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Chamber of Commerce Hawaii  
22<sup>nd</sup> Annual  
2015 Hawaii  
Employment Law Seminar

August 5, 2015

Opening Session  
8:15 – 9:15 am

Jeffrey S. Harris  
John S. Mackey  
Christine K. Belcaid

**Avoiding Costly Discrimination Claims**

Summary Judgment after *Adams v. CDM Media*, 2015 Haw. LEXIS 47 (Feb. 24, 2015)

1. Preserve *admissible* evidence that discrimination did not cause the adverse action:
  - a. *Adams*, 2015 Haw. LEXIS 47 \*30 (“The employer’s explanation must be in the form of admissible evidence and must clearly set forth reasons that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the challenged employment action.”);
  - b. *Adams* (\*81-82) (“Thus, based on established hiring procedures and the fact that Adams only met with Bera, Willis’ two statements indicating “as far as I understood” and the statement “I was advised” are clearly not based on Willis’ personal knowledge. Further, it would appear that Bera had significant input in the decision not to hire Adams, if he did not make the decision outright.”)
  - c. *Adams* (\*73 fn. 31) (“To clarify, an in-court statement based on personal knowledge of test results is not hearsay. In contrast, if a statement in a declaration relies upon information provided by another person, as in this case, it is not based

on personal knowledge and is inadmissible as hearsay, barring an exception to the hearsay rule.”)

- d. Admissible business records: “(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with rule 902(11) or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.” HRE Rule. 803(b)(6).
2. Ensure your admissible evidence shows a legitimate nondiscriminatory reason that relates to the ability of the individual to perform the work in question and is applied equally to all applicants:
    - a. *Adams* (\*39) (“Thus, a ‘legitimate, nondiscriminatory reason’ not to hire a person, in view of the purposes and statutory provisions of HRS Chapter 378, must be a reason related to the “ability of the individual to perform the work in question.”)
    - b. *Adams* (\*38) (“An employer may refuse to hire an individual for justifiable and reasonable cause. In this connection, the employer may, depending on the job, consider the training, experience, intelligence, personality and appearance of the applicant where any or all of these factors are applied equally to all applicants and are determinative in the selection of the best qualified.”) (per SCR)
    - c. *Adams* (\*58) (“Therefore, the Declaration’s articulated criterion of ‘sales experience in the prior five years’ did not satisfy CDM’s burden to produce a legitimate, nondiscriminatory.”)
  3. Make decisions based on required rather than preferred qualifications
    - a. *Adams*(\*33) (“If sales experience was a ‘preference’ and not a minimum qualification, then Adams could have had no sales experience and she still would have been qualified for the job”)
    - b. *Adams* (\*59) (“CDM’s posted solicitation for the position stated ‘Sales experience preferred,’ but the solicitation did not indicate that sales experience in the last five years was required in order to be qualified for the position.”)
    - c. *Adams* (\*74) (“Unpublicized or undisclosed criteria are not likely to be established occupational qualifications, nor can it be assumed that they are applied equally to all persons.”)
  4. Ensure your reason is not undermined by other facts or statements
    - d. *Adams* (\*34) (“The offer of extensive training underscores the fact that no sales experience was required.”)
    - e. *Adams* (\*59) (“The justification in the Declaration is also contradicted by the employee-training program highlighted in CDM’s posted solicitation.”)

5. Disclose required qualifications beforehand
  - a. *Adams* (\*74-75): (“undisclosed criteria measuring a person's ability to perform the work in question are less likely to form the basis of legitimate and nondiscriminatory reasons for adverse employment actions. . . . Here, "sales experience in the prior five years" was not publicized or disclosed as a hiring criterion in any materials in the record other than in Willis' Declaration.”)
6. Be prepared to prove that you did not treat employees with similar performance inabilities differently, before or later during the same year
  - a. *Adams* (\*30 fn. 9) (“*Shoppe* does not require the claimant to provide proof of the qualifications of the applicants that the employer continued to seek for the position”)
  - b. *Adams* (\*32) (“In regard to the fourth element, the position continued to exist after she received a rejection letter on March 1, 2009, because later that year CDM hired seven persons as International Media Sales Executives.”)