STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of STEPHEN C. RODDY, Complainant, and LIFE PORT HAWAII CO., LTD. dba The Oahu Club, Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Appellee.	CASE NO. OSH 2013-17 Discrimination Complaint DECISION NO. 27

DECISION AND ORDER

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

A. NOTICE OF CONTEST AND BOARD PROCEEDINGS

On July 25, 2013, the Hawaii Labor Relations Board (Board) received a Notice of Contest (Notice) from the Hawaii Occupational Safety and Health Division (HIOSH) of the determination by Respondent Director (Director), Department of Labor and Industrial Relations, State of Hawaii (DLIR) regarding a discrimination complaint (Complaint) filed on June 10, 2013 by Complainant Stephen C. Roddy (Complainant or Mr. Roddy), self-represented litigant or *pro se*. The Notice stated, in relevant part, that, "We were unable to grant the complainant's request of a reconsideration of our original determination, and are therefore forwarding this case to you."

A copy of a correspondence from Complainant to Mr. Tin Shing Chao (Chao), Manager for the DLIR Occupational Health Branch, dated and received by HIOSH on June 10, 2013, requesting a review of the determination made in a May 23, 2013 letter sent by Chao to Mr. Roddy closing his discrimination complaint against Respondent Life Port Hawaii Co., Ltd. dba The Oahu Club (Respondent, The Oahu Club, Oahu Club, or Club) was attached to the Notice.

On July 26, 2013, the Board issued a Notice of Initial Conference/Settlement Conference informing the parties of a September 5, 2013 conference.

On August 23, 2013, Respondent Director submitted his Initial Conference Statement of The Director of Labor and Industrial Relations.

On August 26, 2013, Respondent Oahu Club filed its Initial Conference Statement.

On August 28, 2013, Complainant filed his Initial Conference Statement.

On September 5, 2013, the Initial Conference/Settlement Conference was held with all of the parties present. On September 12, 2013, the Board issued Order No. 516 Pretrial Order and Notice of Status Conference establishing deadlines for identification of live witnesses, discovery cutoff, exchange of exhibit lists, and a trial date of January 22, 2014.

On November 14, 2013, the Director filed Director's Motion to Continue Trial. On December 4, 2013, by Order No. 537, the Board granted the Motion and scheduled another Status Conference for February 7, 2014.

After the February 7, 2014 Status Conference, the Board issued a Notice of Hearing and Deadlines revising the deadlines for exchange of exhibits and rescheduling the hearing to April 16, 2014 and continuing until completion.

On April 16, 2014, the Board held a trial on this matter. Based on the entire record in this case, the Board makes the following Findings of Fact, Conclusions of Law, and Order.

B. FINDINGS OF FACT

If it be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

Eldon Henry (Mr. Henry), the Maintenance Manager for Respondent Oahu Club hired Mr. Roddy in 2012 to work under Mr. Henry's supervision in the maintenance department.

After becoming employed, Complainant was directed to, and in fact, was considered as part of his job to, report safety concerns at the Club to Mr. Henry. From October 2012 up until his termination on February 28, 2013, Mr. Roddy made verbal reports almost daily and on several occasions showed Mr. Henry his safety concerns on the premises.

Complainant's reports to Mr. Henry included lack of eye wash stations for employees who handled chlorine tablets several times a day; lack of adequate lighting on the Club premises, such as egress lighting and on a stairway to the yard pool; exposed electrical wires; and nonfunctioning telephone wires and electrical outlets. Mr. Roddy also reported a safety concern regarding a jagged PVC pipe for one of the jacuzzi jets to the General Manager of the Club, Ms. Roberta "Robin" Flanagan (Ms. Flanagan). After seeing and promising to take care of the safety problems, Mr. Henry never addressed the concerns.

None of the other employees working at the Club during Complainant's employment reported safety or health concerns to Mr. Henry.

Up until February 27, 2013, Complainant never had any problems at work; and Complainant and Mr. Henry were friends.

On or about February 19, 2013, Complainant went on the internet and filed a complaint with the United States, Department of Labor, Occupational Safety and Health Administration (OSHA) regarding his safety concerns at The Oahu Club.

Subsequently, the Honolulu Area Director of OSHA Galen Lemke (Lemke) contacted Mr. Roddy to determine whether there were any other concerns. In response, Mr. Roddy sent a February 20, 2013 email, stating in relevant part:

> To touch on just a few; [sic]
> *Gas blower leaks fuel from a crack fuel tank, yet stored next to a [sic] LP gas water heater
> *Charcoal Grill @ top of stair case [Café] blocking stairs, also no lighting at early morning and obstructing pipes.
> *No lighting on stairs to 'Yard Pool' from upper meter pool deck.
> * Extension cord or timer 'lap' clock for yard pool ←also, not properly grounded - danger of electrical shock
> *Exposed electrical wiring @ meter pool last light pole next to sauna
> *No railing on steps from meter pool to Tennis Center And [sic], unknown wiring in ground with rocks as a covering.
> *Employer does not provided [sic] or see that employees have proper leg protection using a provided weed cuter [sic] machine
> *Tennis courts have exposed wiring for overhead lighting

*Maintenance shop has dangerous wiring—electrical shock from over head lights

*Pro-shop has 'NOT TO CODE' wiring---under flo0ring [sic]

*Unstable steel grating outside maintenance room and pump room.

*GAS stored in maintenance room locked shed

*No cover on electrical outlet w/switch in maintenance room.

*No safety guard on bench grinder with wire wheel

On February 21, 2013, Rick Foster (Foster)[i] signed and sent a letter on Lemke's behalf to Mr. Henry at The Oahu Club (OSHA Letter), stating in pertinent part:

> On February 21, 2013, 7:00:00 AM, the Occupational Safety and Health Administration (OSHA) received a report of alleged hazardous working conditions and/or violations of 29 CFR Part 1960 citable program elements in your workplace at 6800 Hawaii Kai Drive. The specific nature of the report involves:
>
> - No lighting for outside emergency egress stairway.
> - No eye-wash station for employees using chlorine.
> - No material safety data sheet (MSDS) for chlorine.
> - No first-aid kits in place.
>
> OSHA has decided not to conduct an inspection in response to this report. However, since allegations of the violation of standards have been made, you should investigate the alleged violation(s). Department of Labor regulation 29 CFR 1960.28 requires that your inspection be conducted within 3 working days for potentially serious conditions and within 20 working days for other-than-serious hazards. Any necessary correction(s) should be made within 30 calendar days after completion of the inspection. If correction(s) cannot be made within 30 calendar days, please provide me with a detailed abatement plan. Your plan should include:
>
> (1) All steps taken and the dates of such action to achieve compliance during the prescribed abatement period.
>
> (2) The specific additional abatement time estimated to achieve compliance.
>
> (3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(4) Interim steps being taken to safeguard the employees against the cited violation(s) during the abatement period.

Since the complainant has requested to remain anonymous, please advise me in writing, within 30 calendar days after completion of inspection, of your finding(s) and of any action you have taken. Your response should be detailed, stating specifically what corrective action(s), if any, were taken. If it is determined that based on the report, no violation(s) exist and an inspection will not be conducted, please notify me in writing within 15 calendar days of receipt of this letter. We have notified the complainant that the complaint has been forwarded to you for action, and, if the violation(s) are not corrected, to notify us. We will forward a copy of your report to the complainant.

You should enclose any supporting documentation on the action(s) taken, such as monitoring results, new equipment orders, or photograph(s) of corrected condition.

If we do not receive a response from you within 30 calendar days, indicating that appropriate action has been taken or that no violation(s) exist, an OSHA inspection may be scheduled.

If you have any questions or need assistance concerning this matter, please contact our office.

Mr. Roddy worked during the February 23 and 24, 2013 weekend. The maintenance employees routinely logged issues arising during their shift in a communication book located in the maintenance area. The binding of that book had become loose, so Complainant glued the binding and logged his work performed on the white board in the maintenance room instead. The maintenance room white board was used by the employees to communicate work-related messages, such as their schedules, job tasks to be performed, completion of those tasks, and supply needs.

After returning to work on February 25, 2013, Mr. Henry received the OSHA Letter. Mr. Henry testified that he discussed it with Ms. Flanagan and that the items identified were "small things, but oversight."

Mr. Henry called Foster for guidance on the OSHA Letter. He then informed "everybody" verbally regarding receipt of the OSHA complaints and made a copy of the OSHA Letter for everyone to read and initial.

On that same day, Mr. Henry found Complainant's handwritten messages regarding his work tasks performed over the weekend on the white board in the maintenance room.

Complainant was not scheduled and did not work on February 25 and 26, 2013. When he returned to work on February 27, 2013, he saw a handwritten message on the white board, stating "Don't write on my board." In response to Complainant's question regarding whether the statement on the white board was about him, Mr. Henry verified that it was. Complainant explained that the reason he used the white board to record his job tasks was because the maintenance communication book binding was being glued.

Mr. Henry then gave Complainant a copy of the OSHA Letter and asked him to sign. Mr. Roddy agreed to sign if he could read and get a copy of the Letter. Mr. Henry told him, "Just take this one."

Complainant went to Ms. Flanagan's office to talk to her about the white board issue, and Ms. Flanagan promised to talk to Mr. Henry. Complainant then left her office and started his regular morning work.

Subsequently, Mr. Henry went up to Ms. Flanagan's office and told her that Mr. Roddy was insubordinate. During the conversation, she told him, "[Y]ou have justification, if you want to terminate his employment for insubordination you can do that."

Mr. Henry left, went downstairs, and called Mr. Roddy into his office. Mr. Henry instructed Complainant to follow him to pound some rocks into the ground to level a grassy area close to where the Club workers were backfilling a trench dug for a new gas line.

Roddy grabbed half of an ʻōʻō bar, a construction tool, out of a bucket. At that point, Mr. Henry referred to Mr. Roddy as a "Nigger." When Complainant asked Mr. Henry what he said, Mr. Henry responded, "Are you being insubordinate? If so, leave your keys on the table and get off the property, or follow me."

Mr. Henry started running out the door and up a small incline outside the office door. Mr. Roddy followed Mr. Henry but stopped before the incline. Mr. Roddy turned, returned into the office, and put the ʻōʻō bar back. After Mr. Henry ran across the top of the incline, he turned and looked back at Mr. Roddy.

Complainant returned to Ms. Flanagan's office and told her what happened. Ms. Flanagan said that if Mr. Henry told Complainant to put his keys down and get off the property, he should.

Mr. Roddy left Ms. Flanagan's office, changed his shirt, collected his personal items, and punched out. As Mr. Roddy was leaving, the police arrived and arrested him.

Prior to leaving the premises on February 27, 2013, Complainant was not terminated from his employment with the Club.

However, on February 28, 2013, the Club issued an Employee Notice of Termination (Termination Notice) to Mr. Roddy indicating that he was given a "Final Warning," and the type of offense was designated "Violation of Company Policies." The Notice further stated:

> Eldon Henry came into my office and told me Steven Roddy had been insubordinate by auguring [sic] with him about maintenance policy. He was reported as being loud and gestured with his finger in Eldon's face. I authorized the termination. After verbally notifying Steven of his termination an incident occurred which required police action. Termination documents could not be present [sic] to employee because of his arrest and are being mailed with his final paycheck.

On March 20, 2013, Mr. Roddy filed a Whistleblower Application with the DLIR alleging termination in retaliation for filing complaints with the Club management and OSHA regarding the safety violations.

On May 23, 2013, after conducting an investigation, Chao notified both Complainant and The Oahu Club of HIOSH's conclusion that Mr. Roddy was terminated for legitimate business reasons and that his claim that his termination was because of his safety complaint could not be sustained. The HIOSH Determination Letter stated, in pertinent part that:

> We received your letter on February 28, 2013, regarding the discrimination complaint you filed with the Department of Labor and Industrial Relations' Hawaii Occupational Safety and Health Division (HIOSH). You allege that your employer, The Oahu Club, violated Chapter 396-8(e), Hawaii Revised Statutes (HRS) and that you were terminated by your employer for reporting unsafe conditions of the work place to and OSHA.
>
> In determining whether or not a prima facie case exists, four (4) elements must be considered: (1) protected activity; (2) employer knowledge; (3) adverse action; and (4) a causal link between all the elements. All of the elements must be met to constitute a violation of Section 396-8(e), HRS.
>
> HIOSH has thoroughly investigated your complaint and had [sic] determined that your termination was for an event unrelated to your complaint about Safety [sic] and health hazards. The employer has provided a legitimate business reasons [sic] for your termination. You were terminated for insubordination and threatening your supervisor with a metal rod.

The investigation found that there is insufficient evidence to support that you were retaliated because of your engagement in the protected activity.

Based on the above reasons, the burden of establishing that you were discriminated against in violation of Section 396-8(e), HRS, cannot be sustained. Accordingly, we are closing your complaint.

We appreciate you bringing this complaint to our attention and thank you for your concern to ensure a safe work environment. Section 396-8(e), HRS, provides that employees who engage in protected activity, which may include filing complaints about safety and health, or, inquiring about a company's safety and health policies, be protected under the Statute. Should you encounter any discrimination in the future as covered under Section 396-8(e), please do not hesitate to file complaint with our office. Please be advice [sic] that you may request a review of this determination by filing a written request to:

HIOSH Administrator
830 Punchbowl Street #423
Honolulu, HI 96813

Your written request in this matter must be received by June 13, 2013, within 20 calendar days from receipt of this letter.

II. CONCLUSIONS OF LAW

If it be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

HRS § 396-11(h) provides:

The appeals board shall afford an opportunity for a de novo hearing on any notice of contest except where rules require a formal hearing at the departmental level, the proceedings of which are required to be transcribed, in which case review before the appeals board shall be confined to the record only.

In this case, in accordance with the relevant Hawaii Administrative Rules § 12-57-1 *et. seq.* implementing HRS § 396-8(e), "a formal hearing at the departmental level, the proceedings of which are required to be transcribed" was not required. Accordingly, the Board review is required to be a *de novo* hearing on the Notice in this case.

In the present Complaint, Mr. Roddy alleges that the Respondent discharged and discriminated against him in retaliation for filing complaints with The Oahu Club management and OSHA regarding safety violations. The relevant statutory provision, HRS § 396-8(e)(3) provides as follows:

> (e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:
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> ***
>
> (3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or cause 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[.]

In Skellington v. City and County of Honolulu, Kapolei Fire Station, et. al., Case No. OSAB 97-015 (Discrimination Complaint) (March 23, 2001) (Skellington Order), the Hawaii Labor and Industrial Appeals Board (LIRAB),[ii] in holding that the Respondent City discriminated against the complainant in that case in retaliation for filing a HIOSH complaint in violation of HRS § 396-8(e), applied the traditional burden shifting analysis employed by both federal and Hawaii state courts in civil rights cases.[iii] The LIRAB articulated that analysis as follows:

> Retaliation
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> The burdens of proof applicable to establishing a retaliation claim have been described as follows:
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> > [O]nce the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to defendant to articulate a legitimate, nonretaliatory explanation for its decision. If the defendant carries this burden satisfactorily, the burden shifts back to the plaintiff to show that the alleged explanation is a pretext for impermissible retaliation.
>
> Prima Facie Case
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> > 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 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. (Citation omitted)

Id. at *8-9. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). *See also*: Lales v. Wholesale Motors Co., 133 Hawaii 332, 356-57, 328 P.3d 341, 365-66 (2014) (Lales); Schefke, 96 Hawaii at 425, 32 P.3d at 69.

In a footnote to a subsequent Order No. 381 in Makakoa v. Aloha Petroleum, Ltd., Case No. OSH 2009-4 (Discrimination Complaint) (March 23, 2010), the Board further clarified that burden of proof, stating:

> The 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."

Id. at 2, n. 1 (citations omitted); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (Burdine).

Regarding the initial burden, the Board holds that similar to the Skellington complainant, Mr. Roddy has unequivocally established a *prima facie* case for retaliation based on the record in this case and the reasonable inferences therefrom, which shows that: 1) he engaged in the protected activities of reporting his safety concerns to the Club management, including his supervisor, and by filing the OSHA complaint on or about February 19, 2013 that included lack of adequate lighting and an eye wash station for the employees handling chlorine; 2) he was terminated by the Club on or about February 28, 2013; and 3) this termination occurred within a day after the Complainant returned to work following the Club's receipt of the OSHA Letter on February 25, 2013. In proving the third element of the *prima facie* case of retaliation, the causal link may be inferred from timing alone where an adverse employment action follows on the heels of protected activity. Davis v. Team Electric Co., 520 F.3d 1080, 1094 (9th Cir. 2008) (Davis); Pasatino v. Johnson & Johnson Consumer Products, 212 F.3d 493, 507 (9th Cir. 2000); Yatzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).

Nondiscriminatory Reason

Accordingly, because Complainant has established a *prima facie* case of discrimination, the burden shifts to the Respondent Oahu Club to articulate a legitimate, nonretaliatory explanation for its decision. "The [respondent] need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the [respondent's] evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the [respondent] must clearly set forth, through the introduction of admissible evidence, the reasons for the [respondent's] rejection. The explanation provided must be legally sufficient to justify a judgment for the [respondent]. If the [respondent] carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." Burdine, 450 U.S. at 255. "The [respondent's] explanation of its legitimate reasons must be clear and reasonably specific." *Id.* at 258.

Based on Ms. Flanagan's testimony and the Termination Notice, Respondent's proffered legitimate, nonretaliatory reason for its decision to discharge Mr. Roddy was his insubordination for arguing with Mr. Henry regarding the maintenance policy, being loud and gesturing with his finger in Mr. Henry's face.

Pretext

Consequently, as the Club articulated a legitimate nonretaliatory reason for the termination, the burden shifts back to Mr. Roddy to show that the alleged explanation is a pretext for impermissible retaliation. A [complainant] may establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256; Lales, 133 Hawaii at 358, 329 P.3d at 367 (*citing* Burdine, 450 U.S. at 256); Shoppe v. Gucci Am., Inc., 94 Hawaii 368, 379, 14 P.3d 1049, 1060 (2000) (*citing* Burdine, 450 U.S. at 256).

Employees may rely on both circumstantial and direct evidence because "[d]efendants who articulate a nondiscriminatory explanation for a challenged employment decision may have been careful to construct an explanation that is not contradicted by direct evidence." Davis, 520 F.3d at 1091 (*citing* Cornwell v. Electra Central Credit Union, 493 F.3d 1018, 1029 (9th Cir. 2006)). In those cases where direct evidence is unavailable, however, the plaintiff may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable. Such evidence of "pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998); Kasperzyk v. Shetler Sec. Servs., 2015 U.S. Dist. LEXIS 37953, at *22 (D. Cal. 2015). "Weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's

proffer" can give rise to an inference of pretext. So can deviations from standard procedures, the sequence of occurrences leading up to a challenged decision, and close temporal proximity between relevant events." Harrington v. Aggregate Industries-Northeast Region, Inc., 668 F.3d 25, 33 (1st Cir. 2012); Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997); Olson v. GE Astrospace, 101 F.3d 947, 951-52 (1996). Applying the foregoing factors to the record, the Board determines that the Club's proffered explanation is unworthy of credence and cannot be credited for the following reasons.

As stated, the Club's proffered explanation established by Ms. Flanagan's testimony is that Mr. Roddy's termination was for insubordination for being physically and verbally abusive in a confrontation over the white board in the maintenance office. In addition, the Termination Notice confirms that Ms. Flanagan's authorization for Complainant's termination was for being insubordinate "by auguring [sic] with him about the maintenance policy. He was reported as being loud and gestured with his finger in Eldon's face." While the Termination Notice also references "an incident occurred which required police action," the Termination Notice states that this incident occurred "[a]fter verbally notifying Steven of his termination." Therefore, the Termination Notice distinguishes between the alleged white board incident and the alleged 'ō'ō stick incident and clarifies that the 'ō'ō stick incident occurred subsequently and in addition to the alleged insubordination that was the basis for the termination.

However, Ms. Flanagan's testimony and the Termination Notice statement regarding the proffered legitimate nondiscriminatory reason of insubordination for the alleged white board incident are simply not convincing; and significantly, are unsupported by the other evidence in the record in this case. First, this proffered reason of insubordination offered by Ms. Flanagan's testimony and the Termination Notice is contradicted by Mr. Henry's testimony. Regarding the alleged insubordination for the alleged white board incident, Mr. Henry testified that following the alleged white board incident and authorization from Ms. Flanagan[iv] to terminate Mr. Roddy for insubordination, he was "on the fence with it." He confirmed that he did not make the termination decision until after the alleged 'ō'ō stick incident. Second, this proffered explanation is in conflict with Mr. Henry's admission in his testimony that OSHA was more important to him than the white board. Third, the lapse in time between the alleged white board incident on February 27, 2013 and the Termination Notice on February 28, 2013 renders the proffered explanation of the insubordination for the white board incident not worthy of credence. In the context of this one-day time period in which the Club had Mr. Roddy arrested for the alleged 'ō'ō stick incident, and Ms. Flanagan also became undisputedly aware from Mr. Roddy that he made the OSHA complaint triggering the issuance of the OSHA Letter, this proffered explanation does not appear to be worthy of credence. Fourth, while the Termination Notice indicates that Mr. Roddy was given a "Final Warning," the record contains no evidence of any prior warnings being given to him regarding any misconduct, work problems or deficiencies, or disciplinary action. More specifically, there is nothing in the record showing that Mr. Roddy ever had a history of or had received warnings for insubordination, abusive conduct, or any

other work-related misconduct. In fact, in his testimony, Mr. Henry denied ever having insubordination problems with Complainant, conceding that "the way he [Mr. Roddy] had acted the short time before was not typical of his behavior." In addition, both Mr. Henry and Mr. Roddy agreed that prior to February 25, 2013, their relationship was not just a positive working relationship but a friendship. Mr. Henry described their relationship in his April 15, 2013 statement during the HIOSH investigation as, "until that day, I considered Steven Roddy a friend. We talked openly each day, we told jokes, laughed and we worked together to groom the younger workers to be an important part of society." Nonetheless, Mr. Henry and Ms. Flanagan confirmed in their testimony that from their initial conversation regarding Complainant on February 27, 2013, on the first day that Mr. Roddy returned to work after Mr. Henry received the OSHA Letter, Ms. Flanagan authorized Mr. Henry to terminate Mr. Roddy for this one alleged incident of insubordination.

Even if the alleged ʻōʻō stick incident is, as Mr. Henry indicated, deemed the reason, in whole or part, for Complainant's termination, Mr. Henry's testimony, and other statements in the record are not consistent or credible regarding this alleged threat and attack. In his testimony, Mr. Henry stated that after Mr. Roddy approached him with the ʻōʻō stick:

> ...I ran from the building. He followed me, chased me to the doorway. The video shows me running, shows him in the doorway with the piece of steel.
>
> ***
>
> Well, I ran. I stumbled, fell as my—trying to get away. I got back up, and I ran until I felt like I was far enough away. I looked back and he wasn't chasing me anymore.
>
> Then he hollered to me that "You're not so smart now, are you?" I moved further away, I called the police.

In his April 15, 2013 statement made during the HIOSH investigation, Mr. Henry's description of stumbling and falling on the incline included an additional threat by Mr. Roddy with "the weapon," stating:

> I stumbled and fell on the small incline outside the maintenance shop. As I was getting up off the ground I looked to see Steven Roddy about six feet from me with the weapon raised over his head ready to strike me. For a moment I thought to myself that I might be killed right then. I was able to get up and I ran across the stone area. Steven Roddy stopped outside the maintenance shop and stated "you are not so fucking smart now are you [?]"

However, in further contrast, Mr. Henry confirmed that a video of the incident shows that as he runs out of the maintenance office, Mr. Roddy stopped at the doorway holding the ʻōʻō stick. The video

explicitly shows Mr. Henry running out the maintenance office doorway, up and across the incline without stumbling or falling before turning back to look at the maintenance office doorway. Most significantly, the video does not show Complainant standing over him with the ʻōʻō stick. Rather, it very clearly shows that Mr. Roddy follows Mr. Henry out of the office doorway carrying the ʻōʻō stick. However, as Mr. Henry continues to run up and across the incline, Mr. Roddy stops before the incline and then turns around and goes back inside the office door. Undeniably, Mr. Henry's testimony, his April 15, 2013 statement, and the video present not only disparate but implausible accounts of the ʻōʻō stick incident rendering these statements unreliable. Further, Mr. Roddy's stopping and returning to the maintenance office is obviously inconsistent with any intention to threaten or attack Mr. Henry as has been alleged and implied. Finally, as indicated above, there is no evidence that Complainant had any history of or exhibited any capacity for the alleged threatening and abusive conduct.

On the other hand, the Board finds Mr. Roddy's testimony and statements regarding the white board and the ʻōʻō incidents and his argument that he was "railroaded" not only to be more credible but also corroborated by the record in this case. Mr. Roddy's testimony and his March 20, 2013 statement to HIOSH regarding both the white board and the ʻōʻō stick incidents are consistent. Further, regarding the white board incident, the undisputed evidence shows that until Mr. Henry instituted the new "policy" on February 27, 2013, the white board had been used by both Mr. Henry and the maintenance employees for communicating regarding work schedules, supply needs, and job responsibilities and status. Mr. Roddy's communications found by Mr. Henry on the white board were not a deviation from this manner in which the white board was used prior to February 27, 2013. While Mr. Henry deemed these communications "meaningless," there is no dispute that these white board writings recorded Complainant's work tasks performed on February 23 and 24, 2013. Moreover, Mr. Roddy's use of the white board to communicate regarding his job tasks was necessitated by the communication logbook being repaired. Complainant maintains that he was "railroad[ed]" because, "It's not over a whiteboard." He argues that he couldn't see why Mr. Henry was getting so upset over a white board that can be easily erased. The Board concurs. Even Mr. Henry conceded that he considered OSHA more important than the white board. Lastly, Mr. Roddy's testimony that he was requested by Mr. Henry to follow him to pound and level the grassy area near the trench for the new gas line was never directly controverted and the video submitted is consistent with Complainant's testimony and statements regarding that ʻōʻō stick incident.

The Board also concludes that the record does not sustain Mr. Henry and Ms. Flanagan's position that they were unaware of, never asked, and did not care who made the OSHA complaint. There is no dispute, first of all, that no other Club employees raised safety concerns with the Club management. Further, after receipt of the OSHA Letter, the record shows that Mr. Henry treated Complainant differently from the other employees. For example, while Mr. Henry denies ever raising the OSHA Complaint with Complainant on February 27, 2013, his April 15, 2013 statement to HIOSH describes the extensive discussion that he had with all of the other maintenance employees after his receipt of the OSHA Letter:

> The first thing that I did after the phone call was post the discrepancies for all of my employees to read and initial that they had read and understood the write-ups. This letter was also available for Stephen Roddy to read and initial on his next day at work. Then I talked to those employees on hand and explained that OSHA was a safety-oriented organization and that their goal was to assist organizations like ours to be as safety conscience as possible. I was surprised to find that one of my employees did not know what OSHA was. I went on to tell them that this was a good thing and not to be frowned on or ignored. Safety is very important to me and I have actually have [sic] set up safety programs for several construction businesses in my past including the U.S. Air Force. I went on to explain to my employees that sometimes we overlook day-to-day situations involving safety and it is helpful to have an outside agency look things over. I did not ask at any time if they knew who reported the violations to OSHA nor asked if any one of them reported it. At no time did I even complain about the OSHA letter to any employee. I actually went the other direction with the whole situation.

In addition, while Mr. Henry denies raising and requesting that Mr. Roddy sign the OSHA Letter on February 27, 2013, the above statement and his testimony verify that the other employees were requested "to read and initial that they had read and understood the write-ups." If the other employees were requested to read and sign and the Complainant was not, then he was treated differently for this reason. The record establishes, however, that the contrary was true. Mr. Roddy was treated differently because he was requested to sign the OSHA Letter while the other employees were not. The Board's finding relies on both Mr. Roddy's testimony and his April 28, 2013 statement to HIOSH but also on the two different copies of the OSHA Letter submitted by the parties. The copy of the OSHA Letter submitted by the Complainant was obtained on February 27, 2013 and contained signature lines for each maintenance department employee, including Complainant, to initial. However, Complainant's copy shows that the only signature on that copy was from Mr. Henry. In contrast, the Club submitted a copy of the OSHA Letter that appears to have been made after Complainant left the Club on February 27, 2013. This copy had no signature line for Mr. Roddy and was signed not only by Mr. Henry but by all of the maintenance department employees. These disparate copies of the OSHA Letter validate Complainant's testimony and statement that on February 27, 2013, Mr. Henry treated Complainant differently by singling him out to initial the OSHA Letter while not making a similar request of the other maintenance department employees. Mr. Henry offered the explanation that the other employees failed to sign off prior February 27, 2013 because "[e]veryone works different shifts, and has different days off." However, this explanation is incongruous with his statement set forth above that prior to February 27, 2013, he discussed the OSHA Letter with the other employees and "post[ed] the discrepancies for all of my employees to read and initial that they had read and understood the write-ups," and with his testimony that "it [OSHA Letter] means a lot to sign it. OSHA's very important."

Finally, the record belies Mr. Henry's statement that both he and Ms. Flanagan were unaware of any OSHA violations. In that same April 15, 2013 statement, Mr. Henry touted his prior experience setting up safety programs for several construction businesses and the United States Air Force and that "Safety is very important to me[,]" and further conceded that he considered the violations noted in the OSHA Letter "legitimate." In addition, as the maintenance department supervisor and as the Club manager, both Mr. Henry and Ms. Flanagan were obviously present on the Club premises on a regular basis and responsible in some measure for any existing safety concerns. The Board concludes that it is simply not credible for these two management officials to maintain that they were unaware of any OSHA violations on these premises. Mr. Henry's admissions that he recognized the seriousness of the OSHA Letter and the violations as "legitimate" constitute sufficient evidence of his awareness of the OSHA violations. In contrast, Mr. Roddy's testimony and statements that he reported his safety concerns regarding the Club premises to OSHA are incontrovertible based on the February 20, 2013 email sent by him to Lemke. While both Mr. Henry and Ms. Flanagan deny that Complainant raised his safety concerns with them, as discussed fully above, their treatment of him following the receipt of the OSHA Letter contradicts that denial. In addition, it is reasonable to infer, based on the evidence that Mr. Roddy filed the OSHA complaint and set forth numerous safety concerns with great specificity in the email to Lemke, that he previously made Mr. Henry aware of those safety concerns.

In short, the Board finds Mr. Henry and Ms. Flanagan's testimony in this case was simply not credible and not supported by the evidence in the record. Rather, the Board determines based on Mr. Roddy's credible testimony, supporting evidence in the record, and for all of the reasons set forth above that the Complainant has made the requisite showing that the Club's proffered explanation was a pretext for impermissible retaliation. Consequently, the Board holds that The Oahu Club violated HRS § 396-8(e).

III. REMEDIES AND ORDER

In accordance with the foregoing, the Decision of the Director, dated May 23, 2013, is reversed.

Regarding the appropriate remedies in this case, the relevant statutory provisions are as follows. HRS § 396-11(i) permits the Board to "affirm, modify, or vacate the citation, the abatement requirement therein, or the proposed penalty or order or continue the matter upon terms and conditions as may be deemed necessary, or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate." HRS § 396-8(e)(6), provides that, "If upon investigation the director determines that the provisions of this subsection have been violated, the director shall order the employer to provide all appropriate relief to the employee, including rehiring or reinstating the employee to the former position with back pay and restoration of seniority." (Emphasis added) HRS § 396-10(h) further provides that, "Any employer who received

an order for violation under section 396-8(e) may be assessed a civil penalty of not more than $1,000 for each violation. (Emphasis added)

Accordingly, the Board renders the following Restitution and Penalty to make Mr. Roddy whole pursuant to these provisions. Based on the testimony of the parties in this case, the Board finds that reinstatement of Complainant to his former position with The Oahu Club is not appropriate. Therefore, Life Port Hawaii Co. Ltd dba The Oahu Club is ordered:

1. To pay Mr. Roddy within 20 calendar days of receipt of this Decision and Order, the sum of $108,145.00 (one hundred eight thousand one hundred forty-five dollars) in lieu of his reinstatement with full back pay, including overtime, and any benefits that would have been provided by The Oahu Club except for his termination, including any vacation, sick leave, or bonuses for the period from February 28, 2013 to the date of this Decision and Order. This sum shall not be offset or reduced by any unemployment benefits that Mr. Roddy may have received based on his termination by The Oahu Club and/or any salary that Mr. Roddy may have earned with any other employer following that termination.

2. To notify the Board when full compliance with the payment of the sum of $108,145.00 (one hundred eight thousand one hundred forty-five dollars) pursuant to paragraph 1 has been made;

3. Expunge Mr. Roddy's personnel and other department records of any and all unfavorable references related to his termination from employment with The Oahu Club;

4. Post the Notice to Employees in a conspicuous place in the work area for convenient access and review by The Oahu Club employees in The Oahu Club's main office for a period of 60 days; and

5. Pay $1,000 as a civil penalty for the violation of HRS § 396-8(e) to the Department of Labor and Industrial Relations within 20 calendar days from receipt of a decision on this contest. Employer shall coordinate with HIOSH on the appropriate method or manner of payment.

DATED: Honolulu, Hawaii, June 18, 2015.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

HAWAII LABOR RELATIONS BOARD STATE OF HAWAII

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to

Stephen C. Roddy
Ms. Robin Flanagan
Herbert B.K. Lau, Deputy Attorney General

NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under Hawaii Occupational Safety and Health Law are posted.

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[i] In some documents in the record, Mr. Foster is also referenced as "Rick Forte." The Board will refer to Mr. Foster as "Rick Foster," for purposes of this decision.

[ii] At the time of this decision, the LIRAB was the "appeals board" as defined in HRS § 396-3 that was authorized to review HIOSH denials of a complaint of discrimination filed by an employee pursuant to HRS § 396-8(e). In the Skellington case cited, however, the Board was acting as hearing officer for the LIRAB on this written notice of contest filed by the Respondent City and County of Honolulu. Skellington Decision and Order, at *1.

[iii] In construing HRS § 378-2(2) and (3), the Hawaii Supreme Court has held that they may look to interpretations of analogous federal laws by the federal courts for guidance. Schefke v. Reliable Collection Agency, Ltd., 96 Hawaii 408, 438, 32 P.3d 52, 69 (2001).

[iv] There may be an issue regarding whether Ms. Flanagan or Mr. Henry had the authority to terminate Mr. Roddy. While Ms. Flanagan was The Oahu Club general manager, who authorized Mr. Henry to discharge Mr. Roddy for the alleged insubordination for the white board incident, Mr. Henry was Complainant's supervisor. However, the Board finds that there is no dispute that Mr. Henry did not discharge Mr. Roddy and Ms. Flanagan was the general manager of The Oahu Club, who signed the Termination Notice and authorized the discharge for the alleged insubordination for the white board incident. Hence, the Board concludes that she was the manager who was authorized and actually made the decision to terminate the Complainant.