

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of, )  
 STEVE MALCOLM, )  
                   Complainant, )  
                   ) )  
 vs. ) )  
                   ) )  
 COUNTY OF HAWAII, )  
 DEPARTMENT OF PARKS AND )  
 RECREATION, )  
                   Respondent, )  
                   ) )  
 and ) )  
                   ) )  
 DIRECTOR, DEPARTMENT OF LABOR )  
 AND INDUSTRIAL RELATIONS, )  
                   Appellee. )

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CASE NO. OSAB 93-115(H)

FILED  
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 STATE OF HAWAII  
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DECISION AND ORDER

This Occupational Safety and Health case is on appeal by STEVE MALCOLM, Complainant, from the decision of the DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, dated August 23, 1993, dismissing his complaint of discrimination filed pursuant to Hawaii Revised Statutes (HRS) §396-8(e).

Pursuant to a pre-trial order filed on August 30, 1994, the issue to be decided on appeal is whether the Director improperly dismissed Complainant's complaint of employment discrimination filed pursuant to HRS §396-8(e).

For the reasons stated below, we affirm the Director's dismissal of the discrimination complaint.



## FINDINGS OF FACT

1. Complainant began employment with COUNTY OF HAWAII, DEPARTMENT OF PARKS AND RECREATION ("Respondent"), as a "tree trimmer/truck and ladder operator," on June 1, 1990. Complainant's position was identified as HC 1416.

2. The duties of HC 1416 required Complainant to climb and trim and/or "de-nut" coconut and other palm trees. Some of these trees grew to a height of over seventy feet. To trim them, Complainant could either use a truck and retractable ladder to reach the branches or fronds. If the fronds or branches could not be accessed by truck and ladder, then Complainant had to climb the trees himself and trim them with a machete. Complainant was required to wear safety straps when climbing trees.

3. Complainant was on probationary status between June 1, 1990 and November 30, 1990, a six month period.

4. For the first six months of his employment, Claimant climbed and trimmed trees and performed his duties without complaints. He received an outstanding job evaluation at the end of his probationary period for his performance in the HC 1416 position.

5. In October of 1990, Respondent was in the process of reallocating several positions. HC 1416, the position for which Complainant was hired, was reclassified from "tree trimmer/truck and ladder operator" to "tree trimmer/heavy truck

operator" and upgraded from pay grade WB-6 to WB-7. Position HC 2604 was also reallocated and reclassified from "equipment operator II" to "tree trimmer/equipment operator II" with a downgraded pay grade from WB-9 to WB-8.

6. The reallocation of positions received final approval on May 12, 1992, and made retroactive from November 1, 1990.

7. HC 2604 was, at some point in time, left vacant when the person who held that position became unavailable.

8. Since HC 2604 was vacant, beginning January of 1991, Respondent temporarily assigned Complainant to fill position HC 2604 for intermittent periods of time. Since the pay grade for HC 2604 was higher than the pay grade for HC 1416, Complainant earned more whenever he was on temporary assignment to position HC 2604.

9. The HC 2604 position required Complainant to climb and trim coconut and other palm trees, and to perform various other duties.

10. Complainant's assignment to HC 2604 was temporary. He was not entitled to work in that job on a permanent basis.

11. On January 1, 1992, Complainant advised his supervisor that Respondent's practice of allowing tree climbers to use machetes to trim branches when they are supported by a safety strap violated §12-94-9(c) of the Hawaii Occupational Safety and Health Administrative Rules.

12. Some time in January of 1992, Complainant refused to climb coconut trees.

13. By letter dated January 14, 1992, Respondent asked Complainant to provide medical certification to show that he is, for some medical reason, unable to climb trees. Respondent reminded Complainant that he was hired to be a tree trimmer, the duties of which required him to climb trees. Respondent advised Complainant that any unexcused refusal to perform the required job duties could result in disciplinary action or termination.

14. Because of his refusal to climb trees, Respondent placed him on restricted duty.

15. Complainant received a satisfactory job performance evaluation on June 1, 1992, for the work period of June 1, 1991 to May 31, 1992. The evaluation noted that while Complainant had refused to climb trees, he performed all other duties satisfactorily.

16. On August 13, 1992, Complainant saw Dr. Robert Bloomgarden, a psychiatrist. By letter dated August 14, 1992, Dr. Bloomgarden informed Respondent that Complainant was having a phobic reaction to tree climbing. He recommended that Complainant be excused from this duty.

17. On September 1, 1992, Complainant, who was at the time on temporary assignment in position HC 2604, was reassigned back to his regular position, HC 1416. Respondent reassigned Complainant back to the lower paying position because it could

not justify keeping him at the higher paying HC 2604 position when he could not, for medical reasons, perform all of the required duties of that position.

18. After Respondent reassigned Complainant back to HC 1416, it assigned Thomas Mattos to temporarily fill HC 2604.

19. Complainant did not report to work after September 1, 1992.

20. Some time prior to September 1, 1992, Complainant submitted a job application to fill the HC 2604 position on a permanent basis. The application was late, but Respondent accepted it for consideration. Because of Complainant's failure to return to work after September 1, 1992, Respondent kept the application process open and postponed Complainant's interview and performance testing for the HC 2604 position until October of 1992.

21. By letter dated October 8, 1992, Respondent advised Complainant that it needed to fill the HC 2604 position and could no longer hold off his interview and testing. Respondent acknowledged that it was aware of Complainant's medical restrictions regarding tree climbing and needed to know from Complainant if he was still interested in the job. Respondent asked Complainant to notify the office by October 26, 1992, whether he intended to follow through with his job application. If so, Complainant was asked to appear for an interview on November 12, 1992, and to bring with him a medical

release from his physician releasing him back to the duty of climbing trees. Respondent informed Complainant that if it did not hear from him by October 26, 1992, it will assume that he is no longer interested in pursuing the HC 2604 position.

22. On October 9, 1992, Complainant filed a claim for workers' compensation benefits, alleging that he suffered a psychiatric injury on September 1, 1992.

23. Respondent did not hear from Complainant by October 26, 1992.

24. On October 27, 1992, Complainant filed a written complaint to the Hawaii Occupational Safety and Health Division of the Department of Labor and Industrial Relations ("HIOSH"), alleging that Respondent had violated certain occupational safety and health standards.

25. On December 1, 1992, Respondent selected Thomas Mattos to fill the HC 2604 position on a permanent basis.

26. On June 14, 1993, Complainant filed a discrimination complaint with HIOSH, pursuant to HRS §396-8(e). Complainant alleged that he was discriminated against when Respondent "demoted" him on September 1, 1992, from HC 2604 to HC 1416, in retaliation for his refusal to work under alleged unsafe employment practices.

27. After an initial screening, HIOSH dismissed the discrimination complaint for insufficient evidence.

28. Complainant's workers' compensation case was settled by a Stipulated Compromise and Release Agreement ("SCRA") which was signed by Complainant on January 20, 1994, and subsequently approved and ordered by the Board. Under the SCRA, Complainant agreed not to file or pursue any complaint or claim against Respondent arising out of the September 1, 1992 incident or his employment with Respondent, in return for a sum of \$33,250.00.

#### CONCLUSIONS OF LAW

We affirm the Director's dismissal of Complainant's discrimination complaint, filed pursuant to HRS §396-8(e), for the following reasons:

A. Complainant's Discrimination Complaint is Barred by the SCRA

According to the terms of the SCRA, Complainant agreed not to pursue any claim or complaint against Respondent arising out of the September 1, 1992 incident or his employment with Respondent. As the record shows, Complainant's discrimination complaint arose out of the September 1, 1992 reassignment and/or his employment with Respondent. His complaint is, therefore, barred by the SCRA.

B. Complainant's Discrimination Complaint was Untimely

Prior to its amendment in 1993, HRS §396-8(e)(3) required discrimination complaints under this section to be filed within thirty days of the alleged act of discrimination. The

alleged act of discrimination in this case occurred on September 1, 1992. Complainant did not file his complaint of discrimination until June 14, 1993, well past the thirty days limitation period. For this reason, we conclude that Complainant's complaint of discrimination was untimely.

C. There is Insufficient Evidence of Discrimination

To sustain a complaint under HRS §396-8(e), Complainant must show that he was discharged, suspended, or otherwise discriminated against in terms and conditions of employment by reason of his failure or refusal to engage in any unsafe employment practices under chapter 396.

In this case, Complainant contended that he was discriminated against when Respondent "demoted" him from HC 2604 to HC 1416. We disagree.

Complainant has presented no evidence that he has a right or claim to be placed in HC 2604, either on a continued temporary basis or on a permanent basis. Complainant was temporarily assigned to HC 2604 at Respondent's discretion. His regular and permanent position, for which he was hired, was HC 1416. To be permanently placed in HC 2604, Complainant was required to apply for the job, be interviewed, and pass certain tests. Complainant was given the opportunity to be interviewed, but he failed to complete the application process to qualify for permanent placement in HC 2604.

Furthermore, Complainant has not shown that Respondent's failure to maintain him in HC 2604 was in response to his refusal to engage in alleged unsafe employment practices. We have found that the September 1, 1992 reassignment was done because Complainant was on medically restricted duty and could not climb coconut trees. As the record shows, climbing trees was one of the required duties of HC 2604. Respondent had no reason to continue Complainant on temporary assignment at the higher paying HC 2604 position, when Complainant was unable to perform all of the required duties of that position. Furthermore, as discussed above, the reason that Complainant could not be considered for permanent placement in HC 2604 was because he failed to complete the selection process.

Our conclusion that Respondent did not discriminate against Complainant is further supported by our findings that Complainant's job application for HC 2604 was accepted for consideration prior to September 1, 1992, that Respondent kept the application process open for Complainant even though he did not show up for work after September 1, 1992, and that it held up his interview and performance testing until October of 1992 to give Complainant time to resolve his medical problems. If Respondent had discriminated against Complainant on September 1, 1992, then it had no reason to keep the application process open for him or to schedule an interview and testing for him in October of 1992.

For these reasons, we conclude that Complainant has failed to present sufficient evidence to show that Respondent had discriminated against him by reason of his refusal to engage in alleged unsafe employment practices.

Accordingly, the Director's dismissal was proper.

ORDER

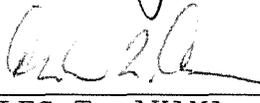
The Director's decision, dated August 23, 1993, is affirmed, in accordance with the foregoing.

Dated: Honolulu, Hawaii, \_\_\_\_\_

FEB 27 1996

  
FRANK YAP, JR., Chairman

  
CAROL K. YAMAMOTO, Member

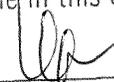
  
CHARLES T. AKAMA, Member

Steve Malcolm,  
Complainant

Frederick Giannini  
for Respondent

Herbert B.K. Lau  
for the Director, Department of  
Labor and Industrial Relations

I do hereby certify that the foregoing  
is a full, true and correct copy of  
the original on file in this office.

  
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NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.