STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of NUANCHUT CHAIGIT, Complainant, and USS MISSOURI MEMORIAL ASSOC., INC., Respondent, and DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Respondent.	CASE NO. OSH 2013-31 Discrimination Complaint ORDER NO. 575 ORDER DENYING RESPONDENT USS MISSOURI MEMORIAL ASSOC., INC.'S MOTION TO DISMISS COMPLAINANT'S APPEAL; AND NOTICE OF ADDITIONAL MOTION DEADLINES

ORDER DENYING RESPONDENT USS MISSOURI MEMORIAL ASSOC., INC.'S MOTION TO DISMISS COMPLAINANT'S APPEAL

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

On December 18, 2013, the Hawaii Labor Relations Board (Board) received a "Notice of Contest" from the Hawaii Occupational Safety and Health Division (HIOSH) of the determination by Respondent DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or DLIR), involving a discrimination complaint (Complaint) by Complainant NUANCHUT CHAIGIT (Complainant or Chaigit). The Notice of Contest stated, in part, that HIOSH was "unable to grant the complainant's request of a reconsideration of [HIOSH's] original determination, and are therefore forwarding this case to you."

Attached to the Notice of Contest was a copy of correspondence from Tin Shing Chao (Chao), Manager, Occupational Health Branch, DLIR, to Complainant, dated September 19, 2013, notifying Complainant that HIOSH "determined that [Complainant's] termination was for an event unrelated to [Complainant's] complaint about Safety and health hazards" and that HIOSH was closing the Complaint. The correspondence further stated, "Please be advised that you may request a review of this determination by filing a written request to [HIOSH Administrator] . . . Your written request in this matter must be received, within 20 calendar days from the receipt of this letter." A copy of the USPS Domestic Return Receipt attached to the Notice of Contest indicates that Complainant received this correspondence on October 5, 2013.

On January 27, 2014, the Board received a copy of correspondence from Complainant to the HIOSH Administrator, which indicates it was received by HIOSH on October 15, 2013. This correspondence stated, in part:

> This case was initially filed with the Federal OSHA system. At that time I requested a protection under federal law to protect me from retaliation actions against me. I was deeply concerned that when I filed this complaint on behalf of myself and other employees about safety and health hazards that eventually put me in disability, my superiors would turn against me and treat me as a whistle blower.
>
> This case was then transferred from a federal OSHA to HIOSH when I was terminated by the USS Missouri Association, Inc. in November, 2013 [sic] which was a month after I had informed the federal OSHA about the workplace safety issues. Therefore, I would like to request a hearing for a new review by the HIOSH Administrator.

At the initial conference/settlement conference held in this matter on January 27, 2014, the Board set the deadline to file dispositive motions on February 10, 2014; the deadline to file responses/objections on February 17, 2014; and the deadline to file replies on February 24, 2014. The motions hearing was scheduled for March 10, 2014.

On February 10, 2014, Respondent USS MISSOURI MEMORIAL ASSOC., INC. (Employer or Respondent) filed its Motion to Dismiss Complainant's Appeal (Motion to Dismiss). Although titled as a "Motion to Dismiss," the arguments and legal standards contained in the motion reflect a motion for summary judgment. The Motion to Dismiss

asserts: (1) Complainant cannot establish a prima facie case of retaliation; (2) the decision of the Employment Security Appeals Office bars Complainant from claiming that Respondent's reason for discharging her was pretextual or not legitimate; and (3) Complainant did not timely file a notice of contest pursuant to Hawaii Revised Statutes (HRS) § 396-11. The Declaration of Michael Yanagihashi (Yanagihashi), Director of Human Resources for Employer, and its accompanying exhibits attached to the Motion to Dismiss establish the following facts for purposes of the Motion to Dismiss:

> Before Complainant last reported to work at her job in the Employer's Human Resources Department on August 24, 2012, she expressed personal concern about noise and dust on the job.
>
> On September 17, 2012, Complainant sent an email to Yanagihashi from her personal account, in which she stated, *inter alia*, that she was unable to access her work email, and that she asked "Sonia" to give Yanagihashi her TDI package together with the doctor's industrial report.
>
> On September 19, 2012, Yanagihashi sent Complainant an email to her personal account, stating in part:
>
> > No one currently has access to you emails since you have not given anyone your pass word. So the email has been blocked. This is for your safety as well as the organization. This will also eliminate the question of whether accessing emails is work time or not.
> >
> > Right now all you should be doing is recuperating and doing what is necessary to get your eyes to be better. Have you seen improvements to your condition? An [sic] quality test was conducted on Thursday 9/13/12. They spent a lot of hours in your office and mine. The results will not be known until next week. I don't know why it takes so long.
> >
> > I will let you know the results when I am notified. In the meantime, take care of yourself. . . .
>
> On October 4, 2012, Yanagihashi sent Complainant another email, stating in part that he had not heard from her in a while; "Please find attached the result of the air quality test"; that "everything is in line with OSHA

standards"; and asking whether Complainant was planning to return and to let him know what her plans are or if she needed anything from him.

On October 18, 2012, Yanagihashi sent Complainant another email, stating that he was looking for the job description binder and to please let him know if she has it.

On October 22, 2012, Yanagihashi sent another email to Complainant, stating in part that he had not heard from her in a while; that he needed to access "Taleo" and whether there are any instructions on how to do that; and asking what her future plans were for herself and her job.

On November 5, 2012, Yanagihashi wrote a letter to Complainant, stating in relevant part that he had not heard from her in a while and she had not sent in an updated doctor's note; that the last doctor's note he received was dated September 12, 2012, which stated that she would be returning to work on November 5, 2012; that Complainant had not returned to work that day and had not answered any of his emails over the last 5 or 6 weeks; and that it would be his last attempt to contact her. The letter further asked Complainant to let Yanagihashi know what she intended to do about her job, and that if he did not hear from her by November 9, 2012, he would consider Complainant to have abandoned her job and terminate her employment.

On November 13, 2012, Employer received an Industrial Work Status Report from Dr. Joseph Dicostanzo, which stated Complainant was placed off work from November 7, 2012, to January 4, 2013.

On December 11, 2012, Yanagihashi wrote a letter to Complainant, stating in part that "Even if this doctor's note had come in earlier, I would not have been able to keep you [sic] position open for the extended period of time being that you have been out from work since August 24, 2012, and I have had a difficult time maintaining the work in the HR Department." The letter further stated that "Since there has been no direct contact from you, I have no other alternative but to confirm the termination of your employment[.]"

On March 28, 2013, Complainant filed an appeal with the Employment Security Appeals Referees' Office (ESARO) from the decision of the

Engineering, and Yanagihashi, about workplace health hazard, conditions of safety on the USS Missouri ship.

The "Investigator's File Page USSM 269-267 and 315-316 showed the header of the faxed Industrial Work Status Report form [sic] Kaiser Permanente that the fax went to Human Resources Department at USSMAI; and in "the comment section, Line 5 and 6, indicated that the doctor, Dr. Joseph Dicostanzo mentioned about OSHA 's/p air testing – patient to discuss test w OSHA' and 'Cont off until patient discusses w OSHA and fu opth.'"

"Investigator's File Page USSM 378- USDL OSHA's dashboard of complaint intake Dated October 12, 2012"; Investigator's File Page USSM 381-384 USDL OSHA's Notice of Alleged Safety or health Hazards Complaint Number 621271 Dated October 17, 2012"; and "Investigator's File Page USSM 317-354 Email Correspondence between Complainant and USSMAI's management and employees regarding safety and health hazard concerns and issues Dated from mid July 2012 to early September 2012."

Complainant brought up "numerous complaints from the employees regarding construction hazards which could affect the employees and the visitors" with the management of USSMAI in the form of written communication when her attempt of verbal communication was ignored by the management and her immediate supervisor, Yanagihashi. Complainant further asserts that she "proposed both immediate and long-term resolutions and requested an action plan and a guideline on occupational safety and workplace safety and hazards be established for both the employees and the visitors since these had not been established before the construction project started.

On March 19, 2014, Employer filed Respondent USS Missouri Memorial Assoc., Inc.'s Reply Memorandum in Support of Its Motion to Dismiss Complainant's Appeal Filed on 02/10/2014.

On April 7, 2014, the Board received via facsimile a letter from Complainant requesting a postponement of the motion hearing scheduled for April 17, 2014, due to a family emergency for which she will be out of the country until

Unemployment Insurance Division (UID) which held that she was disqualified for benefits. The Appeals Officer held that Complainant "Claimant's failure to communicate with the director despite his emails asking her to contact him about whether she was planning to return, her future plans for herself and her job and work related inquiries constituted a willful, deliberate or wanton disregard of the employer's interests"; and that "there was sufficient evidence to find claimant was discharged for misconduct connected with work." The Appeals Officer did not refer to or address any claim of retaliation.

On February 13, 2014, the Director filed a Joinder in Respondent USS Missouri Memorial Assoc., Inc.'s Motion to Dismiss Complainant's Appeal Filed February 10, 2014.

On February 19, 2014, the Board received a letter from Complainant via facsimile that requested an extension of time to respond to the Motion to Dismiss because, *inter alia*, she never received the Board's Notice of Hearing on Motion and Related Deadlines; she had not received a hard copy of the Motion to Dismiss; and that she no longer lived in Hawaii, where the Notice of Hearing on Motion and Related Deadlines was sent, but she now lives in Washington.

The Board granted Complainant's request for an extension of time and rescheduled the motion hearing for April 3, 2014; however, due to the unavailability of Employer's counsel on that date, the motion hearing was again rescheduled to April 17, 2014.

On March 7, 2014, Complainant filed her Responses/Opposition to Respondent USS Missouri Assoc., Inc.'s Motion to Dismiss Complainant's Appeal. Facts asserted by Complainant in her Responses/Opposition include the following:

Complainant made an initial contact to the Federal OSHA (USDL OSHA) in early September 2012 via telephone, and that the agent did not return her call until October 12, 2012, when he finally gathered the information from his first interview with her.

Yanagihashi "had a few conversations with the Complainant before she was on TDI leave about OSHA"; and Complainant made a complaint to both management level, especially Jeffery Conners, VP of Facilities and

July 15, 2014. On April 8, 2014, the Board received a letter of no objection to the postponement from the Director.

The Board determined that oral argument on the motion to dismiss was not necessary to the Board's disposition of the motion, and issued a notice of cancellation of oral argument on April 9, 2014.

II. CONCLUSIONS OF LAW, DISCUSSION AND ORDER

A. Motion to Dismiss

In considering a motion to dismiss, the Board's consideration is strictly limited to the allegations of the complaint, which are deemed to be true. See County of Kauai v. Baptiste, 115 Hawaii 15, 24, 165 P.3d 916, 925 (2007) (citing In re Estate of Rogers, 103 Hawaii 275, 280-81, 82 P.3d 1190, 1195-96 (2003), *reconsideration denied*, 115 Hawaii 231, 116 P.3d 991. Additionally, when considering a motion to dismiss, the Board may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Yamane v. Pohlson, 111 Hawaii 74, 81, 137 P.3d 980, 987 (2006) (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. In re Estate of Rogers, 103 Hawaii 275, 280, 81 P.3d 1190, 1195 (2003) (Rogers); Yamane v. Pohlson, 111 Hawaii 74, 81, 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).

A court is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985). "Dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983) (internal quotation marks and citation omitted).

B. Motion for Summary Judgment

Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, *"relevant materials"*), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawaii 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawaii 118, 905 P.2d 624.

The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.

A non-movant may not rest upon the allegations in the complaint, but must produce evidence which would be admissible at trial to make out the requisite issue of material fact. Tri-S Corp. v. Western World Ins. Co., 110 Hawaii 473, 494, 135 P.3d 82, 103 (2006). However, a motion for summary judgment should only be granted if the motion itself establishes that there is no genuine issue of material fact. Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993).

C. Employer's Motion to Dismiss

The Motion to Dismiss asserts: (1) Complainant cannot establish a prima facie case of retaliation; (2) the decision of the Employment Security Appeals Office bars Complainant from claiming that Respondent's reason for discharging her was pretextual or not legitimate; and (3) Complainant did not timely file a notice of contest pursuant to Hawaii Revised Statutes (HRS) § 396-11.

1. Timeliness

With respect to the timeliness argument, HRS § 396-11 provides in relevant part:

> (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.

Further, Hawaii Administrative Rules (HAR) §12-57-9 provides that within ninety days of the receipt of a complaint filed under section 396-8(e), HRS, the Director will notify the complainant and the employer of the final determination and any subsequent action the department will take to resolves the complaint.

Here, the Director, through the HIOSH office, notified Complainant by letter dated September 19, 2013, that HIOSH "determined that [Complainant's] termination was for an event unrelated to [Complainant's] complaint about Safety and health hazards" and that HIOSH was closing the Complaint. The correspondence further stated, "Please be advice [sic] that **you may request a review of this determination by filing a written request to [HIOSH Administrator]** . . . Your written request in this matter must be received, within 20 calendar days from the receipt of this letter" (emphasis added). A copy of the USPS Domestic Return Receipt attached to the Notice of Contest indicates that Complainant received this correspondence on October 5, 2013.

In response, Complainant sent correspondence that was received by HIOSH on October 15, 2013, well within the twenty-day window. The correspondence stated, in relevant part, that Complainant "would like to request a hearing for a new review by the HIOSH Administrator."

Given that the letter from HIOSH to Complainant advised Complainant she "may request a review of this determination" by filing a written request to the HIOSH Administrator within twenty calendar days, the Board finds and concludes that Complainant adequately notified the HIOSH Administrator of her request for review of its determination. Although Complainant indicated review "by the HIOSH Administrator" rather than review by the Board, Complainant sufficiently followed the directions provided by HIOSH, which did not indicate that Complainant had to specify review "by the Board" in her request for review.

2. The Decision by ESARO

Although not controlling on the Board, the administrative rules governing HIOSH appeals contemplate an employee pursuing remedies in other forums, and are persuasive. HAR § 12-57-11, governing "Arbitration or other agency proceedings," provides in relevant part that "An employee who files a complaint under section 396-8(e), HRS, may concurrently pursue remedies under grievance arbitration proceedings . . . [and] may concurrently resort to other agencies for relief, such as the National Labor Relations

Board." The rule further recognizes, however, that the Director's "jurisdiction to investigate complaints under section 396-8(e), HRS, and to determine whether discrimination has occurred is independent of the jurisdiction of other agencies or bodies." (HAR § 12-57-11(a)).

The rule further contemplates deferral to the results of such other proceeding, but factors to be considered are whether "the rights asserted in other proceedings are substantially the same as rights under section 396-8(e), HRS, and those proceedings are not likely to violate the rights guaranteed by section 396-8(e), HRS." (HAR § 12-57-11(b)). The "factual issues in such proceedings must be substantially the same as those raised by the section 396-8(e), HRS, complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination." Id. A determination to defer "must necessarily be made on a case-to-case basis"; further, "it must be clear that the proceeding dealt adequately with all factual issues, that the proceeding was fair, regular, and free of procedural infirmities, and that the outcome of the proceeding was not repugnant to the purpose and policy of section 396-8(e), HRS." (HAR § 12-57-11(c)).

Here, the decision by ESARO held that "Claimant's failure to communicate with the director despite his emails asking her to contact him about whether she was planning to return, her future plans for herself and her job and work related inquiries constituted a willful, deliberate or wanton disregard of the employer's interests"; and that "there was sufficient evidence to find claimant was discharged for misconduct connected with work." However, the Appeals Officer did not expressly refer to or address any claim of retaliation.

Based on the limited information provided to the Board of the ESARO proceeding, the Board declines to dismiss the Complaint based upon the principles articulated in HAR § 12-57-11.

The Employer asserts that collateral estoppel bars Complainant from re-litigating the issue of the reason for her discharge, as ESARO held that she was discharged for misconduct connected with work. The Board agrees with Employer's assertion that determination of an administrative agency may be given the same preclusive effect as a court. The Board nevertheless evaluates each case individually, on a case-by-case basis. Employer cites to State v. Higa, 79 Hawaii 1, 8, 897 P.2d 928, 935 (1995) for the assertion that the Board should give preclusive effect to ESARO's determination if "the issue decided is identical to the

issue in the current action, a final judgment on the merits was issued, and the parties in the current action are the same or in privity to the parties in the prior action."

For purposes of Employer's Motion to Dismiss, the Board cannot find that the issue before ESARO was "identical to the issue in the current action[.]" As discussed above, the ESARO decision did not expressly discuss the issues of discrimination or pretext. Furthermore, even if the determination of ESARO is given collateral estoppel effect, the Board holds that such determination is not dispositive of the current proceeding. The ESARO decision does not state that misconduct was the sole reason for discharge, and does not, on its face, address the possibility of mixed motive or pretext. See, e.g., Donovan v. Diplomat Envelope Corp., 587 F. Supp. 1417, 1421-22 (D.C.N.Y. 1984). Additionally, cases where findings of "misconduct" did not preclude further actions brought by employees include Gonzales v. AMR, 549 F.3d 219 (3rd Cir. 2008) (ineligibility for unemployment benefits due to misconduct did not preclude suit for wrongful discharge); and Cox v. DeSoto County, Miss., 564 F.3d 745 (5th Cir. 2009) (ineligibility for unemployment benefits due to misconduct did not preclude claim of retaliation under the Age Discrimination in Employment Act).

3. Complainant's inability to establish a prima facie case

The Board agrees with Employer that, in considering retaliation in HIOSH cases, the Board should use a three-stage framework adopted in retaliation cases in other contexts, i.e., Complainant has the initial burden to establish a prima facie case of retaliation by showing participation in protected activity, subsequent adverse action by the Employer, and some evidence of a causal connection between the protected activity and the adverse action. Schweiss v. Chrysler Motors Corp., 987 F.2d 548 (8th Cir. 1993). The Employer must then come forward with legitimate, nondiscriminatory reasons for the adverse action and, if the Employer does so, Complainant must show Respondent's reasons were pretextual. See, e.g., Shoppe v. Gucci America, Inc., 94 Hawaii 368, 14 P.3d 1049 (2000).

Here, the exhibits to the Employer's own motion to dismiss establish that on October 4, 2012, Yanagihashi sent Complainant an email, stating in part that he had not heard her from her in a while; "Please find attached the result of the air quality test"; that "everything is in line with OSHA standards." Furthermore, Complainant asserts that "Yanagihashi "had a few conversations with the

Complainant before she was on TDI leave about OSHA"; that Complainant made "a complaint to both management level, especially Jeffery Conners, VP of Facilities and Engineering, and Yanagihashi, about workplace health hazard, conditions of safety on the USS Missouri ship"; and that in a fax sent from Kaiser Permanente to the Human Resources Department at USSMAI, "in the comment section, Line 5 and 6, indicated that the doctor, Dr. Joseph Dicostanzo mentioned about OSHA 's/p air testing – patient to discuss test w OSHA' and 'Cont off until patient discusses w OSHA and fu opth.'"

Viewing the assertions in a light most favorable to Complainant, the Board finds that Complainant can establish a prima facie case that Respondent was aware, during the month of October 2012, that Complainant reported suspected OSHA violations, and that Complainant's discharge on December 11, 2012, was close enough in time to the alleged complaint of violation as to establish a prima facie case.

Respondent, however, has demonstrated a legitimate, non-discriminatory reason for the discharge, namely, the misconduct described in the ESARO proceeding and documents attached to the motion to dismiss. The burden would then shift back to Complainant to show that the stated reason was pretext for retaliation, which Respondent argues Complainant has not done.

The Board notes that Employer's "Motion to Dismiss" may be more properly characterized as a motion for summary judgment. However, because the motion is entitled "Motion to Dismiss" there may be confusion on the part of a *pro se* complainant as to exactly what showing on her part is required to defeat a motion for summary judgment. Because of the possible confusion, the Board errs on the side of the non-moving party in this instance. The Board recognizes that Complainant may not be able to demonstrate pretext at trial; however, the Board rules in Complainant's favor on this issue as the non-moving party, where there may be confusion caused by the moving party's apparent motion for summary judgment being filed as a motion to dismiss.

ORDER

For the reasons discussed above, the Board hereby denies Respondent USS Missouri Memorial Assoc., Inc.'s Motion to Dismiss Complainant's Appeal, filed February 10, 2014.

NOTICE OF ADDITIONAL MOTION DEADLINES

As discussed above, the Board denies the Employer's motion to dismiss. However, it appears the Employer intended to present a motion for summary judgment to the Board, which was filed as a motion to dismiss and thus possibly creating confusion to a *pro se* complainant. Therefore, the Board will provide the parties an opportunity to file further motions in this case, with the limitation that the parties may not relitigate the issues of timeliness or collateral estoppel, which the Board disposes of on the merits in this Order. NOTICE IS HEREBY GIVEN of the following deadlines:

Deadline to file Motions:	July 31, 2014
Deadline to file Oppositions/Responses to Motions:	August 21, 2014
Deadline to File Replies:	August 29, 2014

The Board may schedule a hearing on any additional motions, including a motion for summary judgment, should the Board decide oral argument on a motion is warranted.

The Board further reminds the parties that any documents presented to the Board must be filed in accordance with the Board's administrative rules and served on the other parties, including a certificate of service to that effect.

DATED: Honolulu, Hawaii, April 23, 2014.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

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ORDER NO. 575

ROCK B. LEY, Member

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