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**Case No. OSH 2013-31**

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

ORDER NO. 689

ORDER GRANTING USS  
MISSOURI'S MOTION FOR  
SUMMARY JUDGMENT

**ORDER GRANTING USS MISSOURI'S MOTION FOR SUMMARY JUDGMENT**

**I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND**

On October 12, 2012, Complainant NUANCHUT CHAIGIT (Complainant) made a complaint to the U.S. Department of Labor Occupational Safety and Health Administration (Federal OSHA) about a health hazard at Respondent USS MISSOURI MEMORIAL ASSOC., INC.'s (USS Missouri) worksite. Although Federal OSHA found that the health hazard claimed in Complainant's complaint was not a violation under OSHA law, Federal OSHA referred the complaint to the Whistleblower Protection Program for further investigation as a retaliation<sup>1</sup> complaint. As such, on December 7, 2012, Federal OSHA turned over Complainant's retaliation complaint to the Hawaii Occupational Safety and Health Division (HIOSH) for further investigation.

<sup>1</sup> Employee claims against an employer for retaliatory action because the employee complained about a workplace condition are interchangeably called discrimination or retaliation claims. For the purposes of this Order, the Board shall refer to Complainant's discrimination claim as a retaliation claim.

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

  
Hawaii Labor Relations Board

Subsequent to Federal OSHA's transfer of the retaliation complaint to HIOSH, Complainant was dismissed from her job with the USS Missouri. On December 11, 2012, HIOSH notified Complainant that it received Complainant's retaliation complaint under Hawaii Revised Statutes (HRS) § 396-8(e) of the Hawaii Occupational Safety and Health Law.<sup>2</sup>

In addition to the retaliation complaint,<sup>3</sup> Complainant filed a claim for unemployment insurance benefits with the Unemployment Insurance Division (UID). The UID found that she voluntarily quit her job without good cause and denied Complainant unemployment insurance benefits pursuant to HRS § 383-30(1). On March 28, 2013, Complainant filed an appeal with the Employment Security Appeals Referees' Office (ESARO) regarding UID's decision. ESARO conducted evidentiary hearings, then affirmed UID's decision to deny Complainant unemployment insurance benefits, but modified the decision as to the reason for the denial. ESARO found that Complainant was discharged from her job with the USS Missouri because of her misconduct connected with work.

The Hawaii Labor Relations Board (Board) previously held in Order No. 575 that it would not defer to the ESARO decision or apply the principles of collateral estoppel; however, based upon the evidence submitted to Board by the parties in this matter, the Board's findings of fact herein are consistent with the following findings of ESARO: Complainant failed to communicate with her supervisor (Mr. Michael Yanagihashi, Human Resources (HR) Director for the USS Missouri) despite several e-mails asking Complainant to contact him about her plans to return to work. Complainant's last day at work with the USS Missouri was August 24, 2012, and she was on medical leave up until her employment with the USS Missouri was terminated. From October 4, 2012, Yanagihashi attempted to communicate with Complainant regarding her plans to return to work, her future plans for herself and her job and other work related matters. In addition, Yanagihashi sent a letter to Complainant on November 5, 2012, about her failure to answer his e-mails over the last month. Yanagihashi's letter also said that the last doctor's note Complainant submitted said that she would return to work on November 5 but that she did not report to work on that day and had not answered any of his e-mails. Yanagihashi asked Complainant to let him know what she intended to do about her job and he warned her that if he

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<sup>2</sup> HRS § 396-8(e) is a section under the Hawaii Occupational Safety and Health law that prohibits discharge or discrimination against employees for exercising any right under the Hawaii Occupational Safety and Health law, including complaining about workplace conditions. Specifically, HAR § 12-57-4 prohibits discharge or discrimination against employees who, among other things, complain about workplace conditions to another federal, state, or local agency which has the authority to regulate or investigate occupational safety and health conditions. An employee does not have to directly institute the proceeding in order to obtain the protection provided by HRS § 396-8(e). Haw. Admin. R. § 12-57-4 (2014).

<sup>3</sup> Claimant also filed a disability compensation claim with the Disability Compensation Division. She claimed a work injury related to exposure of dust particles from the construction site at her workplace; however, on March 7, 2013, the Disability Compensation Division denied Claimant's claim and found that she was absent from work for a non-work related condition.



did not hear from her by November 9, 2012, he would have no choice but to consider her to have abandoned her job and terminate her employment with USS Missouri. On November 13, 2012, USS Missouri received another report from Complainant's physician stating that Complainant's proposed return to work date was January 5, 2013. On December 11, 2012, Yanagihashi sent a letter to Complainant informing her that he would not keep her position open until January 4, 2013 (her anticipated return to work date) because he had difficulty maintaining the work in the HR department for USS Missouri. Yanagihashi said that since he had no direct contact from Complainant, he had no other alternative but to terminate her employment with the USS Missouri.

On September 19, 2013, HIOSH issued its decision to deny Complainant's retaliation claim. In Mr. Tin Shing Chao's (Manager, Occupational Health Branch) letter to Complainant, HIOSH notified Complainant that it "determined that [Complainant's] termination was for an event unrelated to [Complainant's] complaint about Safety and health hazards. The employer has provided a legitimate business reason [*sic*] for your termination. . . . The investigation found that there is insufficient evidence to support that you were retaliated [against] because of your engagement in the protected activity." HIOSH's September 19, 2013 letter was mailed to Complainant by certified mail, and the receipt states that Complainant picked up the said letter on October 5, 2013. On October 22, 2013, Complainant mailed a letter requesting a new hearing on her retaliation claim, and the letter was received by the HIOSH Administrator on October 15, 2013.

On December 18, 2013, the Board received a "Notice of Contest" from HIOSH for Respondent DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or DLIR), involving the retaliation complaint by Complainant. 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."

On February 10, 2014, USS Missouri filed its Motion to Dismiss Complainant's Appeal (Motion to Dismiss). The Motion to Dismiss asserted: (1) Complainant cannot establish a prima facie case of retaliation; (2) the ESARO Decision 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. USS Missouri relied on the findings of Appeals Officer Stacey Miyatake in the ESARO Decision and the testimony of Michael Yanagihashi in both the ESARO evidentiary hearings and in Yanagihashi's Declaration which was attached to the Motion to Dismiss.

On February 13, 2014, the Director filed Respondent Director of Labor and Industrial Relations' 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 Complainant's letter of February 14, 2014, to Mr. Jim Nicholson, the Board's Chair, and Ms. Doris Dvorch, the Deputy Attorney General representing HIOSH, wherein Complainant claimed that she "did not receive a hard copy of the motion to dismiss," that it was "not [her] fault that [she] never received it" and requested a two week extension of time to file her opposition to the Motion to Dismiss (extension to March 6, 2014) and a continuation of the hearing on the Motion to Dismiss to early April of 2014. The Board granted Complainant's request and the hearing on the Motion to Dismiss was re-set for April 3, 2014.<sup>4</sup>

On March 7, 2014, Complainant filed her Responses/Oppositions to Respondent USS Missouri Assoc., Inc.'s Motion to Dismiss Complainant's Appeal (Complainant's Opposition) wherein she questioned the relevance of the ESARO Decision and argued that if the Board felt that the ESARO Decision is relevant to the issues in the Motion to Dismiss, the Board should subpoena the record of the ESARO hearings and provide her with a copy of the record. In Complainant's Opposition, Complainant continued to dispute the findings of Appeals Officer Miyatake in the ESARO Decision; however, she failed to offer any evidence or reason for the Board to disregard the ESARO Decision.

On March 19, 2014, USS Missouri filed its Reply Memorandum in Support of its Motion to Dismiss. The Board determined that oral argument was not necessary for the Board's disposition of the Motion to Dismiss, and issued a notice of cancellation of oral argument on April 9, 2014.

On April 23, 2014, the Board issued Order No. 575 which denied USS Missouri's Motion to Dismiss. In denying the Motion to Dismiss, the Board separately addressed the three assertions of USS Missouri.<sup>5</sup> Most relevant to USS Missouri's Motion for Summary Judgment

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<sup>4</sup> The April 3, 2014, hearing date was subsequently rescheduled to April 17, 2014, by Board Order No. 557.

<sup>5</sup> Regarding the USS Missouri's timeliness argument, the Board found that although Complainant did not file a notice of contest with the Board within twenty calendar days of Complainant's receipt of the September 19, 2013 HIOSH decision, Complainant followed HIOSH's instructions that Complainant "may request a review of this determination" by filing a written request to the HIOSH Administrator within twenty calendar days. HIOSH's instructions did not indicate that Complainant needed to specify review "by the Board" in her request for review. The Board found that Complainant sufficiently followed the directions provided by HIOSH and filed with HIOSH a request for review of the September 19, 2013 HIOSH decision within the twenty-day window.

Regarding USS Missouri's argument that Complainant is collaterally estopped from re-litigating ESARO's finding that Complainant was discharged from her job because of misconduct connected with work, the Board noted that Appeals Officer Miyatake "did not expressly refer to or address any claim of retaliation" in the ESARO Decision. Furthermore, the Board noted that there was limited information provided to the Board of the ESARO proceedings and therefore declined to dismiss the Complainant's discrimination claims based upon the principles of collateral estoppel.



(see discussion below) is the Board's discussion in Order No. 575 regarding USS Missouri's argument that Complainant is unable to establish a prima facie case.

In analyzing and deciding the Motion to Dismiss, the Board used a three-part analysis in evaluating a claim of retaliation: (1) complainant must make an initial showing of retaliation by showing participation in a 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); (2) employer must then come forward with legitimate, nondiscriminatory reasons for the adverse action; and (3) if the employer does so, complainant must show that the employer's reasons were pretextual. See, e.g., Shoppe v. Gucci America, Inc., 94 Hawaii 368, 14 P.3d 1049 (2000).

The Board found in Order No. 575 that Complainant met its initial burden to establish a prima facie case of retaliation. Viewing the assertions in a light most favorable to Complainant, the Board found 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."

The Board also found that the USS Missouri demonstrated a legitimate, non-discriminatory reason for Complainant's discharge, namely the misconduct described in the ESARO Decision and the documents attached to the Motion to Dismiss. Thus, USS Missouri met its burden and the Board noted that the burden then shifts back to Complainant to show that the stated reason for the discharge was pretext for retaliation. Although Complainant failed to show USS Missouri's pretext for retaliation, the Board nevertheless denied the Motion to Dismiss. The Board stated at page 12 of Order No. 575 the following:

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.

Subsequent to Order No. 575 and on July 30, 2014, USS Missouri filed its Motion for Summary Judgment, together with Respondent USS Missouri Memorial Assoc., Inc.'s Concise

Statement of Facts in Support of Its Motion for Summary Judgment, which was accompanied with the Declaration of Jeffrey S. Harris, Declaration of Michael Yanagihashi and Exhibits A-D. The Motion for Summary Judgment incorporates many of the same arguments in the Motion to Dismiss, but emphasis and focus are placed on Complainant's failure to show that USS Missouri's reason for termination was a pretext for retaliation.

On March 13, 2015, Complainant filed Complainant Nuanchut Chaigit's Opposition to Respondents USS Missouri Memorial Assoc., Inc., and Director of Labor and Industrial Relations Motion for Summary Judgment<sup>6</sup>, together with the Declaration of Nuanchut Chaigit and Exhibits A-G (collectively called Complainant's Opposition). Complainant's Opposition was filed by her attorney, Charles H. Brower, Esq., and she is no longer a *pro se* party in this case. In Complainant's Opposition, Complainant claims that the pretext for her job termination was her failure to reply to e-mails or communicate with her supervisor. Complainant claims that she could not communicate with her work supervisor because her work e-mail had been turned off in September 2012 and that she was not able to check her e-mail in October 2012 due to her eye injuries. Accordingly, Complainant argues that her work supervisor, Michael Yanagihashi, should have used some method other than the computer to contact her, especially since Yanagihashi had Complainant's cell phone number which was working at that time. According to Complainant, Yanagihashi's failure to make an effort to contact Complainant by telephone demonstrates the pretext. In Paragraph 4 of the Declaration of Nuanchut Chaigit, she states under oath the following:

"4. In the latter part of September 2012, my work e-mail was turned off by Mr. Yanagihashi. I did not receive e-mails from Mr. Yanagihashi thereafter. I was dealing with my eye injuries which affected my vision. My doctor told me not to use my computer, so I did not check my e-mail." (emphasis added)

On March 26, 2015, USS Missouri filed Respondent USS Missouri Memorial Assoc., Inc.'s Reply Memorandum in Support of its Motion for Summary Judgment filed on 07/30/2014, together with the Declaration of Margaret A. Kageyama and Exhibits C to E (collectively called USS Missouri Reply Memorandum). It is evident through the filings of the USS Missouri in its Reply Memorandum that there are many flaws in Complainant's attempt to demonstrate her former employer's pretext.

USS Missouri points out that Yanagihashi communicated with Complainant through her personal e-mail address – [heyarnia@gmail.com](mailto:heyarnia@gmail.com) – in September and October 2012, thus

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<sup>6</sup> Although Complainant's opposition to the USS Missouri's Motion for Summary Judgment also refers to "and Director of Labor and Industrial Relations Motions for Summary Judgment" it appears the Director only joined in the USS Missouri's earlier Motion to Dismiss Complainant's Appeal that was filed on February 10, 2014, and not the Motion for Summary Judgment that was filed on July 30, 2014.



contradicting her claim that she did not receive e-mails from Yanagihashi after her work computer was turned off. The following facts are noted by the Board:

1. Complainant emailed Yanagihashi on September 17, 2012 from her personal e-mail account to say that she could not access her work e-mail. (See, Exhibit B to Motion for Summary Judgment at 11013300026.)
2. On September 19, 2012, Yanagihashi replied to Complainant via her personal e-mail address to explain the reason USS Missouri turned off her work email and informed her that an air quality test was conducted at the worksite. From that point forward, Yanagihashi emailed Complainant's personal address for all communications.
3. On October 4, 2012, Yanagihashi transmitted by e-mail to Complainant's personal e-mail address the air quality test that Complainant admits she received. In this e-mail, Yanagihashi asked Complainant to tell him what her plans are about returning to work.
4. On October 18, 2012, Yanagihashi e-mailed Complainant about a job description binder. Complainant never responded to this e-mail.
5. On October 22, 2012, Yanagihashi e-mailed Complainant about access to Taleo. He also asks "what your future plans are for yourself and your job here at the Missouri." Again, no response from Complainant.
6. On November 5, 2012, Yanagihashi wrote a letter to Complainant, stating 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.
7. 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.
8. 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 your [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[.]”

Complainant’s claim that she could not check her e-mails on her personal computer because of her eye injuries is not believable because there is overwhelming and unchallenged evidence that Complainant frequently used her personal computer while on medical leave to engage in online advertising for a different job. The Board takes note of the following undisputed facts on this issue:

1. Screenshots taken on March 11, 2015, showing Complainant’s Facebook.com account shows her frequently using her computer to engage in other work.
2. Complainant listed herself as an “Independent Stylist for Stella and Dot,” an online retailer, and consistently posted updates on her Facebook.com page throughout October, November and December 2012.
3. On October 25, 2012, Complainant posted, “I’m still working on putting this page together everyone ☺ Please stay tune!!”
4. On October 27 she posted, “I am so excited to let you ladies know that a package for my next month's trunk show just arrived yesterday. Now I’m pretty busy checking out some lovely jewels ☺ Can’t wait to share them with you for my first trunk show get together!! Delight Guarantee ☺”
5. On November 6, 2012, she posted, “Come join our team and you’ll get a free beautiful scarf this month when you sign up with us. Getting a little income does not hurt for the holiday season ☺”
6. On November 7, 2012, she posted, “Congratulations ☺ We’re in the right business at the right place, at the right time ☺”
7. Her Facebook.com account also shows that she was traveling in Seattle on or about October 25, 2012, and having a piano Sunday brunch on November 20, 2012.

Subsequent to the submission of the evidence above to the Board, Complainant has not filed any pleadings or new documents or declarations in response to the revelations made in the USS Missouri Reply Memorandum.

Moreover, on April 24, 2015, the Board issued a Notice of Briefing Deadline and Rescheduled Motion Hearing Date that continued the oral arguments on the USS Missouri’s Motion for Summary Judgment from April 23, 2015, to May 15, 2015. On May 8, 2015, the USS Missouri submitted its Supplemental Memorandum About Jurisdiction (Jurisdiction Memo). The Jurisdiction Memo including an attached declaration of Mr. Yanagihashi which stated, *inter alia*, that Complainant “expressed personal concern about noise and dust on the job



on August 24, 2012”; that “I understood that she alleged she was discriminated against for reporting a safety concern to management”; and that Yanagihashi “had no idea that [Complainant] reported any concern to the Occupational Safety Health Commission, until she advised the Board that she did that in the pleading that she filed on March 6, 2014.” Complainant did not refute Mr. Yanagihashi’s declaration through pleadings or at the subsequent oral argument (oral argument on the Motion for Summary Judgment was scheduled for April 23, 2015, which was continued to and completed on May 15, 2015).

## II. CONCLUSIONS OF LAW, DISCUSSION AND ORDER

### A. 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 (9<sup>th</sup> Cir. 1993).

### B. Three-step analysis of Complainant’s retaliation claim.

As in the Board’s analysis of Complainant’s retaliation claim in the Motion to Dismiss, the Board utilizes the same three-step framework in deciding this Motion for Summary Judgment. First, Complainant has the initial burden to establish a *prima facie* case of retaliation by showing participation in protected activity, subsequent adverse action by the USS Missouri, and some evidence of a causal connection between the protected activity and the adverse action. Schweiss v. Chrysler Motors Corp., 987 F.2d 548 (8<sup>th</sup> Cir. 1993). Second, USS Missouri must then come forward with legitimate, nondiscriminatory reasons for the adverse action. And third and lastly, if the USS Missouri does so, Complainant must show the USS Missouri’s reasons were pretextual. See, e.g., Shoppe v. Gucci America, Inc., 94 Hawaii 368, 14 P.3d 1049 (2000).

As the Board found and held in Order No 575, the first and second steps of the three-step analysis were met by Complainant and the USS Missouri, respectively. Complainant met her burden of establishing a *prima facie* case of retaliation because Complainant's discharge on December 11, 2012 followed and was close enough in time to her filing of Federal OSHA case on October 12, 2012. USS Missouri met its burden of demonstrating a legitimate, non-discriminatory reason for her discharge, namely, the misconduct described in the ESARO proceeding and the documents attached to the Motion to Dismiss.

The only remaining issue in this Motion for Summary Judgment is the third and final step which requires the Complainant to show that the USS Missouri's stated reason for her job termination was a pretext for retaliation. In essence, Complainant must show that her termination from her job was really because she complained about her workplace condition and filed the Federal OSHA case about workplace safety at the USS Missouri.

Unlike the situation in the Motion to Dismiss, there is no concern that Complainant does not understand the specific issue at hand and what she must do in order to defeat the motion filed by USS Missouri. There is no confusion between the requirements under a motion to dismiss verses a motion for summary judgment since the motion before us is a motion for summary judgment. Most important, Complainant is now represented by counsel and her defense against the Motion for Summary Judgment and the prosecution of her retaliation claim is no longer done *pro se* and there is no longer a need to err on the side of the unrepresented party.

Based on the facts presented in this matter, including the submissions in support of and in opposition to the USS Missouri's Motion for Summary and the evidence submitted as a part of the USS Missouri Reply Memorandum, and also based on the lack of any response or sufficient evidence from Complainant to challenge the evidence submitted by the USS Missouri, we find that Complainant has not shown that the stated reason for her termination was pretext for retaliation. Complainant's arguments fail even when viewing the evidence in a light most favorable to the non-moving party.

The Board finds and concludes that Complainant cannot meet her burden in the third step of the three-part test described above, there is no genuine issue as to any material fact, and the USS Missouri is entitled to judgment as a matter of law.

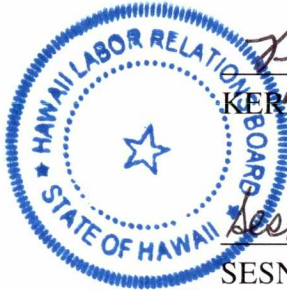
#### ORDER

For the reasons discussed above, the Board hereby grants Respondent USS Missouri Memorial Assoc., Inc.'s Motion for Summary Judgment filed on July 30, 2014. This case is dismissed.



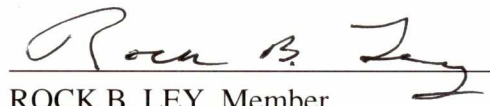
Dated: Honolulu, Hawaii, September \_\_\_\_ 15, \_\_\_\_ 2015.

HAWAII LABOR RELATIONS BOARD



  
KERRY M. KOMATSUBARA, Chair

  
SESNITA A.D. MOEPONO, Member

  
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