

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

JAMES P. STONE,

Complainant-Appellant,

and

HAWAII AIR AMBULANCE
(HAWAII LIFE FLIGHT),

Respondent-Appellee,

and

DIRECTOR, DEPARTMENT OF
LABOR AND INDUSTRIAL
RELATIONS,

Appellee.

CASE NO. OSH 2011-10
DISCRIMINATION COMPLAINT

ORDER NO. 502

ORDER; AND NOTICE OF
FILING DEADLINES AND
HEARING

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On December 14, 2012, Complainant-Appellant James P. Stone (Stone) filed a Motion to Stay Proceedings Pending Disposition of Federal Occupational Safety and Health Administration Proceeding and a Motion for Leave to File Amended Pretrial Conference Statement with the Board. In Stone's motion to amend his Pretrial Conference Statement, he sought to include the following issue for trial:

1. Whether the Director lacked proper jurisdiction for this complaint due to federal preemption of Hawaii law and regulation by the Federal Aviation Act of 1958, 49 U.S.C. § 40103 et seq., the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, and the Surface Transportation Assistance Act, 49 U.S.C. § 31105.

On January 14, 2013, the Board conducted a hearing on the motions and indicated that the foregoing issue regarding jurisdiction should be addressed as a threshold matter and requested the parties to submit briefs on jurisdiction to the Board.

The Board reserved the right to schedule a hearing on the matter and denied both pending motions.

On February 19, 2013, Respondent-Appellee HAWAII AIR AMBULANCE (HAWAII LIFE FLIGHT) (HLF) filed a Motion in Support of Jurisdiction of the Hawaii Occupational Safety and Health Division with the Board. HLF alleged that on July 13, 2010, Stone filed a complaint with HIOSH claiming that he was wrongfully terminated from employment with HLF in retaliation for "speaking up on safety and legal concerns regarding [HLF] daily operations that may or may not have resulted extra [sic] expenses for the company" and detailed an incident in 2008 where Stone claimed that pilots were operating fuel trucks without a Commercial Driver's License (CDL), as required by the State Department of Transportation. HLF alleged that by letter, dated July 21, 2010, HIOSH notified HLF that Stone had filed a complaint alleging HLF discriminated against him in violation of HRS § 396-8(e). HLF also alleged that Stone filed a copy of the same complaint with the Federal Occupational Safety and Health Administration (OSHA) and OSHA informed HLF by letter, dated August 17, 2010, that Stone had filed a complaint alleging discriminatory employment practices in violation of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century (AIR21) 49 USC § 42121. HLF alleged that the HIOSH investigator found no nexus between the CDL complaint and HLF's decision to lay off Stone with six (6) other pilots after the merger. HLF alleged that by letter, dated November 24, 2010, Appellee DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director) denied Stone's complaint and Stone appealed the decision to the Board on December 9, 2010.

HLF contended that the federal law, Surface Transportation Assistance Act 49 USC § 31105 (STAA) which protects employees from discharge, discipline or discrimination for filing complaints related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, specifically provides that the federal law does not preempt Stone's state law complaint¹. HLF further contended that the only issue alleged in Stone's HIOSH complaint was the CDL issue which did not raise federal AIR 21 preemption issues and thus the issue was not before the Board in this appeal. In addition, HLF argued that the OSHA investigation has continued over two and one-half years with no final investigation report and that HIOSH had, and therefore the Board has, jurisdiction over the instant appeal and the case was not preempted by any federal law.

Also on February 19, 2013, the Director filed a Memorandum in Support of HIOSH Jurisdiction to Conduct its Discrimination Investigation with the Board. The Director contended that HIOSH had authority to conduct an investigation in the instant case under HRS § 396-8(e). The Director contended that one of the safety complaints Stone made to HLF regarded the requirement for a CDL and training in refueling for pilots and noted that other safety complaints regarding the operation of an aircraft when Stone encountered smoke in the cockpit of his aircraft were under the authority of the

Federal Aviation Administration (FAA) and not within HIOSH's authority to inspect or investigate. The Director stated that an issue has been raised whether HIOSH had authority to conduct a discrimination investigation in this case and whether its authority under State law was preempted by AIR21 and the STAA. The Director contended that his jurisdiction was not preempted under the STAA because there is a specific provision in the STAA which states that the STAA does not preempt any other state or federal law safeguarding against discrimination. The Director also contended that HIOSH has statutory authority to investigate a safety complaint pertaining to any employer on State property. The Director further contended that he has the authority to conduct a discrimination investigation under the state plan which is patterned after the federal Occupational Safety and Health Act, 29 U.S.C.A. § 651, et seq. In particular, HIOSH has the authority to address safety issues pertaining to training in hazardous materials. Thus, the Director contended that the Board must hold that HIOSH had jurisdiction to conduct a discrimination investigation under HRS § 396-8(e) and that the STAA does not preempt HIOSH's enforcement authority in the field of workplace discrimination.

On February 19, 2013, Stone filed a Memorandum Regarding Jurisdiction with the Board. Stone contended that HIOSH lacked the proper jurisdiction to unilaterally investigate and decide his complaint. Stone argued that it was not a question of federal preemption under AIR21 or STAA or state sovereignty but one of administrative authority - whether a state agency which is a creature of federal law and exists solely under the supervision of a federal authority can usurp from the federal administrative body in an area where the federal administrative body has explicitly retained authority. Stone alleged that he filed his whistleblower complaint with both HIOSH and federal OSHA and upon receiving Stone's complaint, HIOSH should have referred it to OSHA since the complaint arose under federal statutes. If HIOSH chose not to refer the Complaint to OSHA, at the least, Stone contended that HIOSH was obligated to inform OSHA and to coordinate its investigation with OSHA in order to protect both Stone's and Respondent's rights under the differing laws and HIOSH did neither.

Stone contended that under the terms of an Operational Status Agreement (OSA), the Director exacerbated HIOSH's error and injury to Stone by overstepping his limited authority in a case where federal OSHA has clearly claimed jurisdiction and that the Board risks the same error by failing to acknowledge federal OSHA's current investigation. Stone contended that federal OSHA has exclusive jurisdiction over his complaint under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660, Section 11(c) which prohibits the discharge or discrimination or retaliation against an employee because the employee exercised rights under the act. In addition, Stone contended that the United States Secretary of Labor delegated to OSHA the responsibility to investigate claims of retaliation by employees under the whistleblower provisions of 20 specific federal statutes, including the STAA and AIR21, and that AIR21 protects whistleblowers who have reported complaints regarding any violation of FAA laws, rules or regulations and STAA protects whistleblowers who filed complaints regarding

violations of commercial motor vehicle safety or security laws and regulations. Stone contended that OSA provides that HIOSH and federal OSHA retain concurrent enforcement authority over employment discrimination complaints, and federal OSHA will investigate any allegations of retaliation covered under the OSHA-administered whistleblower laws such as STAA and AIR21. Stone contended that HIOSH is subject to federal authority and supervision under the terms of the OSA² which provides that HIOSH and federal OSHA will retain concurrent enforcement authority over employment discrimination complaints pursuant to Section 11(c) of the Act and that employees may file with OSHA or HIOSH or both.³ Stone contends that under OSA, federal OSHA will investigate any allegations of retaliation covered under OSHA-administered whistleblower laws other than Section 11(c), such as STAA and AIR21 and if the authority is not clearly defined in the agreement, the Director and the Regional Administrator will resolve the issue.⁴

Stone contended he properly filed his complaint with both HIOSH and OSHA and since the Complaint arose under federal statutes, the investigation should have been handled by OSHA or at the least, HIOSH should have coordinated its investigation with OSHA. Stone argued that the question before the Board is whether the Director and HIOSH had the authority to unilaterally decide Stone's Complaint without consultation with federal OSHA. Stone requested that the Board rule that the Director lacked the proper jurisdiction to unilaterally dismiss Stone's Complaint and that the Board lacks jurisdiction to rule on the merits.

Stone also contended that he may suffer irreparable harm if the Board proceeds to a trial as the Board's findings may have preclusive effect. Stone argued that the Board should defer to federal OSHA and stay any ruling on the merits rather than be subject to being overturned by OSHA through a Complaint about State Program Administration (CASPA).⁵

On March 13, 2013, the Board conducted a hearing on the issue of jurisdiction and the parties had full opportunity to present further evidence and argument to the Board.

Based upon its review of the record, the Board finds that there are no facts in dispute that on July 14, 2010, Stone filed a discrimination complaint with HIOSH alleging he was wrongfully terminated for reporting safety concerns to management, including an incident in 2008 where Stone claimed that pilots were operating fuel trucks without a CDL or proper training, as required by the State Department of Transportation. On July 16, 2010, Stone filed an identical complaint with OSHA alleging that he was wrongfully terminated because of his reporting safety concerns.

By letter to Stone, dated July 21, 2010, HIOSH, by Tin Shing Chao, Manager, Occupational Health Branch, acknowledged receipt of Stone's complaint of discrimination pursuant to HRS § 396-8(e).

HRS Chapter 396 pertains to Occupational Safety and Health and HRS § 396-8(e) provides as follows:

(e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

- (1) No person shall discharge, suspend or otherwise discriminate in terms and conditions of employment against any employee by reason of:
 - (A) The employee's failure or refusal to operate or handle any machine, device, apparatus, or equipment which is in any unsafe condition; or
 - (B) The employee's failure or refusal to engage in unsafe practices in violation of this chapter or of any standard, rule, regulation, citation or order issued under the authority of this chapter;
- (2) Upon discretion of the director or request, names of complainants may be withheld from the employer;
- (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;
- (4) Any employee who believes that there has been a discharge or discrimination against the employee by any person in violation of this subsection may, within sixty days after the violation occurs, file a complaint with the

director alleging unlawful discharge or discrimination and setting forth the circumstances thereof;

- (5) Upon receipt of the complaint, the director shall investigate to determine if a discharge or discrimination in violation of this subsection has occurred;
- (6) 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;
- (7) Within ninety days of receipt of a complaint filed under this subsection, unless extended by the director, the director shall notify the employee of the final determination and any subsequent action the department will take to resolve the complaint; and
- (8) Nothing in this subsection shall preclude any employee or representative of an employee from simultaneously pursuing a cause of action for injunctive relief or any other remedy provided by law.

By letter dated August 17, 2010, Joshua B. Paul, OSHA Regional Supervisory Investigator, notified HLF that Stone filed a complaint with the office alleging discriminatory employment practices in violation of AIR21 and requested information from the company.

Thereafter, by letter dated November 24, 2010, the Director, by Ryan Markham (Markham), HIOSH Operations Manager, advised Stone that based on the information obtained during the course of the investigation, the evidence showed that Stone's termination was based on a legitimate business reason and therefore he was not terminated for filing a safety complaint. Accordingly, HIOSH closed the complaint and Markham stated that an appeal of the determination must be filed by letter to the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division. By letter to Markham, dated December 9, 2010, Stone appealed the determination that he was not discriminated against

and requested a thorough investigation into the case. On April 8, 2011, the Director transmitted Stone's appeal to the Board.

HRS § 396-11(e) and (g) provide for the review of the Director's decision and states as follows:

(e) Any employee or representative of employees may file a notice of contest of an order of the director denying a complaint of discrimination filed by an employee pursuant to section 396-8(e); provided that in each case the notice is filed within twenty days after receipt of the order by the employee.

* * *

(g) Upon receipt, the director shall advise the appeals board of any notice of contest.

Stone contended that OSHA asserted jurisdiction over his discrimination claims pursuant to AIR21 and STAA and produced a redacted copy of the first page of a Memorandum to File, dated September 27, 2011, regarding Case File Review, from the OSHA Regional Investigator citing AIR21 and STAA as a basis for jurisdiction, to support his arguments. Stone argued that the question before the Board was whether the Director and HIOSH had the authority to unilaterally decide Stone's Complaint without consultation with federal OSHA. Stone further requested that the Board rule that the Director lacked the proper jurisdiction to unilaterally dismiss his Complaint and that the Board lacks jurisdiction to rule on the merits of this case.

There is no dispute that OSHA has not yet completed its investigation of Stone's complaint. As such, the Board does not find Stone's arguments that HIOSH's jurisdiction was preempted by OSHA to be persuasive. Based upon a review of the record, HIOSH investigated Stone's claims of discrimination pursuant to HRS § 396-8(e) and Stone appealed HIOSH's determination to the Board pursuant to HRS § 396-11(e). The Board concludes that HIOSH had jurisdiction to investigate Stone's discrimination complaint under the applicable statutes and likewise, the Board has jurisdiction to review its determination. Any issues regarding the scope of HIOSH's investigation and whether the HIOSH investigator followed proper procedures for multiple claims involving both federal and state laws in determining whether Stone was discriminated under HRS § 396-8(e) remain for trial. Accordingly, the Board concludes that it has jurisdiction over this matter and establishes the following deadlines and schedule for trial.

NOTICE OF FILING DEADLINES AND HEARING

The deadline for filing the parties' final naming of witnesses is **May 1, 2013**. Each party shall file with the Board the original and four copies of its list of

witnesses it plans to call at trial, along with the witnesses' addresses and a brief summary of expected subject of their testimony, with a certificate of service to the other party, by this date. Each party shall also exchange any expert witness reports by this date.

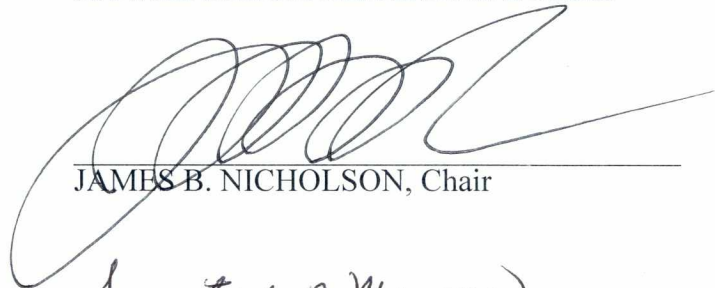
The discovery cutoff date is **June 3, 2013**. All other discovery and information requests, including depositions and document requests, must be completed by this date.

Trial in this matter is scheduled on **July 9 - 11, 2013 at 9:00 a.m.**, in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The trial will continue from day-to-day until completed. The parties shall submit to the Board four copies of all exhibits identified and offered into the record. Additional copies for opposing counsel shall also be provided.

Appropriate provisions of the Pretrial Order, Order No. 489, dated November 19, 2012, remain applicable.

DATED: Honolulu, Hawaii, March 28, 2013.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted at least five working days prior to the trial date. Further, you are required to furnish a copy of this Order to a duly recognized representative of the employees, if any, at least five working days prior to the trial date.

JAMES P. STONE v. HAWAII AIR AMBULANCE (HAWAII LIFE FLIGHT)
and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL
RELATIONS
CASE NO. OSH 2011-10
ORDER NO. 502
ORDER AND NOTICE OF FILING DEADLINES AND HEARING

Copies sent to:

Christopher Pan, Esq.
Corianne W. Lau, Esq.
Herbert B.K. Lau, Deputy Attorney General

ENDNOTES

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1. The STAA, 49 U.S.C.A. § 31105(f), provides as follows:

Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

2. OSA is an Operational Status Agreement under Section 18(e) of the Occupational Safety and Health Act of 1970 between the State of Hawaii and federal OSHA. While the parties do not dispute the existence or the terms of a September 12, 2012 OSA and Stone's counsel stated in his Declaration, dated February 19, 2013, that he attached a true and correct copy of the OSA, the Board notes that the document is not signed by the parties. Nevertheless, the OSA states as follows:

This procedural agreement implements the Federal Register Notice (77 FR 58488) which will announce the temporary suspension of Hawaii's 18(e) status, and is entered into between the Regional Administrator for OSHA, Region 9, and Director of the Department of Labor and Industrial Relations of the State of Hawaii as the State Designee, in response to a request for assistance from Department of Labor and Industrial Relations of the State of Hawaii (DLIR) to assure occupational safety and health protection for workers due to an insufficient number of trained safety and health personnel employed by the state.

This agreement does not terminate Federal approval of the Hawaii State Plan and does not affect the legal authority of Hawaii to carry on enforcement activities under the State Plan. The Hawaii State Plan, Chapter 396 Hawaii Revised Statutes, and all its regulations remain in effect.

3. The OSA states in item 4 as follows:

4. HIOSH will retain enforcement authority over complaints of alleged violations of Section 396-8(e) of the Hawaii Revised Statutes (employment discrimination). Federal OSHA will also continue to retain authority to investigate and enforce employment discrimination complaints under Section 11(c) of the Act. Pursuant to Section 11(c) of the Act, employees may continue to file occupational safety and health whistleblower complaints with federal OSHA, the state, or both.

However, in accordance with OSHA's long-standing policy, OSHA will generally continue to refer all employment discrimination complaints that are federally-filed by private-sector and non-federal public sector employees to HIOSH for investigation, a determination on the merits, and the pursuit of a remedy, if appropriate. If such complaints also contain allegations of retaliation covered under the OSHA-administered whistleblower laws other than Section 11(c), such allegations will be investigated by federal OSHA under those laws.

4. The OSA states in item 5 as follows:

5. If there arises any case or circumstance in which authority is not clearly defined in this agreement, the Director of the Department of Labor and Industrial Relations of the State of Hawaii as the State Designee and the Regional Administrator, or their designated representatives, will resolve the issue. While the issue is being resolved about who has authority (e.g., where quick response is required such as a Fatality, Catastrophe or Significant Event) OSHA shall respond to the situation.

5. Federal OSHA provides a review process for decisions made by HIOSH. OSHA state monitoring policies provide that anyone alleging inadequacies or other problems in the administration of the state's program may file a CASPA. The CASPA process provides a review mechanism to notify federal OSHA of specific issues, systemic problems or concerns about a state program. Upon receipt of a complaint, OSHA will review the state's investigative file and conduct other investigation to determine whether the state's investigation was adequate and that the determination was supported by appropriate available evidence.