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DEPARTMENT OF PUBLIC SAFETY,  
STATE OF HAWAII

**EFiled: Nov 08 2012 08:33AM HAST**  
**Transaction ID 57565650**  
**Case No. OSH 2012-4**  
2012 NOV -8 AM 8: 33

HAWAII LABOR  
RELATIONS BOARD

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of  
  
LATASIA ANZAI-TORRES,  
  
Complainant-Appellant,  
  
and  
  
DEPARTMENT OF PUBLIC SAFETY,  
State of Hawaii,  
  
Respondent-Appellee,  
  
and  
  
DEPARTMENT OF LABOR AND  
INDUSTRIAL RELATIONS, State of  
Hawaii,  
  
Appellee.

CASE NO. OSH 2012-4  
  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

Hearing

Date: September 20 and 21, 2012  
Time: 9:00 a.m.

**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 February 6, 2012 by Complainant-

Appellant Latasia Anzai-Torres through her counsel G. Todd Withy. Complainant-Appellant contests the decision issued on January 27, 2012 by Appellee DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), via the Hawaii Division of Occupational Safety and Health (HIOSH), finding that Complainant-Appellant failed to carry her burden of establishing that she was not promoted because she filed an internal complaint and a HIOSH complaint protected under Hawaii Revised Statutes (HRS) Chapter 396, in violation of HRS §396-8(e).

On April 30, 2012, the Board conducted an initial conference and issued Pretrial Order No. 468, dated May 1, 2012, identifying the following issues for hearing as follows:

1. Whether Respondent-Appellee discriminated against Complainant-Appellant for participating in protected activity, in violation of HRS §396-8(e)?
2. If so, what is the appropriate relief and penalty?

On September 20, 2012, the Board conducted a contested case hearing in the instant case. At the conclusion of Complainant-Appellant's case, Respondent-Appellee made a motion for judgment as a matter of law on the basis that Complainant-Appellant failed to present a prima facie case of discrimination and/or retaliation.

After careful consideration of the entire record, evidence, and arguments presented, on September 20, 2012, pursuant to Rule 52(c), Hawai'i Rules of Civil Procedure, the Board grants Respondent-Appellee's motion for judgment as a matter of law, finding that the Complainant-Appellant failed to present evidence to establish a prima facie case.

#### **FINDINGS OF FACTS**

1. The process for filling Lieutenant positions involves applicants taking a written examination. Those scoring 70% or better are qualified for any openings and the "qualified" list is further ranked by order of facility seniority.

2. In November 2010, a decision was made by the Warden, Francis Sequeira, to hire only two additional Lieutenants, even though there were potentially four vacancies. The decision to fill only two of the positions was made for budgetary reasons.

3. At that time, neither the names on the Lieutenant “qualified” list nor the ranking was known to the Warden or the facility’s staff. The list is created and maintained by the main office in Honolulu.

4. The request to hire two additional Lieutenants was granted on January 25 and 27, 2011.

5. Warden Sequeira announced the promotional opportunity in April 2011.

6. Ranking first and second on the Lieutenant “qualified” list were Thomas Taum and Fiafia Sataraka, above Complainant-Appellant. They both authorized the “suitability check” process by signing waivers on April 11, 2011.

7. Although one applicant did not pass his “suitability check,” the Lieutenant position was not offered to Complainant-Appellant, who was next in line because the applicant who did not pass his suitability check appealed the suitability rating. The appeal was still pending as of July 1, 2011.

8. On April 27, 2011, a hiring freeze ordered by the Governor went into effect. No additional promotions were considered.

9. On December 19, 2010, Complainant-Appellant filed an in-house incident report alleging unsafe working conditions.

10. On December 20, 2010, Complainant-Appellant filed a complaint with HIOSH alleging slippery floors due to water and the presence of mold in the workplace. A letter

informing Warden Sequeira of the nature of the complaint, but not the identity of Complainant-Appellant, was sent on December 22, 2010.

### CONCLUSIONS OF LAW

1. The burden of proof is upon Complainant-Appellant to establish by a preponderance of the 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 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.”

Timothy Santos v. Cascade Industries, Inc., OSH 2006-7, pp. 10-11 (6/29/06), citing Marcia Lineville v. State of Hawaii, et. al., 874 F.Supp. 1095, 1110 (D. Hawaii, 1994) (emphasis added).

2. There is insufficient evidence to support a finding of violation of section 396-8(e), Hawaii Revised Statutes that Complainant-Appellant was discriminated against when she filed an internal complaint and a HIOSH complaint.

3. Complainant-Appellant engaged in protected activities when she filed an internal complaint and a HIOSH complaint soon after or on December 19 and 20, 2010.

4. Complainant-Appellant filed her internal complaint directly with management.

5. Complainant-Appellant was not promoted to Lieutenant.

6. There was no nexus between the complaint filed in December 2010 and the decision not to promote Complainant-Appellant.

7. The decision to fill only two of four vacant positions was made prior to Complainant-Appellant's complaint and was made for budgetary reasons, and neither Warden Sequeira nor Clayton Kitamori, Personnel Manager, knew who was on the list.

8. Although one of the initial two candidates was determined to be "not suitable," he filed an appeal, so there was still no available Lieutenant position to offer Complainant-Appellant as of May 5, 2011, when the discrimination complaint was filed.

**ORDER**

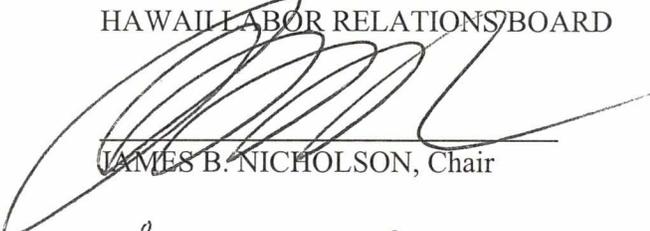
This contest filed by Complainant-Appellant on February 6, 2012 is dismissed.

DATED: Honolulu, Hawai'i, November 8, 2012.

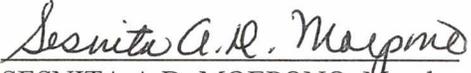
DECISION NO. 26

DATED: November 8, 2012

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair

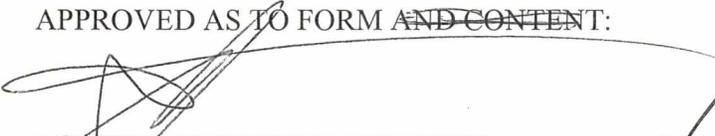


SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

APPROVED AS TO FORM AND CONTENT:



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AND INDUSTRIAL RELATIONS

Latasia Anzai-Torres, and Department of Public Safety, State of Hawaii, and Department of Labor and Industrial Relations, State of Hawaii, Case No. OSH 2012-4: Findings of Fact, Conclusions of Law, and Order