STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of SHELDON KELIINOI, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	)	CASE NO. OSH 2003-8 ERRATA FOR DECISION NO. 12
In the Matter of SAMUEL KELIINOI, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	)	CASE NO. OSH 2003-9
In the Matter of GENO AKUI, Complainant, vs. SI-NOR, INC.,	)	CASE NO. OSH 2003-10

Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	
In the Matter of LEIGH WESTBROOK, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2003-11
In the Matter of RUSSELL SANBORN, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2003-12
In the Matter of PERRY SUA,	CASE NO. OSH 2003-13

Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	)
In the Matter of CLIFFORD BIRGADO, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2003-14

ERRATA FOR DECISION NO. 12

The Hawaii Labor Relations Board inadvertently omitted Case Nos.: OSH 2003-9, Samuel Keliinoi v. Si-Nor, Inc. and Director, Department of Labor and Industrial Relations and OSH 2003-14, Clifford Birgado v. Si-Nor, Inc. and Director, Department of Labor and Industrial Relations from the caption for Decision No. 12, Final Decision Adopting Proposed Findings of Fact, Conclusions of Law, and Order, issued on March 22, 2006 in these consolidated cases.

DATED: Honolulu, Hawaii, April 7, 2006.

HAWAII LABOR RELATIONS BOARD

/s/
BRIAN K. NAKAMURA, Chair

/s/
EMORY J. SPRINGER, Member

/s/
KATHLEEN RACUYA-MARKRICH, Member

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Clifford Birgado

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of SHELDON KELIINOI, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	)	CASE NO. OSH 2003-8 DECISION NO. 12 FINAL DECISION ADOPTING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
In the Matter of GENO AKUI, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	)	CASE NO. OSH 2003-10
In the Matter of LEIGH WESTBROOK, Complainant, vs. SI-NOR, INC.,	)	CASE NO. OSH 2003-11

Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	
In the Matter of RUSSELL SANBORN, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2003-12
In the Matter of PERRY SUA, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2003-13

FINAL DECISION ADOPTING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 23, 2006, the Hawaii Labor Relations Board (Board) issued its Proposed Findings of Fact, Conclusions of Law and Order (Proposed Decision) in this case reversing Appellee DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS's (DIRECTOR) findings of discrimination in violation of Hawaii Revised Statutes (HRS) § 396-8(e) and Citation against Respondent SI-NOR, INC., and vacating the back pay and penalty awarded.

As Member Emory J. Springer had not heard the testimony in this case and participated in the Proposed Decision after reviewing the entire record, pursuant to HRS § 91-11, the Board afforded the parties adversely affected by the Proposed Decision ten days from the service of the certified copy of the Board's Proposed Decision to file exceptions thereto.

On March 6, 2006, the DIRECTOR, and by through his counsel, filed Appellee, Director, Department of Labor and Industrial Relations' Exception to the Hawaii Labor Relations Board's Proposed Findings of Fact, Conclusions of law, and Order.

On March 8, 2006, the Board notified the parties of an exceptions hearing to be conducted on March 20, 2006, at 9:30 a.m. in the Board's hearing room.

Thereafter, on March 16, 2006, SI-NOR, INC. filed Respondent's Memorandum in Opposition to Appellee, Director, Department of Labor and Industrial Relations' Exception to the Hawaii Labor Relations Board's Proposed Findings of Fact, Conclusions of Law and Order.

On March 20, 2006, the Board conducted a hearing on the DIRECTOR's exceptions where counsel for the DIRECTOR and SINOR, INC., appeared. The Complainants adversely affected by the Board's Proposed Findings of Fact and Conclusions and Order did not file exceptions, nor attend the exceptions hearing on March 20, 2006.

Based upon careful consideration of the DIRECTOR's arguments and exceptions, and the SINOR, INC's opposition thereto,

IT IS HEREBY ORDERED THAT the Board's Proposed Findings of Fact, Conclusions of Law and Order shall be adopted as the Final Decision and Order.

SHELDON KELIINOI v. SI-NOR, INC., et al.
CASE NO. OSH 2003-8
SAMUEL KELIINOI v. SI-NOR, INC., et al.
CASE NO. OSH 2003-9
GENO AKUI v. SI-NOR, INC., et al.
CASE NO. OSH 2003-10
LEIGH WESTBROOK v. SI-NOR, INC., et al.
CASE NO. OSH 2003-11
RUSSELL SANBORN v. SI-NOR, INC., et al.
CASE NO. OSH 2003-12
PERRY SUA v. SI-NOR, INC., et al.
CASE NO. OSH 2003-13
CLIFFORD BIRGADO v. SI-NOR, INC., et al.
CASE NO. OSH 2003-14
DECISION NO. 12
FINAL DECISION ADOPTING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATED: Honolulu, Hawaii, March 22, 2006.

HAWAII LABOR RELATIONS BOARD

/s/
BRIAN K. NAKAMURA, Chair

/s/
EMORY J. SPRINGER, Member

/s/
KATHLEEN RACUYA-MARKRICH, Member

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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of SHELDON KELIINOI, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	)	CASE NO. OSH 2003-8 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
In the Matter of SAMUEL KELIINOI, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	)	CASE NO. OSH 2003-9
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Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	
In the Matter of CLIFFORD BIRGADO, Complainant, vs. SI-NOR, INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2003-14

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board) pursuant to a written notice of contest filed July 16, 2003 by Respondent SI-NOR, INC. (Respondent or SI-NOR). SI-NOR contests seven decisions issued by Appellee DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (DIRECTOR), via the Hawaii Division of Occupational Safety and Health (HIOSH), finding Respondent terminated the above-named Complainants for participating in safety and health activity protected under Hawaii Revised Statutes (HRS) Chapter 396, in violation of HRS § 396-8(e).

On September 5, 2003, after conducting two initial conferences on August 5, 2003 and September 2, 2003,[1] the Board issued Order No. 65 consolidating the above-captioned cases for the purposes of hearing and disposition as provided under Hawaii Administrative Rules (HAR) § 12-42-8(g)(13). The Pretrial Order identified the following issues for hearing as follows:

1. Whether Respondent SI-NOR, INC. violated HRS §§ 396-8(e)(1) and (3) by discriminating against the named Complainants for engaging in protected activity?

2. If so, whether the penalties imposed including reinstatement, payment of back wages, clearance of personnel records, and payment of a $1,000 fine as imposed by the Hawaii Occupational Safety and Health Division, Department of Labor and Industrial Relations were appropriate?

After the requisite time for discovery ended on December 12, 2003, the evidentiary hearing began on January 12, 2004 and continued for eight consecutive business days until January 22, 2004. On January 22, 2004, the Board stayed the hearing for 30 days to give Respondent's counsel an opportunity to confer with his client and the Office of Disciplinary Counsel about the appropriateness of testifying as a witness.[2] Pursuant to a status conference on March 1, 2004, the Board orally ruled that Respondent's counsel could testify as a witness and continue to represent SI-NOR. On March 23, 2004, the DIRECTOR filed its Motion for Reconsideration of Oral Order Allowing Respondent SI-NOR, INC.'s Attorney, Preston A. Gima, to Testify as a Witness. On March 24, 2004, SI-NOR opposed said motion for reconsideration. Throughout the proceedings, the Complainants, pro se, except Complainant CLIFFORD BIRGADO (BIRGADO), appeared and participated only as witnesses and waived their right to appear for purposes of examining witnesses and objecting to evidence. Deputy Attorney General J. Gerard Lam represented the DIRECTOR, and Preston A. Gima (Gima), Esq., represented Respondent.

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[1]The second initial conference was held to allow Complainant SAMUEL KELIINOI, proceeding pro se, to participate by telephone conference. Although notices were sent to Complainant CLIFFORD BIRGADO, pro se, he neither appeared nor participated in any proceedings before the Board in this matter.

[2]See Transcript of Proceedings (Tr.), Vol. 1, dated January 12, 2004; Vol. 2, dated January 13, 2004; Vol. 3, dated January 14, 2004; Vol. 4, dated January 15, 2004; Vol. 5, dated January 20, 2004; Vol. 6, dated January 21, 2004; and Vol. 7, dated January 22, 2004.

The evidentiary hearings continued on April 5, 6, and 7, 2004, June 14, 15, 16, 17, 2004, July 1, 2004, and concluded on August 31, 2004.[3] Thereafter, the Director and SI-NOR, filed post hearing memoranda on October 27, 2004.[4]

On September 16, 2005, the Board conducted a status conference with respective counsel for the DIRECTOR and Respondent to provide them with an opportunity to provide citations only to the transcript of proceedings and record in the consolidated cases in their closing memoranda, rather than rely on the record in Case No. OSH 2003-3 which was dismissed by the circuit court for lack of jurisdiction in Civil No. 04-1847-10 on April 20, 2005. Both counsel declined to supplement their closing memoranda with citations to the record. Both counsel also objected to the submission of proposed findings of fact and conclusions of law for the benefit of Board Member Emory J. Springer (Springer), who began his appointment on July 1, 2005 and consequently did not hear the testimony presented at the hearing. Nevertheless, Board Member Springer took part in rendering this proposed decision after personally considering the whole record of the instant consolidated cases, including the transcript of proceedings and exhibits, in accordance with HRS § 91-11. For purposes of this proposed decision, Board Member Springer also read, reviewed and considered the record and proceedings in Case Nos. OSH 2003-4, Charles K. Ke-a v. Si-Nor, Inc., et al., OSH 2003-17, Director, Department of Labor and Industrial Relations v. Si-Nor, Inc., and OSH 2003-18, Rene Ann Mateo v. Si-Nor, Inc., as part of the record in these consolidated cases.

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[3]See Tr. Vol. 8, dated April 5, 2004; Tr. Vol. 9, dated April 6, 2004; Tr. Vol. 10, dated April 7, 2004; Tr. Vol. 11, dated June 14, 2004; Tr. Vol. 12, dated June 15, 2004; Tr. Vol. 13, dated June 16, 2004; Tr. Vol. 14, dated June 17, 2004; Tr. Vol 15, dated July 1, 2004; and Tr. Vol. 16, dated August 31, 2004.

[4]At the commencement of the evidentiary hearing the Board took administrative notice of the proceedings in Case No. OSH 2003-3, Director, Department of Labor and Industrial Relations, State of Hawaii v. Si-Nor, Inc., and a discrimination complaint in Case No. 2003-4 Charles K. Ke-a v. Si-Nor, Inc. and the Director, Department of Labor and Industrial Relations, State of Hawaii.

The Board, however, also takes administrative notice of the appellate court review of the Board's decisions rendered in both cases. On April 20, 2005, the First Circuit Court with appellate jurisdiction over the Board's Decision No. 8, Findings of Fact, Conclusions of Law, and Order in Case No. OSH 2003-3 entered a Final Judgment and Order Dismissing Appellant Si-Nor, Inc.'s Appeal filed October 11, 2004 and Complainant-Appellant Director of Labor and Industrial Relations' Appeal filed October 11, 2004 for Lack of Jurisdiction and Entering Judgment for the Director in Both Appeals in Civil No. 04-1-1844.

On August 16, 2005, the First Circuit Court entered Final Judgment reversing Decision No. 9, Findings of Fact Conclusions of Law and Order in Case No. OSH 2003-4 in Civil No. 04-1-2194. Both cases are on appeal to the Hawaii Supreme Court.

Having reviewed the whole record and provided all parties a full and fair opportunity to be heard, the Board makes the following proposed findings of fact by a preponderance of the evidence, conclusions of law and order.

PROPOSED FINDINGS OF FACT

1. For all times relevant, SI-NOR was a mainland-based refuse and recycling business incorporated in California, with federal contracts to collect refuse on several military bases on Oahu since June of 1999, and an employer within the meaning of HRS § 396-3. Its administrative offices are located at 1345 Fitzgerald Avenue, Suite F, Rialto, California. Its baseyard is a large fenced-in lot located at 91-559 Nukuawa St., Lot 16, in Kapolei, Hawaii.

2. For all times relevant, Anthony Uwakwe (Uwakwe) was the Vice President of Operations in charge of SI-NOR's Hawaii operations and worked out of SI-NOR's California office.

3. For all times relevant, SHELDON "Kapena" KELIINOI (SHELDON KELIINOI), his older brother SAMUEL "Kala" KELIINOI (SAMUEL KELIINOI), and BIRGADO, were employed by SI-NOR as refuse drivers; GENO AKUI (AKUI) was initially employed as a driver's helper and later became a quality control manager for the Hickam refuse crew. For all relevent times, LEIGH "Kaleo" WESTBROOK (WESTBROOK), RUSSELL "Ikaika" SANBORN (SANBORN), and PERRY SUA (SUA) were employed as driver's helpers.

4. In September of 2002, SI-NOR hired Lionel Deguzman (Deguzman), a mechanic, as a quality control manager with supervisory responsibility to oversee the refuse collection services for a majority of the military bases, except Hickam.

5. On September 30, 2002, there was an altercation between Deguzman and refuse truck driver Charles Ke-a (Ke-a). Ke-a claimed Deguzman punched him in the face several times. Deguzman initially denied hitting Ke-a. Ke-a and Deguzman both filed police reports and reported the incident to Uwakwe. On October 4, 2002, after returning to work and seeing Deguzman at the worksite, Ke-a filed a workplace violence (WV) safety complaint with HIOSH. Thereafter, Uwakwe directed Deguzman to terminate Ke-a. On October 11, 2002, Deguzman terminated Ke-a for not reporting to work.

6. The above-named Complainants resented Deguzman after he terminated Ke-a. In addition, the Complainants were hostile and angry at Deguzman because

Uwakwe failed to discipline or terminate him after the fight with Ke-a and Deguzman disciplined the workers for various infractions. WESTBROOK described Deguzman as being on a "power trip."[5]

7. SI-NOR hired Private Investigator Mauro Edwards (Edwards) to investigate inter alia, allegations of missing equipment and overtime abuse. On December 12, 2002, Edwards interviewed Deguzman who acknowledged hitting Ke-a in the September 30, 2002 incident and signed a written statement with the admission. On December 14, 2002, SI-NOR's counsel Gima recommended that SI-NOR terminate Deguzman. Uwakwe did not decide to fire Deguzman for hitting Ke-a and lying about it until December 19, 2002.

8. On December 19, 2002, Deguzman saw Hickam Project Manager Chad Pasoquen (Pasoquen) and his crew, including Complainants SAMUEL KELIINOI, SUA, AKUI and SANBORN and six other employees, drinking beer at the baseyard around 2:30 p.m. while working overtime painting trash cans. Consequently, Deguzman reported the drinking to SI-NOR on the company's Disciplinary Action Form.[6]

9. In the early morning hours between 6:00 a.m. and 6:30 a.m. on December 20, 2002, the crews were gathered in SI-NOR's baseyard before driving out to collect refuse at their assigned military bases. The above-named Complainants were involved in a WV incident which resulted in serious physical and mental injuries to Deguzman, as well as physical injuries to Paul Espinda (Espinda) and Alan Paahana (Paahana).[7]

10. On December 20, 2002, two employees, Ronald Benarao and Pasoquen reported to Uwakwe, that there was a fight in the yard and Deguzman was attacking the employees but was knocked out onto the ground. Office manager Rene Mateo (Mateo) also reported that the workers had beaten Deguzman and someone hit him with a pipe. Uwakwe was unable to talk to Deguzman immediately after the fight. Two days later, Uwakwe asked SI-NOR's investigator Edwards to investigate to "find out what actually happened in the premises, and who was really the aggressor and who started the fight."[8]

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[5]Director's Ex. B-30, WESTBROOK stated in a Police Report that his supervisor Deguzman was on a "power trip" over the employees and that this was going on too long."

[6]Director's Ex. B-21.

[7]Si-Nor Ex. R, Dr. Doris C. Bullen, M.D.'s diagnosis was Post Traumatic Stress Disorder triggered by the severe beating.

[8]Tr. Vol. 5, pp. 30-33.

11. On December 20, 2002, WESTBROOK filed a police report claiming that Deguzman hit him with a pipe causing a "bump" on his head for which he refused medical treatment. According to the police report, "Westbrook stated that his supervisor 'Deguzman' has a power trip over the employees and that this was going on to (sic) long." Espinda also filed a police report claiming that Paahana hit him in the back of the head and that Deguzman punched him in the jaw. Espinda identified an 18" black metal pipe which was turned over to the police by SAMUEL KELIINOI. SHELDON and SAMUEL KELIINOI also provided witness statements in Espinda's police report claiming Espinda was assaulted by Deguzman.[9]

12. On December 24, 2002, Complainant WESTBROOK called HIOSH reporting a safety complaint citing the December 20, 2002 WV incident and claiming that Deguzman assaulted Espinda and hit him (WESTBROOK) with a pipe. WESTBROOK claimed he was afraid for his life and that SI-NOR did not have a WV program in place. This complaint prompted a safety inspection on December 26, 2002 by HIOSH compliance officer Mel Han (Han).[10]

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[9]Director's Ex. B-29, B-30.

[10]The Board takes administrative notice of Case No. OSH 2003-17, Director, Department of Labor and Industrial Relations v. Si-Nor, Inc., where the Board affirmed a wilful citation against SI-NOR in Decision No. 11, dated February 16, 2006 and the Director's Ex. B-33, admitted in that case, which includes WESTBROOK's account of the workplace violence incident as follows:

> On Dec. 20, 2002 I noticed 2 co workers (Paulie, Allen) jumping around ready to fight with each other. We ran to the fight to stop the fight and the Boss (Lionel) turned around and told us to let them go. I jumped in the middle and stopped the two men fighting. Immediately, Lionel got upset and we both exchanged words, then I saw Lionel take a swing (punch) at Paulie. I started exchanging words with him (Lionel) and he walked up to Paulie again and punched Paulie (sic) in the jaw. I jumped around and got into Lionels (sic) face and told him "if you get a problem deal w/me." He turned around and ran into his truck I chased him and he pulled out a piece of metal (a pipe) and strucked me over the head w/it the pipe broke and someone grabbed the pipe and took it away. Lionel held the other piece of the pipe in his hand and ran straight towards me. I threw a punch and caught him near his eye, he dropped to the ground and I let him go because he had enough. I walked away and the police arrived and I filled out a police report. I am afraid of my life and we don't (sic) have a work place violence program."
>
> See also, Tr. Vol. 6, Testimony of Melvin T. S. Han, pp. 175-80.

13. On December 26, 2002, HIOSH inspector Han began his inspection with an opening conference with Pasoquen and AKUI, as Respondent's management representatives. SHELDON and SAMUEL KELIINOI, WESTBROOK, SANBORN, SUA and BIRGADO were among the more than 15 SI-NOR employees interviewed by Han during his inspection regarding the WV violence incident that occurred on December 20, 2002.[11]

14. On December 29, 2002, based on a preliminary report from Edwards and having reviewed photographs of Deguzman's multiple injuries, Uwakwe determined that Deguzman was not the aggressor in the incident but was trying to fend off blows from several people. In addition, Uwakwe determined that Deguzman's injuries were not inflicted by one person from one punch. Uwakwe also relied on a list of employees allegedly responsible for the assault on Deguzman compiled by Edwards which was confirmed by Deguzman.[12]

15. On December 30, 2002, SI-NOR, through its private investigator Edwards. terminated SHELDON KELIINOI, SAMUEL KELIINOI, AKUI and WESTBROOK for their direct participation in the assault on Deguzman on December 20, 2002. Based on information received from Edwards and confirmed by Deguzman, Uwakwe decided to terminate these Complainants because he believed they were responsible for the assault on Deguzman.[13]

16. Also, on December 30, 2002, Edwards also discharged several other employees, including Ruel Arzaga and Myles Lyman for workplace infractions, including drinking on the job and participating in the December 20, 2002 WV incident. Pasoquen was demoted from project manager to refuse truck driver. Respondent did not discharge Espinda, Deguzman, Paahana and Davalos for their participation in the WP violence incident.

17. On December 31, 2002, SHELDON and SAMUEL KELIINOI, AKUI, and WESTBROOK, respectively, filed discrimination complaints with HIOSH alleging that their employer SI-NOR discharged them on December 30, 2002 for engaging in protected activity in violation of HRS § 396-8(e).[14]

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[11]Tr. Vol. 6, pp. 175-180.

[12]Tr. Vol. 5, pp. 41-43.

[13]Id.

[14]See Director's Exhibit (Ex.) B-1.

18. After learning that SHELDON and SAMUEL KELIINOI, AKUI, and WESTBROOK had been discharged, SANBORN, SUA, and BIRGADO, Complainants in Case Nos. OSH 2003-12, OSH 2003-13, and OSH 2003-14, respectively, quit. On December 31, 2002, they also filed discrimination complaints with HIOSH alleging that Respondent discriminated against them for engaging in protected activity in violation of HRS § 396-8(e).[15]

19. At the time of the filing of the instant discrimination complaints, HIOSH had investigated and cited SI-NOR for safety violations on November 15, 2002 pursuant to Ke-a's WV safety complaint and again, on December 24, 2002 on Ke-a's discrimination claim.[16] HIOSH credited Complainants' version of the assault on Espinda by Paahana and Deguzman, which then led WESTBROOK to chase and knock out Deguzman with one punch.

20. On February 28, 2003, HIOSH cited SI-NOR for violating HRS § 396-8(e) in the instant discrimination cases. Based on its investigation, HIOSH concluded that Respondent fired Complainants SHELDON and SAMUEL KELIINOI, AKUI and WESTBROOK in reprisal for their "participation in the workplace violence investigation conducted by OSHCO Mel Han on December 26, 2002[.]" HIOSH also identified other protected activity as including complaining to their supervisor Pasoquen about fearing for their personal safety because of the first WV incident between Ke-a and Deguzman and making statements to HIOSH and the police after the December 20, 2002 fight. HIOSH also concluded that SI-NOR had knowledge of the unsafe work environment; that SI-NOR "exhibited animosity when its attorney (Preston Gima) received a certified Findings of Discrimination Investigation" [in the Ke-a complaint] . . . on 12/30/2002;" that SI-NOR "w[as] not able to articulate any legitimate, non-discriminatory reason for the adverse employment action;" and that SI-NOR's reason for the termination, i.e., drinking on the job and

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[15]Id.

[16]The Board takes administrative notice of Case No. OSH 2003-4, Si-Nor, Inc., and Charles K. Ke-a and the Director of the Department of Labor and Industrial Relations, Findings of Fact, Conclusions of Law, and Order dated October 26, 2004, in Decision No. 9, vacating, the Director's Finding of Discrimination, which on appeal was reversed by the First Circuit Court, finding SI-NOR's reasons for terminating Ke-a were a pretext for discrimination. The Circuit Court found direct evidence of pretext in Uwakwe's directive to Deguzman to terminate Ke-a because he was causing problems with HIOSH. See, Civil No. 04-1-2194, Order Reversing the Hawaii Labor Relations Board's Decision No. 9, Findings of Fact, Conclusions of Law, and Order dated October 26, 2004, and Affirming Appellant Director, Department of Labor and Industrial Relations' Finding of Discrimination, Back Pay Award to Appellee Charles K. Ke'a, and Penalty against Appellee Si-Nor, Inc., filed on August 16, 2005. On November 11, 2005, SI-NOR appealed the First Circuit Court's final judgment to the Hawaii Supreme Court in S.C. No. 27497.

being involved in the December 20, 2002 WV incident was a pretext to justify the terminations.[17]

21. Also, on February 28, 2003, HIOSH cited Respondent SI-NOR for violating HRS § 396-8(e) relating to the complaints filed by SANBORN, SUA and BIRGADO. Regarding their decision to quit work, HIOSH concluded that their job refusal was justified because they:

a) reasonably believed the work environment posed an imminent risk of death or serious injury;
b) in good faith refused to subject [themselves] to such a dangerous situation;
c) ought and was unable to fix the problem by notifying the employer; and
d) had reason to believe that there was not sufficient time or opportunity to either seek effective redress from his employer or for HIOSH to remedy the perceived danger.

HIOSH relied on Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), for the proposition that an employee can choose not to perform his assigned task because of a reasonable apprehension of death or serious bodily injury coupled with a reasonable belief that no less drastic alternative is available.[18]

22. HIOSH ordered SI-NOR to pay a penalty of $1,000 per violation of HRS § 396-8(e); post a Notice to Employees; and clear the personnel and other company records of any unfavorable references relating to the violation. In addition, HIOSH ordered SI-NOR to make each Complainant whole with back pay, overtime pay, and reinstatement without loss of benefits, seniority or wages by March 7, 2003, as calculated by HIOSH in the following amounts for: SHELDON KELIINOI ($8,284.77); SAMUEL KELIINOI ($8,153.82); AKUI ($6,233.87); WESTBROOK ($3,689.46); SANBORN ($5,018.38); SUA ($4,667.35); and BIRGADO ($8,312.60).[19]

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[17]See, Summary of Findings for Discrimination, Director's Exs.: B-9 at 21; B-10 at 21-22; B-11 at 21-22; B-12 at 22-24.

[18]See, Summary of Findings for Discrimination, Director's Exs.: B-13 at 6; B-14 at 6; B-15 at 5.

[19]See, Findings of Discrimination Investigation, Director's Exs.: B-2 to B-8.

23. On March 17, 2003, Respondent timely appealed the DIRECTOR's discrimination findings and orders.[20]

24. The Board received testimony about a series of fights that occurred inside and outside of SI-NOR's baseyard on December 20, 2002. There were essentially two accounts of how the assault on Deguzman occurred outside SI-NOR's baseyard gate. After reviewing the record in this case, based on the multiple physical injuries sustained by Deguzman to his eyes, face, head, and forearm, and injuries to Paahana's left eye and mouth, the Board finds their injuries are defensive in nature, and more consistent with Paahana's account that Deguzman was chased and beaten by a group of employees led by the above-named Complainants, not just WESTBROOK.

25. The Board credits Paahana's testimony over the testimony of Complainants in finding that a verbal confrontation inside the baseyard between Paahana and Espinda triggered the WV on December 20, 2002. Paahana was first hit in the mouth by Espinda hard enough to make him bleed. After WESTBROOK broke up the fight between Paahana and Espinda inside the baseyard, Espinda then rushed to his car parked outside the entrance to the baseyard and grabbed a metal baseball bat and threatened both Paahana and Deguzman. Another supervisor Pasoquen, who was Espinda's brother-in-law, took the bat away from Espinda. By then three separate groups of employees encircled Deguzman, Paahana and Deguzman's brother-in-law Hanin Davalos (Davalos), and were "trying to get closer to Lionel (Deguzman)." The Board finds that Deguzman then tried to escape the crowd of employees encircling him by running to his truck. Deguzman grabbed a pipe from his truck to defend himself and hit WESTBROOK on the head with it. Deguzman, however, was overpowered and hit by WESTBROOK, while also being hit with the pipe by SHELDON KELIINOI. In addition to being hit in the mouth by Espinda, Paahana was hit on the left eye by BIRGADO. Davalos was also chased, beaten and kicked by a number of co-workers including SAMUEL KELIINOI, who "kicked [him] in the ribs."[21]

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[20]On July 16, 2003, HIOSH sent Respondent's Notice of Contest to the Board.

[21]Tr. Vol. 10, pp. 17-19, 21-42. In describing the assault, Paahana testified, in part, as follows:

> At the gate Paul said: Okay, now I'll take the both of you on. Meaning Lionel and I, and he had the metal bat in his hand. I think Chad took the bat away from him at the time. And then it escalated on to the street, and I turned around because everybody was like circling Lionel, myself and Hanin, trying to get closer to Lionel. In

26. The Board finds Paahana's account of the assault on Deguzman as more credible and reliable than Complainants' version describing one knockout punch by WESTBROOK. Complainants' account omitted SHELDON KELIINOI's repeated hitting of Deguzman with a pipe which SAMUEL KELIINOI gave to the police. Given Paahana's account of how the series of fights occurred, the Board can reasonably infer that Deguzman was not the aggressor, but that Complainants chased and beat Deguzman, their supervisor, and were responsible for the serious physical and mental injuries that Deguzman sustained.

27. Deguzman never returned to work after December 20, 2002 because of these physical and mental injuries, which the Board finds he sustained at the hands of Complainants. In fact, Uwakwe did not intend for Deguzman to return to

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> that movement getting closer to Lionel, I just kept on noticing that mostly all the workers was just getting closer and closer. So my attention from Lionel had turned to look at who was around us, and by the time I had turned back around, everybody was chasing Lionel. People was chasing after Lionel. People was chasing after Hanin. And in all the commotion, Clifford Birgado hit me on my left eye, and I was bleeding on my left eye. Then I wiped my left eye to notice that there was blood and blurry vision from my left eye. He ran past me and hit me at the same time, stopped about 25, 30 feet down from me, pointed back to me and just said: Ha, ha, ha, good for you. So I turned and I looked for Lionel. I found Lionel by his truck. So I proceeded to go towards Lionel. Then I notice Pena [SHELDON "Kapena" KELIINOI] was hitting Lionel with a pipe. Lionel blocked it with his right elbow, and then Pena put the pipe back up to hit him again and the second hit got him on his left eye. Lionel had fallen down, and at that time him and Westbrook was fighting. So he was fighting with Westbrook and blocking Pena's – while Pena was hitting him with the pipe. After he got hit on the eye that caused him to bleed and fall on the ground, then Pena had thrown the pipe into the lot next to us. It was a vacant lot, and I heard Westbrook say: Good for you, Lionel, that's what you needed. The whole incident just stopped. Everybody stopped fighting because Lionel was bleeding, Lionel was on the ground. I helped him back up. Blood was all over the ground, the truck that he fell against as he fell down to the ground, and blood all over the ground. So by the time he had stood up and wiped up, we turned around and the ambulance was coming already. Tr. Vol. 10, pp. 28-29.

See also, Director's Ex. B-16, Hanin Davalos' written statement to HIOSH inspector Mel Han describing Paul Espinda threatening both Deguzman and Paahana with a bat.

work, but allowed him to remain on the payroll in order to secure a workers' compensation claim for his injuries.

28. SI-NOR's decision to discharge Complainants SHELDON and SAMUEL KELIINOI, AKUI, and WESTBROOK was based upon a reasonable belief that they were directly responsible for causing the serious physical and mental injuries suffered by Deguzman. This was the real reason for the above-named Complainants' terminations. Although WESTBROOK was hit on the head with a pipe by Deguzman, neither WESTBROOK nor any of the other Complainants were medically treated for any injuries on December 20, 2002. All of the Complainants continued to work until December 30, 2002. Complainants are younger, stronger, and physically better built than Deguzman and Paahana, who were clearly outnumbered. Deguzman was the only person taken to the hospital by ambulance and medically treated after he, Paahana, and Davalos were assaulted by Complainants and other employees, on December 20, 2002. On this basis, the Board finds that given the serious physical and mental injuries which Deguzman sustained, it was reasonable for SI-NOR to believe, based on Edwards' investigation, that Deguzman was not the aggressor, but rather the victim of an assault led by Complainants.

29. Respondent's reason for terminating Complainants is supported by a hearings officer in the DIRECTOR's Employment Security Appeals Referees' Office who denied unemployment benefits to AKUI and SHELDON KELIINOI because the assault on their supervisor constituted misconduct and proper grounds for termination.[22]

30. The Board finds that Complainants engaged in protected activity by participating in HIOSH's investigation which was initiated by WESTBROOK's December 24, 2002 safety complaint. In addition, WESTBROOK filed a police report on December 20, 2002.[23]

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[22]See Respondent's Ex. K and L, Decision 0300380 and 0300270, issued February 24, 2003, by Thomas Rack, Appeals Officer, Employment Security Appeals Referees' Office, Department of Labor and Industrial Relations.

[23]See Complainant's Ex. B-22, Respondent's Ex. B, C. Based on their testimony, SANBORN and SUA both denied engaging in protected activity by making complaints or statements to the police or HIOSH, and did not file a WV complaint against Respondent other than their discrimination complaint on December 31, 2002, after quitting their jobs. See, Tr. Vol. 3, pp. 189-90, 310-12. The Board received no testimony or evidence from BIRGADO establishing a prima facie case of discrimination.

31. However, there is no reliable and credible evidence upon which the Board can reasonably infer that Complainants' participation in the HIOSH investigation on WESTBROOK's safety complaint, their statements to police about the December 20, 2002 WV incident, and complaints to their supervisor (Pasoquen) about Deguzman, were substantial factors in Respondent's decision to discharge Complainants.[24]

32. SUA, SANBORN and BIRGADO quit their jobs on December 31, 2002 after meeting with Edwards at the baseyard who informed SUA and SANBORN that the employer intended to make changes in the workplace to "straighten things out." Edwards then introduced Mateo as the new interim manager to replace Deguzman. Immediately thereafter, SUA and SANBORN informed Mateo that they were quitting work.

33. SUA and SANBORN saw Deguzman at the baseyard on December 31, 2002. However, the Board is not persuaded that they were confronted with a choice between performing their work or being subjected to serious injury or death upon seeing him. There was no reasonable basis for SUA and SANBORN to assume that Deguzman was back at work since Mateo had just been introduced as the new manager. Therefore, the Board finds that SUA, SANBORN and BIRGADO's decision to walk off the job was unprotected because it was not based on a reasonable belief that continuing to work posed a danger of death or serious injury and they were left with no reasonable alternative. The reason they decided to quit work was because their friends and co-workers had been terminated the day before and were no longer at the workplace.[25]

34. The Board thus finds that SUA, SANBORN, and BIRGADO walked off the job and therefore did not suffer an adverse employment action.

DISCUSSION

The issue in the instant appeal filed by Respondent is whether Complainants were terminated in violation of HRS § 396-8(e) for having engaged in protected activity following a workplace violence incident that occurred on December 20, 2002 which they reported to their supervisor, the police and HIOSH.

The purpose of the Hawaii Occupational Safety and Health Law, Chapter 396, HRS, is to encourage employee efforts at reducing injury and disease arising out of the

[24]Tr. dated Jan. 20, 2004, Vol. 5, pp. 49-55, 138-44.

[25]Tr. Vol. 3, pp. 189-95, 303-05, Vol. 4, pp. 44-45.

workplace and to prevent retaliatory measures taken against those employees who exercise these rights.

HRS § 396-8 provides, in part:

> (e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:
>
> * * *
>
> (3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter; . . . .

The burden of proof is on the DIRECTOR and/or Complainants to establish a prima facie case of discrimination by a preponderance of evidence.[26] This Board has adopted the shifting burden of proof application in pretext cases to a Section 11(c) retaliation claim.[27]

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[26]The DIRECTOR/Complainant has the burden of proof as well as the burden of persuasion. The degree or quantum of proof is by a preponderance of evidence. HRS § 91-10(5). The preponderance of the evidence has been defined as "that quantum of evidence which is sufficient to convince the trier-of-fact that the facts asserted by a proponent are more probably true than false." Ultimate Distribution Systems, Inc., 1982 OSHD § 26.011 (1982).

[27] See also, Jim Skellington v. City and County of Honolulu, Kapolei Fire Station, OSAB 97-015 (LIRAB August 29, 2001); and Kay Miura v. Pacific Ohana Hostel, Decision 2, OSAB 2002-16 (HLRB October 4, 2002) (Miura). In Miura, supra, the Board stated that:

> The burden of proof is the Director's and/or Complainant's to establish by a preponderance of evidence a prima facie case of discrimination.
>
> "Proof of a prima facie case of retaliatory discharge requires a showing that (1) plaintiff engaged in a protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link exists between the protected activity and the adverse employment action. (Citation omitted.) Like disparate treatment

> Courts have adopted the shifting burden of proof application in pretext cases to Section 11(c) retaliation claims. The Secretary bears the initial burden of demonstrating: (1) that an employee engaged in protected activity, (2) that the employee suffered an adverse employment action, and (3) that there was a causal nexus between the protected activity and the adverse action. Causation may be inferred from circumstantial evidence. The burden then shifts to the employer to proffer a permissive, nondiscriminatory reason for the employment action. Finally, the Secretary must demonstrate that the employer's reason is merely a pretext for discrimination.

Rabinowitz, Occupational Safety and Health Law, 1999 Cumulative Supplement, 400 (BNA Books 1999) (footnotes omitted.)

Protected Activity

This Board has held that under HRS § 396-8(e) "'[e]mployees are protected when they complain to their employers about safety or health conditions. To be protected, such employee complaints must be made in good faith; but employees are protected even if their concerns prove to be unwarranted." See Vernon Yamada, OSH 2003-2, Decision No. 5 (HLRB April 21, 2004) at 17 citing Occupational Safety and Health Law, p. 666 (BNA Books 1989).[28]

In the instant contests, the DIRECTOR contends that "all Complainants engaged in protected activities by complaining and/or giving statements to the police, Si-Nor, and/or HIOSH." The DIRECTOR points to a police report filed by WESTBROOK on the day he chased and assaulted Deguzman; witness statements to police given by SHELDON and SAMUEL KELIINOI identifying Deguzman and Paahana as Espinda's assailants; and a HIOSH complaint filed by WESTBROOK on December 24, 2002, which triggered a

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> claims, the evidence necessary to establish a prima facie case of retaliatory discharge is minimal. (Citation omitted.) A plaintiff may satisfy the first two elements by demonstrating that she was fired, demoted, transferred or subjected to some other adverse action after engaging in protected activity. The causal link may be inferred from circumstantial evidence such as the employer's knowledge that the plaintiff engaged in protected activity and the proximity in time between the protected action and the allegedly retaliatory employment decision." Marcia Linville v. State of Hawaii, et al., 874 F.Supp 1095, 1110 (D. Haw. 1994).

[28]See Appellee Director, Department of Labor and Industrial Relations, Post Hearing Brief, p. 11.

HIOSH inspection on or about December 26, 2002.[29] Furthermore, the DIRECTOR contends that AKUI, SHELDON KELIINOI, and SUA, "expressed concerns about Deguzman and the fights and requested corrective action from Si-Nor."[30]

The preponderance of evidence supports the Board's findings that: 1) WESTBROOK engaged in protected activity by filing a safety complaint on December 24, 2002, and police report to report the series of fights that erupted at the workplace on December 20, 2002; 2) SHELDON and SAMUEL KELIINOI, AKUI, WESTBROOK, SANBORN, SUA, and BIRGADO engaged in protected activity when they participated in the inspection conducted by HIOSH inspector Han on December 26, 2002, following the safety complaint filed by WESTBROOK; and 3) SHELDON and SAMUEL KELIINOI, engaged in protected activity by giving witness statements to police identifying Deguzman and Paahana as Espinda's assailants.

CASE NOS. OSH 2003-8, OSH 2003-9, OSH 2003-10, and OSH 2003-11

In the cases filed by Complainants SHELDON and SAMUEL KELIINOI, AKUI and WESTBROOK, respectively, the DIRECTOR proved that on December 30, 2002, SI-NOR discharged these Complainants approximately one week after WESTBROOK filed a safety complaint against SI-NOR, and Complainants SHELDON KELIINOI, SAMUEL KELIINOI, AKUI and WESTBROOK participated in HIOSH's inspection relating to the WV incident on December 26, 2002.[31] There is no dispute that these Complainants suffered adverse employment action under HRS § 396-8(e). Given the close proximity in time after Complainants' engaged in protected activity and their discharge, the Board can reasonably infer a causal link to establish a prima facie case of discrimination.

The burden of proof then shifts to SI-NOR to articulate a permissive, nondiscriminatory reason for the employment action. Similarly, assuming arguendo, the protected activity was a substantial factor in Respondent's decision to terminate Complainants, then the burden shifts to the employer to establish by a preponderance of evidence that it would have reached the same decision even in the absence of the protected conduct. Marshall v. Commonwealth Aquarium, 469 F.Supp. 690, 692 (Mass. 1979).

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[29]See Director's Exs.: B-30, B-29 and B-33.

[30]See Appellee Director, Department of Labor and Industrial Relations, Post Hearing Brief, pp. 12-13.

[31]This inspection resulted in a repeat citation against SI-NOR for failing to provide adequate protection from workplace violence by eliminating or reducing the potential for violent physical acts resulting in serious injuries to its employees, which SI-NOR appealed in Case No. OSH 2003-17. On February 15, 2006, the Board affirmed the Director's citation and penalty totalling $49,500.00 in Case No. OSH 2003-17.

Under HIOSH's administrative rules, a causal connection between an employee's protected activity and an employer's adverse action may be established in one of two different ways:

> (a) The protected activity must constitute a substantial factor for the discharge or other adverse action, or
>
> (b) The discharge or other adverse action would not have taken place "but for" engagement in the protected activity by the employee.

HAR § 12-57-3.

Based on the testimony of Uwakwe and Paahana, the Board concludes that Respondent had legitimate, nondiscriminatory reasons for discharging Complainants. First, based on a preliminary report from Edwards and having reviewed photographs of Deguzman's multiple injuries, Uwakwe determined that Deguzman was not the aggressor in the incident but was trying to fend off blows from several people. In addition, Uwakwe determined that Deguzman's injuries were not inflicted by one person from one punch. Uwakwe also relied on a list of employees allegedly responsible for the assault on Deguzman compiled by Edwards which was confirmed by Deguzman.

Second, there were essentially two accounts of how the assault on Deguzman occurred outside of SI-NOR's baseyard. After reviewing the record in this case, based on the multiple physical injuries sustained by Deguzman to his eyes, face, head, and forearm, and injuries to Paahana's left eye and mouth, the Board finds their injuries are defensive in nature, and more consistent with Paahana's account that Deguzman was chased and beaten by a group of employees led by the Complainants, not just WESTBROOK.

Third, although WESTBROOK was hit in the head with a pipe by Deguzman causing a bump, neither WESTBROOK nor any of the other Complainants were medically treated for any injuries on December 20, 2002. All of the Complainants continued to work until December 30, 2002. Complainants are younger, stronger and physically better built than Deguzman and Paahana, who were clearly outnumbered. Deguzman was the only person taken to the hospital by ambulance and medically treated on December 20, 2002.

On this basis, the Board finds that given the serious physical and mental injuries which Deguzman sustained, it was reasonable for Uwakwe to believe, based on Edwards' investigation, that Deguzman was not the aggressor, but rather the victim of an assault led by Complainants. Consequently, on December 30, 2002, Complainants were terminated because Uwakwe reasonably believed that they were responsible for the assault on Deguzman.

Based on SI-NOR's reasonable belief that Complainants were directly responsible for the assault on their supervisor, the Board concludes that SI-NOR had a legitimate, nondiscriminatory reason for discharging Complainants. Furthermore, there is no reliable or credible evidence from which the Board can reasonably infer that Complainants' participation in the WV investigation by HIOSH of the safety complaint filed by WESTBROOK, statements to police about the December 20, 2002 WV incident made by WESTBROOK, SHELDON and SAMUEL KELIINOI, and complaints to their supervisor (Pasoquen) about Deguzman, were substantial factors in Respondent's decision to discharge Complainants. In the instant case, the Board finds SI-NOR has established by a preponderance of evidence that it would have reached the same decision to discharge Complainants even in the absence of the protected conduct. Marshall v. Commonwealth Aquarium, 469 F.Supp. 690, 692 (Mass. 1979).

If the [Respondent] carries this burden satisfactorily, the burden shifts back to the [Director/Complainants] to show that the alleged explanation is a pretext for impermissible retaliation." Marcia Linville v. State of Hawaii, et al., 874 F.Supp. 1095, 1110 (D.Haw. 1994). Assuming arguendo, Complainants' protected activity was a substantial factor in Respondent's decision to discharge Complainants, the burden again shifts to the DIRECTOR/Complainants to show that the alleged explanations are a pretext for discrimination. Complainants may succeed in this burden either directly, by persuading the trier-of-fact that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. Id., at 1109.

In the instant case, there are no facts on which this Board can rely to conclude that Respondent's true reason for terminating Complainants is merely a pretext for discrimination. Complainants do not dispute that they were discharged because of the assault on their supervisor. For this Board to condone Complainants' assault on their supervisor under the guise of protected activity, would be contrary to the purpose of HIOSH's anti-discrimination provisions. SI-NOR was well within its rights to discharge Complainants based on a reasonable belief that they were directly responsible for the assault on Deguzman. Further, Respondent's discharge of Complainants AKUI and SHELDON KELIINOI were supported by the Director's Employment Security Appeals Referees' Office finding that they were not entitled to unemployment benefits because the assault on their supervisor constituted misconduct. Other than the close proximity in time from which WESTBROOK engaged in protected activity by filing a police report on December 20, 2002 and a HIOSH safety complaint on December 24, 2002, there is no evidence that WESTBROOK's safety complaint to HIOSH or Complainants' participation in HIOSH's investigation on December 26, 2002 were motivating factors for their discharge. The weight of the evidence and Complainants' lack of credibility about the assault on their supervisor do not support a finding that their exercise of protected activity were substantial factors in the employer's decision to discharge.

SI-NOR terminated Complainants based on a reasonable belief that their violent acts caused serious physical and mental injuries to Deguzman. The reliable and credible evidence supports a finding that Complainants were directly responsible for Deguzman's injuries which were defensive in nature. The DIRECTOR urges this Board to reasonably infer that Respondent's failure to terminate every employee who was involved in the WV incident on December 20, 2002, including Deguzman, Paahana, Espinda and Davalos, demonstrates that SI-NOR's reason for discharging Complainants is pretext for discrimination.

The Board is not convinced that Respondent's reason for terminating Complainants is a pretext for discrimination. Respondent was consistent in not terminating the employees who were involved in the WV incident and suffered serious injuries as a result, particularly Espinda. Even though Espinda engaged in protected activity by filing a police report, he was not terminated by SI-NOR. On the other hand, SI-NOR terminated other employees, such as Ruel Argaza, who did not engage in protected activity similar to Complainants'. Moreover, SI-NOR did not terminate every employee who, like Complainants, participated in HIOSH's inspection on December 26, 2002. On this basis the Board can reasonably infer that Complainants were not discharged for engaging in protected activity. Accordingly, the DIRECTOR and the Complainants have failed to show by a preponderance of evidence that but for engaging in protected activity, Respondent would not have discharged them on December 30, 2002.

Based on the foregoing, the Board concludes that Respondent did not unlawfully terminate Complainants SHELDON and SAMUEL KELIINOI, AKUI and WESTBROOK in violation of HRS § 396-8(e).

CASE NOS. OSH 2003-12, OSH 2003-13, and OSH 2003-14

Based on the record in this case, the Board finds that BIRGADO failed to appear at the hearings to prosecute his case, OSH 2003-14. The Board therefore concludes that Complainant BIRGADO failed to prove a prima facie case of discrimination.

Nevertheless, relying on the DIRECTOR's presentation of evidence for BIRGADO's case, the Board concludes that SANBORN, SUA and BIRGADO did not suffer any adverse action within the meaning of HRS § 396-8(e) by walking off the job on December 31, 2002. Pursuant to HAR § 12-57-7(b)(1), "[t]here is no right afforded by the law which would entitle employees to walk off the job because of potentially unsafe conditions at the workplace. . . ."[32]

HAR § 12-57-7(b)(1) states:

> There is no right afforded by the law which would entitle employees to walk off the job because of potentially unsafe

The DIRECTOR urges this Board to interpret broadly HIOSH's anti-discrimination provisions to give employees a right to refuse or stop working under a constructive discharge theory. The DIRECTOR contends that under HIOSH's anti-discrimination provisions, HAR § 12-57-7(b)(2), when a hazardous condition cannot be "cured," employees have a right to leave a job under a constructive discharge claim."[33] This is an issue of first impression before this Board and has not been addressed by Hawaii's appellate courts.

HIOSH's anti-discrimination provisions were adopted as a rule in substantial part from the Occupational Safety and Health Act (Act) of 1970, 29 U.S.C. § 651, et seq. As a general rule, "there is no right afforded by the Act which would entitle employees to walk

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> conditions at the workplace. Hazardous conditions which may be violative of the law will ordinarily be corrected by the employer once brought to the employer's attention. If corrections are not accomplished, or if there is a dispute about the existence of a hazard, the employee will normally have an opportunity to request an inspection of the workplace pursuant to section 396-8(b), HRS, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 396-8(e), HRS, by taking action to discipline an employee for walking off the job because of alleged safety or health hazards.

See, Appellee Director, Department of Labor and Industrial Relations, Post-Hearing Brief, pp. 15-16.

[33]HAR §12-57-7(b)(2) provides that:

> However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting themselves to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to be exposed to the dangerous condition, that employee would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through the resort to regular statutory enforcement channels. In addition, under such circumstances, the employee, where possible, must also have sought from the employer, and had been unable to obtain, a correction of the dangerous condition.

off the job, because of the potential unsafe conditions at the workplace." Hence, the refusal to perform an assigned task, does not include the act of walking off the job as the employees did in this case. If, however, an employee's valid refusal to perform the assigned work results in a suspension or discharge, then the employee's job refusal may be protected activity covered under HAR § 12-57-7(b)(2).[34]

Under certain circumstances, protection may be afforded an employee who engages in a form of "self-help." Under HAR § 12-57-7(b)(2), such protection is afford in very limited situations when an employee is confronted with a choice between not performing assigned tasks or being subjected to serious injury or death arising from a hazardous condition at the workplace, and left with no reasonable alternative, refuses in good faith to be exposed to the dangerous condition.

In Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), the Supreme Court found valid and consistent with the Act, the federal rule permitting an employee's "self-help" by two employees, who refused to perform work on an elevated wire mesh screen two weeks after another employee had fallen through the screen to his death. In that case, the refusal to work occurred two weeks after the employees filed an Occupational Safety and Health Administration (OSHA) complaint and unsuccessfully voiced concerns to management over the safety of the elevated wire mesh screen. The District Court found that the two employees had refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm, that the danger presented had been real and not something which had existed only in the minds of the employees, that the employees had acted in good faith, and that no

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[34]According to Rabinowitz, "Employee Work Refusals Under Section 11(c)," Occupational Safety and Health Law, 2nd Ed. (BNA Books 2002), pp. 592-95:

> In 1973 the Secretary [of Labor] promulgated a regulation providing that an employee has a right to refuse to work in certain situations. Noting that the Act does not specifically provide employees with the right to refuse to perform hazardous work, the regulation observes that in most situations, employees will be able to correct hazardous conditions by bringing them to the attention of their employers or, if this fails, by requesting an inspection by OSHA pursuant to Section 8(f) of the Act. While an employer generally will not violate Section 11(c) if it disciplines an employee who refuses to perform normal job assignments because of alleged safety or health hazards, the regulation provides that an employee occasionally may be "confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from the hazardous condition at the work place. According to the regulation, Section 11(c) protects an employee in this situation who refuses to perform work that the employee reasonably believes to be hazardous."

reasonable alternative had realistically been open to them other than to refuse to work. The Sixth Circuit Court of Appeals upheld the factual determinations of the District Court, but disagreed with the conclusion that the regulation authorized an employee's refusal to work in certain situations. The Supreme Court held the federal regulation authorized the employees' preemptive refusal to work.

Like its federal counterpart, we interpret HIOSH's anti-discrimination rules to protect employees who refuse to perform hazardous work that the employees reasonably believe to be hazardous when "confronted with a choice between not performing assigned tasks or subjecting themselves to serious injury or death arising from a hazardous condition at work." An employee's preemptive refusal to work is protected if the employee chooses not to perform an assigned task over subjecting themselves to serious injury or death arising from a hazardous condition. Cases involving employee work refusal typically require objective evidence that the employee would have been in danger of death or serious injury, if the employee had performed the assigned tasks.[35]

In the instant complaints of SANBORN, SUA and BIRGADO, the preponderance of evidence does not support a finding that they suffered adverse action when they refused to work by walking off the job on December 31, 2002. As a result, their form of "self-help," i.e., walking off the job, is not protected under HAR § 12-57-7(b)(2). Even assuming arguendo, SUA, SANBORN and BIRGADO could prove they suffered an adverse employment action, the preponderance of evidence does not support a finding that they walked off the job because of a genuine fear of death or serious injury with which they were confronted, and were left with no reasonable alternative. The test is whether a "reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels[,]" of such a nature as provided under HIOSH's anti-discrimination provisions.

Although SANBORN and SUA testified they saw Deguzman at the baseyard on December 30, 2002, they incorrectly assumed that Deguzman was back at work. SANBORN never saw Deguzman return to the baseyard after December 20, 2002 until the day he quit on December 31, 2002.[36] In addition, SANBORN decided to quit after learning his friends were fired and the employer was making changes in the workplace to address the WV incident, by appointing Mateo as the new temporary interim manager.[37] Similarly, SUA

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[35]Rabinowitz, Occupational Safety and Health Law, 2nd Ed. (BNA Books 2002) p. 595.

[36]Id., p. 190.

[37]Id., p. 194.

failed to establish that he was in danger of death or serious injury after observing Deguzman at the baseyard, since he testified that he did not participate in the fight, but rather remained a distant observer and stayed out of Deguzman's eyesight on December 20, 2002.[38] Like SANBORN, SUA testified that he quit the job on December 31, 2002 after Mateo had been introduced as the interim manager.[39] Again, this occurred the day after learning his friends had been fired.

The Board is not persuaded that SUA and SANBORN were confronted with a choice between performing their work or being subjected to serious injury or death simply because they saw Deguzman at the baseyard. There was no reasonable basis for SUA and SANBORN to assume that Deguzman was back at work since Mateo had been introduced as the new manager. In fact, Deguzman never returned to work after December 20, 2002, because of the physical and mental injuries he sustained. Therefore, the Board concludes that SUA, SANBORN and BIRGADO's decision to walk off the job was unprotected because it was not based on a reasonable belief that continuing to work posed a danger of death or serious injury and they were left with no reasonable alternative. Instead, the Board finds that these employees' decisions to quit work were motivated more by the fact that their friends and co-workers had been terminated and were gone from the workplace.

PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant consolidated contests pursuant to HRS § 396-11.

2. In a pretext case, the DIRECTOR and Complainants bear the initial burden of demonstrating (1) that an employee engaged in protected activity, (2) that the employee suffered an adverse employment action, and (3) that there is a causal nexus between the protected activity and the adverse action. The burden then shifts to the employer to articulate a permissive, nondiscriminatory reason for the employment action. Finally, if the employer satisfies its burden, the Director must demonstrate that the employer's reason is merely a pretext for discrimination. Marcia Linville v. State of Hawaii, et al., 874 F.Supp. 1095, 1110 (D.Haw. 1994)

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[38] Id., p. 303. In describing his version of the fight, SUA testified that: "I never like be seen around – I never like Lionel [Deguzman] see me around watching because he might think I involved, so I just wen' walk back to the truck."

[39] Id., p. 318.

3. The DIRECTOR and Complainants established by a preponderance of evidence a prima facie of discrimination by demonstrating that SHELDON and SAMUEL KELIINOI, AKUI and WESTBROOK were terminated after they engaged in protected activity under HRS Chapter 396, which included WESTBROOK's safety complaint with HIOSH about WV filed on December 24, 2002; their participation in HIOSH's subsequent investigation on December 26, 2002, and the filing of police reports against their supervisor following the December 20, 2002 WV incident.

4. The DIRECTOR and Complainants failed to prove by a preponderance of evidence that their exercise of protected activity, i.e. WESTBROOK's safety complaint to HIOSH about WV; their participation in HIOSH's subsequent investigation of the safety complaint; and filing police reports against their supervisor following the WV incident on December 20, 2002, were substantial factors in Respondent's decision to terminate Complainant.

5. SI-NOR proved by a preponderance of evidence that it had a legitimate, nonretaliatory reason for discharging Complainants SHELDON and SAMUEL KELIINOI, AKUI and WESTBROOK based on a reasonable belief that they were directly responsible for the assault on their supervisor which resulted in serious physical and mental injuries. Therefore, the Board concludes that Respondent's proferred reason for terminating SHELDON and SAMUEL KELIINOI, AKUI and WESTBROOK was worthy of credence, and not a pretext for discrimination.

6. The DIRECTOR and Complainants failed to prove by a preponderance of evidence that because Complainants engaged in protected activity, Respondent terminated them. The reliable and credible evidence does not support a conclusion that but for engaging in protected activity in the form of WESTBROOK's safety complaint, participation in HIOSH's subsequent investigation, and the filing of police reports against their supervisor, Complainants would not have been discharged.

7. Based on the reliable and credible evidence, the Board concludes that Respondent would have terminated Complainants in any event based on a reasonable belief that they were directly responsible for the assault on their supervisor. Therefore, the Board concludes that Respondent's legitimate, nonretaliatory reason for terminating Complainants, was not a pretext for discrimination.

8. The Board concludes that Complainants SHELDON and SAMUEL KELIINOI, AKUI and WESTBROOK were not terminated for engaging in the exercise of protected activity under HRS § 396-8(e).

9. The Board concludes that Respondent did not violate HRS § 396-8(e) by terminating Complainants SHELDON and SAMUEL KELIINOI, AKUI, and WESTBROOK.

10. Regarding the discrimination complaints filed by SANBORN, SUA, and BIRGADO, the Board concludes that the DIRECTOR and these Complainants failed to prove a prima facie case of discrimination by a preponderance of evidence because they suffered no adverse action within the meaning of HRS § 396-8(e) by walking off the job on December 31, 2002. Pursuant to HAR § 12-57-7(b)(1), "[t]here is no right afforded by the law which would entitle employees to walk off the job because of potentially unsafe conditions at the workplace. . . ."

11. Under certain circumstances, protection may be afforded an employee who engages in a form of "self-help." Under HAR § 12-57-7(b)(2), such protection is afforded in very limited situations when an employee is confronted with a choice between not performing assigned tasks or being subjected to serious injury or death arising from a hazardous condition at the workplace, and left with no reasonable alternative, refuses in good faith to be exposed to the dangerous condition. The Board concludes that SUA, SANBORN and BIRGADO's decision to walk off the job was unprotected because it was not based on a reasonable belief that continuing to work posed a danger of death or serious injury when they saw their supervisor at the baseyard on December 31, 2002, and thus were left with no reasonable alternative.

PROPOSED ORDER

It is hereby ordered that in accordance with the foregoing, the DIRECTOR's decisions, corresponding backpay award and penalty assessed against Respondent SI-NOR are vacated.

DATED: Honolulu, Hawaii, February 23, 2006.

HAWAII LABOR RELATIONS BOARD

/s/
BRIAN K. NAKAMURA, Chair

/s/
EMORY J. SPRINGER, Member

/s/
KATHLEEN RACUYA-MARKRICH, Member

FILING OF EXCEPTIONS

Any party adversely affected by the Proposed Findings of Fact, Conclusions of Law and Order may file exceptions with the Board, pursuant to HRS § 91-9, within ten days of the service of a certified copy of this document. The exceptions shall specify which proposed findings or conclusions are being excepted to with full citations to the factual and legal authorities therefore. A hearing for the presentation of oral arguments may be scheduled by the Board in its discretion. In such event, the parties will be so notified.

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