109 Hawai'i 457
Unpublished Disposition
Unpublished disposition. See HI R RAP Rule 35 before citing.
Supreme Court of Hawai'i.

ALOHA ISLANDAIR, INC., Appellant–Appellee/Cross–Appellant
v.
William D. HOSHIJO, in his Capacity as Executive Director of the Hawai'i Civil Rights Commission; and Bruce Pied, Appellees–Appellants/Cross–Appellees.

No. 24561.
|
Jan. 26, 2006.

Synopsis

Background: Airline sought review of finding by state civil rights commission that airline engaged in discriminatory practices by denying employment to applicant on basis of applicant's monocular vision. The First Circuit Court, Eden Elizabeth Hifo, J., reversed the commission's decision. Applicant and director of civil rights commission appealed and airline cross-appealed.

Holding: The Supreme Court, Nakayama, J., held that airline was entitled to a jury trial.

Vacated and remanded for jury trial.

Acoba, J., filed dissenting opinion.

Appeal from the First Circuit Court (Civ. No. 00–1–3779).

Attorneys and Law Firms

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MOON, C.J., LEVINSON, NAKAYAMA, and DUFFY, JJ. and ACOBA, J., dissenting.

SUMMARY DISPOSITION ORDER

***1** Appellees–Appellants/Cross–Appellees Bruce Pied (Pied) and William D. Hoshijo (Hoshijo)[1] appeal from the August 22, 2001 judgment of the circuit court of the first circuit, the Honorable Eden Elizabeth Hifo presiding, reversing the November 22, 2000 final decision and order of the Hawai'i Civil Rights Commission (HCRC or Commission), which found that Appellant–Appellee/Cross–Appellant Aloha Islandair, Inc. (Island Air) engaged in "unlawful discriminatory practices," in violation of Hawai'i Revised Statutes (HRS) § 378–2(1)(A) (Supp.2000), by denying Pied employment on the basis of his monocular vision in 1990 and 1991.

On appeal, Pied and Hoshijo present the following questions: (1) whether Pied timely challenged alleged discriminatory practices that occurred more than 180 days before a charge of discrimination was filed; (2) whether the circuit court, in reviewing the HCRC's findings of fact *de novo,* was required to defer to the Commission's findings on witness credibility; (3) whether, under the statutory definition of "disability" found in HRS § 378–1, mitigating measures may be considered when examining the extent to which an individual's physical or mental impairment limits him or her in a major life activity; (4) whether Island Air's admissions in a prior federal court proceeding involving the same parties are binding and entitled to preclusive effect in the instant case; (5) whether, upon the plaintiff's establishment of a *prima facie* case of discrimination based on disparate treatment, Hawai'i Rules of Evidence (HRE) Rule 304 shifts the burden of persuasion to the defendant to prove that non-discriminatory reasons motivated the challenged employment action; and (6) whether the circuit court erred in reversing the HCRC's determination that Island Air unlawfully denied Pied employment because he was (a) disabled in fact, and (b) regarded by Island Air as being disabled. Pied and Hoshijo request that the HCRC's final decision and order be affirmed in its entirety. In its cross-appeal, Island Air argues that: (1) the circuit court's finding of fact that Island Air maintained a policy against hiring monocular pilots between 1989 and 1991 was clearly erroneous; and (2) the court denied Island Air its constitutional right to have a jury determine common law damages.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that Island Air was improperly denied its constitutional right to a jury trial inasmuch as we have previously held that "a respondent who appeals a final order of the HCRC pursuant to HRS § 368–16, is entitled to a jury trial on any claims that form the basis of an award of common law damages by the HCRC." *SCI Management Corp. v. Sims,* 101 Hawai'i 438, 452, 71 P.3d 389, 403 (2003).[2] Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is vacated and the case remanded for jury trial.

Dissenting Opinion by ACOBA, J.

***2** I would respectfully hold that (1) because *Lavelle v. Massachusetts Comm'n Against Discrimination,* 426 Mass. 332, 688 N.E.2d 1331 (Mass.1997),[1] upon which *SCI Mgmt. Corp. v. Sims,* 101 Hawai'i 438, 71 P.3d 389 (2003), is based, has been overruled, *SCI* should be overruled and (2) accordingly, Hawai'i Revised Statutes (HRS) chapter 91 should apply to our secondary review of the August 22, 2001 final judgment of the circuit court of the first circuit (the court) pursuant to *State v. Hoshijo ex. rel. White,* 102 Hawai'i 307, 317, 76 P.3d 550, 560 (2003).

I.

First, because the majority chooses to follow the majority holding in *SCI,* I briefly comment on the precepts established in that case. In *SCI,* a majority of this court adopt[ed] the "solution" fashioned by the Massachusetts Supreme Judicial Court in

addressing a similar statutory scheme in *Lavelle,* and held that "a respondent who appeals a final order of the [Hawai'i Civil Rights Commission (HCRC)] pursuant to HRS § 368–16, is entitled to a jury trial on any claims that form the basis of an award of common law damages by the HCRC." *SCI,* 101 Hawai'i at 452, 71 P.3d at 403. The majority in *SCI* further indicated that

> *[b]y electing to seek a jury trial, however, the respondent waives his or her right to appellate review of the HCRC's final order in the circuit court, and the whole action is tried de novo in the circuit court. Cf. Kaulia v. Honolulu Rapid Transit Co., Ltd.*, 32 Haw. 446, 448 (1932).

Id. at 452 n. 12, 71 P.3d at 403 n. 12 (emphasis added).

In this case, Appellant–Appellee/Cross–Appellant Aloha Island Air, Inc. (Island Air) asserted its right to a jury trial in its direct appeal to the court from the HCRC's final decision and order. It argued that HRS chapter 368 violated its constitutional right to a trial by jury. However, the court declined to rule on the constitutionality of the chapter. Under *SCI,* Island Air's claim must be honored. Accordingly, after the HCRC rendered its final order, and Island Air invoked its right to a jury, it should have been given a jury trial.

As stated in *SCI,* by "electing ... a jury trial" SCI "waive[d its] right to appellate review of the HCRC's final order in the circuit court." *Id.* The court, then, was not authorized to conduct a review of the HCRC decree. Hence, the appeal and cross-appeal to this court would not have been taken. Because those appeals were foreclosed, *SCI* requires that these appeals be dismissed and the court's findings of fact, conclusions of law, and order be vacated and the case remanded for Island Air to proceed with its jury trial.

Having chosen a jury trial, Island Air is required to proceed in a jury trial *de novo* on the "whole action." *Id.* Accordingly, because the majority affirms Island Air's right to a jury trial, it must remand for trial on the *whole case* in accordance with the dictates of *SCI*. For, this court has previously defined *de novo* in the context of a circuit court's review of an HCRC decision as "anew, afresh[.]" *Hoshijo ex. rel. White,* 102 Hawai'i at 315, 76 P.3d at 558.

***3** In sum, once the "respondent" requests a jury trial, *SCI* does not countenance review of the HCRC's final order in the circuit court or review by this court of appeals from that order, or the resulting determination of substantive issues *before* remand to circuit court. 101 Hawai'i at 452 n. 12, 71 P.3d at 403 n. 12. This court thus lacks jurisdiction to render any decision regarding the HCRC order.

II.

Insofar as the merits are concerned, this opinion refers only to my views and not to the views of the other members of the court and also does not necessarily indicate my position on certain similar issues that may arise in the different context of a jury trial in a future appeal, if any, resulting from remand.

III.

As stated before, I would overrule *SCI*. We cannot choose to ignore the basis for the majority holding in *SCI*. After this court adopted the *Lavelle* "solution," the Massachusetts Supreme Judicial Court overturned the *Lavelle* decision in *Stonehill College v. Massachusetts Comm'n Against Discrimination,* 441 Mass. 549, 808 N.E.2d 205 (Mass.2004). Inasmuch as the

sole authority for the majority decision in *SCI* has been overturned, *see SCI,* 101 Hawai‘i at 452–53, 71 P.2d at 403–04 (deciding to "simply follow the persuasive example of the Massachusetts high court[ ] in *Lavelle* "), the jury trial holding in *SCI* should likewise be overruled.

In *Stonehill College,* the Massachusetts court acknowledged that *Lavelle* "circumvent[ed] the comprehensive scheme set out by the Legislature for the resolution of discrimination claims and (unintentionally) undermine[d] the commission's authority to fulfill its mandate of protecting citizens of the Commonwealth from discriminatory employment decisions and punishing unlawful discrimination in the workplace." 808 N.E.2d at 216. In light of *Stonehill College* and the compelling circumstances of the instant case, which illustrate how the majority opinion in *SCI* can afford employers not one, not two, but *three or more* bites at the apple, *SCI* should be overruled.

A.

As I have previously noted in my dissent in *SCI,* "*Lavelle* [was] couched and qualified with speculation about the consequences flowing from it."[2] 101 Hawai‘i at 456, 71 P.3d at 407 (Acoba, J., dissenting). Six years after *Lavelle* was issued, the Massachusetts court confronted these apprehensions and "conclude[d] that the jury trial holding in *Lavelle* should be overruled." *Stonehill College,* 808 N.E.2d at 216. The *Stonehill College* court cited four reasons for overruling the *Lavelle* holding. First, that court observed the "significant" "differences between the administrative proceedings conducted [by the Massachusetts Commission Against Discrimination (MCAD)] pursuant to [Massachusetts General Laws (MGL) 151B] § 5, and a private right of action under [MGL 151B] § 9." *Id.* It noted that

> [w]hile the main object of a judicial proceeding under § 9 is to recover damages for the individual victim of unlawful discrimination, *the primary purpose of an administrative proceeding before the MCAD is to vindicate the public's interest in reducing discrimination in the workplace by deterring and punishing, instances of discrimination by employers against employees.* ... While a successful complainant in an administrative proceeding may, in appropriate cases, be awarded damages for emotional distress, the commission is empowered to fashion equitable remedies designed chiefly to *protect and promote the broader public interest in eradicating systemic discrimination.*

***4** *Id.* at 216–17 (citations omitted) (emphases added). Second, as the *Stonehill College* court explained, "that the [Massachusetts] Legislature has provided complainants, and not respondents, *the right to choose the forum in which their claim will be heard does not pose an equal protection problem.*" *Id.* at 217 (emphasis added). Third, the Massachusetts court recognized that

> [t]he statutory scheme [in MGL chapter 151B] merely grants an alleged victim of employment discrimination the threshold opportunity to choose one of "two largely independent avenues for redress of violations of [MGL chapter 151B], one through the MCAD ... and the other in the courts...." *It is reasonable, and constitutionally permissible, to provide a complainant with a choice of enforcement options.*

Id. at 218 (emphasis added) (citations omitted). That court acknowledged that "Lavelle's purported remedy" for the "perceived constitutional infirmity violation" in MGL chapter 151B "created an even more inequitable solution,"

> departs from the [Massachusetts] Legislature's clear intent that both parties would be bound by an MCAD decision, subject only to judicial review, and is *at odds with* the *doctrine of collateral estoppel and the strong and oft-stated public policy of limiting each litigant to one opportunity to try his case on the merits.*

Id. at 219 (internal quotation marks and citations omitted).

Finally, it was observed that the right to a jury trial afforded by the Massachusetts constitution did not "vest whenever an allegation of a [MGL chapter] 151B employment violation is lodged with the MCAD" inasmuch as "MCAD proceedings do not involve a suit between two or more persons in the sense provided for by [article 15 of the Massachusetts constitution], nor do they involve a case or controversy concerning property as that phrase is used in [article] 15." *Id.* (internal quotation marks

omitted). Reasoning that "[p]rinciples of equity and fairness dictate that complainants who have been found by the full commission to have been illegally discriminated against not be forced to relitigate their claims in the [courts]," the Massachusetts court extended retroactive application of its holding, overruling *Lavelle,* to all cases still open on direct review. *Id*. at 221.

B.

Similarly, the dissenting opinion in *SCI* noted eight deleterious effects of entitling a respondent employer to a *de novo* jury trial on any claims that form the basis for an award of common law damages by the HCRC. *See SCI,* 101 Hawai'i at 454–56, 71 P.3d at 405–07 (Acoba, J., dissenting). First, under the *SCI* majority decision, "only an employer is entitled to a second trial if it is unsuccessful in the administrative process" and, thus, the employer is given "a second proverbial bite at the apple not afforded to an employee." *Id*. at 454, 71 P.3d at 405.

Second, "[b]ecause, under the [*SCI*] majority's rule, the outcome before the commission is always potentially subject to a retrial at the employer's behest, the administrative hearing before the commission, *see* HRS § 368–14 (1993), will not provide a means of formally ending the dispute[,] ... invit [ing] a 'second ordeal,' by way of a jury trial." *Id*. at 455, 71 P.3d at 406 (brackets and internal citation omitted). "Third, allowing duplicative adjudication increases the burden upon litigants and the judicial system, contrary to the express policies of this court. What was tried in the administrative hearing before the commission will again be retried before a jury in court." *Id*. Fourth, "allowing only the employer to obtain a retrial deprives the employee of judicial review of the commission's order as prescribed in HRS § 368–16(b)" as "the determinations made by the commission are legally jettisoned, becoming irrelevant in the court trial and in any resulting appeals from the trial." *Id*.

***5** Fifth, two opposing decisions, one by the HCRC and one by a jury, could be "rendered in separate contested proceedings in the same case[,] ... breed [ing] public distrust in the ultimate disposition of discrimination cases." *Id*. Sixth, the *SCI* "majority's approach ... increase[d] the expenses borne by an employee, even though the statute was designed to minimize such expenses." *Id*. Seventh, the *SCI* "majority's formulation is distinctly at odds with the legislative intent of HRS § 368–3, namely to resolve complaints in an expeditious and less costly manner through an administrative hearing process." *Id*. Finally, the majority decision in *SCI* "abrogates the powers and functions of the HCRC granted under HRS § 368–3(5)" and "in effect repealed the statutory grant of power to the commission to award legal damages, because any such award may be superceded by a jury verdict." *Id*. at 456, 71 P.3d at 407.

C.

The history of the instant case presents a factual scenario confirming the defects inherent in the *SCI* ruling. To avoid the discrimination claims of Appellee–Appellant/Cross–Appellee Bruce Pied (Pied) before the HCRC, Island Air sued in federal court on preemption grounds and was eventually unsuccessful before the Ninth Circuit. Thereafter, the HCRC determined that Island Air discriminated against Pied in violation of HRS § 378–2. Island Air then appealed to the court. The court found in favor of Island Air and reversed the HCRC's decision. Pied appealed to this court.

Because the majority vacates the court's ruling as to the claims of discrimination and remands the matter for a jury trial on these issues, Island Air is afforded a *fourth* opportunity to overcome Pied's discrimination claims, despite the fact that Island Air exhausted both federal judicial and state administrative processes. This process in effect renders the administrative

proceedings meaningless and multiplies the burden cast on Pied or other employees or potential hirees. For the reasons stated before, *SCI* renders our applications of Hawaii's anti-discrimination laws superfluous. It undermines the integrity of this court's pronouncements and offends our state appellate court hierarchy. In tandem with the reasons already enunciated, such considerations demand that *SCI* be overruled.

IV.

Because *SCI* should not apply, the standard of review established as to appeals from HCRC decisions must be followed. We clarified the proper standard of review to be utilized by the circuit court in an appeal from a decision of the HCRC in *Hoshijo ex. rel. White,* 102 Hawai'i at 317, 76 P.3d at 560. In that case, we said an appeal from the HCRC is reviewed *de novo* by the circuit court as required by HRS § 368–16(a).

HRS § 368–16(a) deals only with the HCRC, and provides as follows:

> (a) A complainant and a respondent shall have a right of appeal from a final order of the commission.... *An appeal before the circuit court shall be reviewed de novo. ...*

***6** (Emphasis added.) *Black's Law Dictionary* 435 (6th ed.1990) defines "*de novo* " as follows: "Anew; afresh; a second time." By way of illustration, it is "as if the reviewing court is the front-line judicial authority and, therefore, accords no deference to the lower courts' determinations." *State v. Navas,* 81 Hawai'i 113, 129, 913 P.2d 39, 46 (1996).

Id. at 315, 76 P.3d at 558 (brackets omitted). It was acknowledged that generally "HRS § 91–14(g) pertains to appeals from administrative agencies...." *Id*. However, we said that "[w]hile both HRS §§ 368–16(a) and 91–14(g) are directed at agency decisions, HRS § 368–16(a) is concerned solely with the appropriate standard of review of a HCRC decision in the circuit court.... [Under] HRS § 368–16(a)[,] ... review of the HCRC's decision in the circuit court is *de novo* review." *Id*. at 316, 76 P.3d at 559. Our conclusion was further supported by legislative history, which demonstrated that the legislature rejected an amendment to HRS § 368–16(a) that would eliminate *de novo* review by the circuit court in favor of HRS § 91–14(g) review. *Id*. at 316, 76 P.3d at 559 (citing 1991 Haw. Sess. L. Act 252, §§ 1–9, at 549–53 (approving Senate Bill 1567 on June 12, 1991)).

But with respect to secondary appeals from the circuit court's review of the HCRC order, the standard of review is that established with respect to appeals from administrative agencies generally. As related previously, "[i]n line with HRS § 368–16(a), HRS § 368–16(d), which also specifically relates to the HCRC, provides that 'the final judgment or decree of the circuit court *shall be subject to review by appeal in the same manner and form as other appeals from that court*.' " *Id*. (emphasis added) (brackets omitted).

Generally our " '[r]eview of a decision made by [a] court upon its review of an [administrative] decision is a secondary appeal. The standard of review is one in which this court must determine whether the court [under review] was right or wrong in its decision[.]' " *Soderlund v. Admin. Dir. of the Courts,* 96 Hawai'i 114, 118, 26 P.3d 1214, 1218 (2001) (quoting *Farmer v. Admin. Dir. of the Courts,* 94 Hawai'i 232, 236, 11 P.3d 457, 461 (2000) (internal quotation marks and citations omitted)). "Hence, this court's standard of review of an appeal from the circuit court regarding an appeal from the HCRC is that we review the findings of fact of the circuit court under a clearly erroneous standard, and its conclusions of law *de novo* under the right or wrong standard." *Hoshijo ex. rel. White,* 102 Hawai'i at 317, 76 P.3d at 560.

V.

Having established the appropriate standard of review, I would hold that (1) we may vacate the circuit court's findings of fact if they are not supported by substantial evidence or, despite substantial evidence, if we are left with a definite and firm conviction that a mistake has been made, (2) admissions of fact by Island Air in federal court to the effect that it had a discriminatory policy against monocular pilots is binding upon it in our state courts, (3) a complainant such as Appellee–Appellant/Cross–Appellee Bruce Pied (Pied) may prove intentional discrimination by direct or circumstantial evidence, (4) regardless of whether a respondent employer's burden under the paradigm of *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), is characterized as one of persuasion or production, a determination that the respondent's proffered non-discriminatory reasons are not credible, in addition to the complainant's establishment of a *prima facie* case, is sufficient to support a conclusion of discrimination, (5) in that regard, under the circumstances of this case, Pied satisfied his ultimate burden of proving that, in violation of HRS § 378–2,[3] Island Air regarded him as being substantially limited in the major life activity of seeing, and (6) Island Air's repeated refusals to hire Pied in violation of HRS § 378–2 constitute an "ongoing discriminatory practice" under HRS § 368–11(c) and, thus, Island Air's refusal to hire Pied in 1990 as well as in 1991 was actionable as a violation of HRS § 368–11(c)(2).

***7** Accordingly, with all due respect to the court, I would vacate the court's August 22, 2001 final judgment herein which was to the contrary, and remand to the court with instructions to enter an order affirming the November 22, 2000 decision and order of the HCRC that determined Island Air had discriminated against Pied in violation of HRS § 378–2.

All Citations

109 Hawai'i 457, 127 P.3d 953 (Table), 2006 WL 181596

Footnotes	
1	Hoshijo appears in his official capacity as executive director of the Hawai'i Civil Rights Commission.
2	All parties should be advised that, as stated in the dissent, the views expressed are those of Justice Acoba and do not necessarily reflect the views of other members of this court. Dissent at 3.
1	In *Lavelle v. Massachusetts Comm'n Against Discrimination,* 426 Mass. 332, 688 N.E.2d 1331, 1335 (Mass.1997), the Massachusetts court reasoned that "the constitutional right of a complainant to have a trial by jury applies equally to a respondent," and, accordingly, afforded the respondent the right "to obtain a jury trial only after the commission has taken final action," *id.* at 1336.
2	The *Lavelle* court "recognize[d] that there [would] be practical problems in extending a jury trial right to a respondent, including the preparation of a complaint to be filed in court by or on behalf of a complainant." 688 N.E.2d at 1336. It also noted that "[o]ther questions may arise concerning the process ... described, but [the court] decline[d] to anticipate and answer them [at the time of the decision]." *Id.*
3	HRS § 378–2 (Supp.1991) states in pertinent part as follows: **Discriminatory practices made unlawful; offenses defined.** It shall be an unlawful discriminatory practice: (1) Because of race, sex, sexual orientation, age, religion, color, ancestry, handicapped status, 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[.]

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