500 Thai workers trafficked into the country, in which the farms were ordered to pay \$23.6 million in damages.

The EEOC also confronts emerging discrimination issues, such as those involving pregnancy-related disabilities, LGBT individuals, varying working relationships (ie. temporary workers or independent contractors), and changing racial and religious stereotypes. The EEOC recognizes the need to constantly evolve in its focus and commitments, in response to changes in our political and social landscapes. In 2016, a bipartisan task force released a study on harassment in the workplace, as it continues to be one of the most commonly raised complaints. Acknowledging the importance of prevention, a new

Respectful Workplace Training was introduced in October 2017, focusing on respectful supervisor conduct and bystander intervention.

Lindsay Kukona Pakele, from the Legal Aid Society of Hawai'i, spoke about the Hanahana Justice Project, which endeavors to empower low-wage workers in three ways: 1) through Outreach and Education, 2) with Advocacy and Referrals, and 3) by providing Representation. Common methods that employers will use to exploit their employees include stealing tips, not paying overtime, issuing pay checks that bounce, and paying less than the minimum wage. We see this throughout a variety of industries – food service, hotels, domestic help, and farming among them. Through the Hanahana Justice Project, workers are informed of their rights as employees, and given referrals to receive services. In some cases, Legal Aid may provide representation at the administrative level for victims of wage theft. When asked about common signs that wage theft may be occurring, Kukona Pakele answered that being paid in block payments, having ambiguous start and end times, or faulty record keeping are just a few of them. Wage theft disproportionately affects the most vulnerable and reflects the overall poverty within a community. Moreover, some victims of wage theft also face other legal issues such as labor trafficking and employment discrimination.

¹ A draft was prepared by Ming Tanigawa-Lau, Windward Oahu AmeriCorps Advocate, and edited by the presenters.