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Case No. OSH 2017-16**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

JAMES H. HALL,

Complainant-Appellant,

and

MOUNT TERRACE AOA,

Respondent-Appellee,

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Appellee.

CASE NO. OSH 2017- 16

ORDER NO. 959

ORDER GRANTING IN PART AND
DENYING IN PART COMPLAINANT-
APPELLANT'S MOTION TO COMPEL
DISCOVERY; NOTICE OF STATUS
CONFERENCE

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT-APPELLANT'S MOTION TO COMPEL DISCOVERY

On May 19, 2017, the Hawaii Labor Relations Board (Board) received a Transmittal of a Notice of Contest, filed on March 16, 2017 (Contest), by Complainant-Appellant James H. Hall (Hall), Self-Represented Litigant (SRL) appealing the determination of the Hawaii Occupational Safety and Health Division, Department of Labor and Industrial Relations (HIOSH) on his whistleblower retaliation claim in Case No. 16-003 Mt. Terrace AOA/Hall commencing the above-entitled matter.

On May 23, 2017, the Board issued a Receipt of Notice of Contest and General Information; Notice of Status Conference and Oral Arguments on a Dispositive Motion; and Notice of *De Novo* Hearing. This Notice stated in relevant part that:

The parties shall immediately proceed to 1) meet and confer among themselves regarding possible settlement and/or discovery needs, and 2) **commence the discovery process without any further notice. The methods, scope, limits, and timing of discovery and answers to discovery requests shall be as provided in the applicable rules of the Hawaii Rules of Civil Procedure.**

(Bold in original)

On October 3, 2017, Hall filed a Certificate of Service for Complainant-Respondent, James H. Hall's First Request for Production of Documents Dated October 2, 2017.

On October 9, 2017, AOA filed Respondent-Appellee Mount Terrace AOA's Motion for Summary Judgment (AOA MSJ).

On October 31, 2017, Respondent-Appellee Mount Terrace (AOA) filed a Certificate of Service for Re: Respondent-Appellee Mount Terrace AOA's Response to First Request for Production of Documents, ESI, and Tangible Things Dated October 2, 2017.

On October 31, 2017, Hall filed Complainant-Appellant, James H. Hall's Ex-Parte Motion to Enlarge Time to Conduct Discovery and Thus Automatically Adjusting The Other Correspondent Deadlines (Motion to Enlarge Time)[.] In the Motion, Hall requested a 90-day extension of time to conduct further discovery based on AOA's objection and refusal to provide the names of the members of the Board of Directors, who served during Hall's employment; the contract between Mount Terrace and Touchstone Properties, LTD. (Touchstone); the originals of the complete onsite managers logs, time cards and records; and vacation/sick leave requests, which are materially prejudicing Hall and rendering AOA's MSJ premature.

On November 2, 2017, AOA filed Respondent-Appellee Mount Terrace's Opposition to Complainant-Appellant James H. Hall's Ex Parte Motion to Enlarge Time to Conduct Discovery and Thus Automatically Adjusting the Other Corresponding Deadlines (AOA's Opposition), which requests that the Board deny Hall's Motion to Enlarge Time because Hall has had 160 days to propound discovery and that this dilatory tactic is to harass AOA and its former directors, who are not parties to this appeal. Further, AOA asserts that the request to join Touchstone is an attempt to meld this appeal with Hall's federal lawsuit, in which the U.S. district court has already awarded AOA with over \$10,000 in sanctions for Hall's discovery misconduct and denied Hall's Motion to Compel, which requested, among other things, documents identifying former members of the AOA Board of Directors and onsite manager's logs.

On November 20, 2017, the Board held a Status Conference in this matter. At the Status Conference, Hall took the position that Touchstone, the management company retained by AOA, should be added as a party. Hall further contended that the basis for his Motion to Enlarge Time is to address AOA's stonewalling of his discovery, including but not limited to his requests for safety training documents, contracts between AOA and Touchstone, video(s) of AOA's workplace violence claim, emails between AOA and Touchstone regarding safety training prior to the filing of the Contest and purchases of safety equipment, records regarding the payment of bonuses at Mount Terrace between 2013-2015, the monthly managers reports

between January 2013-2015, and contracts between Touchstone, AOA, and cellular telephone companies. AOA responded that discovery regarding Touchstone is not relevant because Touchstone is not a party. After hearing oral argument from the parties, the Board orally ruled that the Motion to Enlarge Time will be construed as a Motion to Compel Discovery (Motion to Compel) under Hawaii Rules of Civil Procedure (HRCP) Rule 37 (Rule 37),ⁱ the hearing on the merits will not be changed, AOA will have the until November 28, 2017 to file an opposition to the Motion to Compel, and a hearing will be held on the Motion to Compel on November 30, 2017.

On November 28, 2017, AOA filed Respondent-Appellee Mount Terrace AOA's Memorandum in Opposition to Motion to Compel requesting that the Board deny the Motion to Compel because: Hall failed to comply with HRCP regarding the Motion because he failed to review the documents at issue; Hall never met or conferred with AOA to resolve the discovery issues; the Motion has no basis because all documents relevant to the claims and parties in this matter are in the possession of or have been made available to Hall; Hall had 160 days to propound discovery in this appear and failed to timely request the production and inspection prior to filing the Motion, and raise valid objections with AOA or the Board. Finally, AOA argues that Hall misrepresented facts and has not met his burden regarding the Motion to Compel, further delay of this appeal would be prejudicial, and the MSJ should not be further delayed.

On November 30, 2017, the Board held a hearing on the Motion to Compel. Hall was given the opportunity to present arguments to support his request that specific items be produced through discovery. The Board limited his request for names of AOA Board of Directors members, contracts between Touchstone and AOA, and the monthly management reports to his period of employment at Mount Terrace (February 27, 2013 through June 5, 2015). AOA was further given the opportunity to respond to the arguments presented by Hall.

The relevant provisions of the HRCP are as follows. HRCP Rule 26 (Rule 26) states in relevant part:

Rule 26. GENERAL PROVISIONS GOVERNING DISCOVERY.

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or tangible things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) IN GENERAL.

(A) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information or tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(1)(B) and 26(b)(2)(i), (ii), and (iii).

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or expense. If that showing is made, the Court may nonetheless order disclosure or discovery from such sources if the requesting party shows good cause considering the limitations of Rule 26(b)(2). The Court may specify conditions for the disclosure of discovery.

HRCF Rule 34 provides in relevant part:

Rule 34. PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION AND TANGIBLE THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES.

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents or electronically stored information (which together include books, papers, writings, drawings, graphs, charts, photographs, sound recordings, images, electronic documents, electronic mail, and other data or data compilations from which information can be obtained, either directly or, if necessary, after conversion by the responding party into a reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served;....

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth,

either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Rule 37 provides in relevant part:

**Rule 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY;
SANCTIONS.**

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) APPROPRIATE COURT. An application for an order to a party may be made to the court in which the action is pending or, on matters related to a deposition, to the court in the circuit where the deposition is being taken. An application for an order to a person who is not a party shall be made to the court in the circuit where the deposition is being, or is to be, taken.

(2) MOTION. ... if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for ...an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. ...

The Hawaii Supreme Court in Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 100-01, 73 P.3d 46, 54-55 (2003), articulated the applicable principles in considering a motion to compel discovery under Rule 26:

However, "the extent to which discovery is permitted under Rule 26 . . . is subject to considerable latitude and [the] discretion [of the trial court]." *Id.* (internal quotation marks and citation omitted). "Thus[,] the exercise of such discretion will not be disturbed in the absence of a clear abuse of discretion that results in substantial prejudice to a party." *Id.* Accordingly, the applicable standard of review on a trial court's ruling on a motion to compel discovery, brought pursuant to HRCF Rule 26, is abuse of discretion. "An abuse of discretion occurs when the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant."

Inasmuch as the language of Federal Rules of Civil Procedure (FRCP) Rule 26(b) and HRCF Rule 26(b) are substantially similar, interpretations of FRCP Rule 26(b) are persuasive. Under FRCP Rule 26(b), "the question of relevancy is to be more loosely construed at the discovery stage than at the trial, where the relevance question for purposes of admissibility is governed by the Federal Rules of Evidence." "To limit an examination to matters relevant to only the precise issues presented by the pleadings would not only be contrary to the express purposes of rule 26, but also might result in a complete failure to afford plaintiff an adequate opportunity to obtain information that would be useful at trial."

(Citations and footnotes omitted) (Emphasis added)

These principles are applicable to discovery permitted under Rule 34. Wakabayashi v. Hertz Corp., 66 Haw. 265, 275, 660 P.2d 1309, 1315-16 (1983).

In addition, a party must make a diligent effort to ascertain the location of an original document during pre-trial discovery. Von Brimer v. Whirlpool Corp., 536 F.2d 838, 842-43 (9th Cir. 1976) (Von Brimer).

Applying these principles and based on the parties' contentions regarding the requested discovery at issue, the Board renders the following determinations on the Motion to Compel the documentary items sought by Hall as follows:

Documents Requested	AOAO Objection(s) to Request	Board Ruling on Request:
Names and terms of the members of AOAO Board of Directors who served during the period of Hall's employment with AOAO (2/27/13-6/5/14)	Provided the requested information	The motion is granted because the information is relevant.
Contract between AOAO and Touchstone	The information requested is not relevant.	The motion is granted because the contract is reasonably calculated to lead to relevant and admissible evidence but limited to the period of Hall's employment period with AOAO (2/27/13-6/5/14).
Complete security video of the incident for which Hall was terminated	Provided part of the video through the HIOSH investigation file	The motion is granted to produce the complete video(s) of the incident.
Time Sheets for Hall	Provided the requested information	The motion is denied because the information has been provided.
Bylaws of AOAO and Touchstone	The information requested is not relevant.	The motion is granted because the information is reasonably calculated to lead to relevant and admissible evidence.
Monthly Management Reports	The requested information was provided.	The motion is granted that originals of the reports for the period of Hall's employment at AOAO (2/27/13-6/5/14) be produced.
Any and all e-mails regarding safety training	The requested information is not relevant.	The motion is granted for any e-mails exchanged regarding safety training for the period of Hall's employment at AOAO (2/27/13-6/5/14).

Any and all e-mails exchanged among the AOA Board of Directors, Touchstone, any subcontractors, and any employees of these entities.	The requested information is not relevant.	The motion is granted but limited to those e-mails exchanged during the period of Hall's employment at AOA (2/27/13-6/5/14).
Any and all e-mails and documents exchanged between Richard Boyd and Gordon Heinecke and any other employee.	The requested information was provided but not from AOA and Touchstone and employees.	The motion is granted but limited to only e-mails exchanged by Richard Boyd and Gordon Heinecke.
Annual Operating Budget regarding Expenditures for Safety Equipment from 2013 through 2015	The requested information is not relevant.	The motion is denied as not reasonably calculated to lead to the discovery of relevant and admissible evidence.
All records regarding the bonuses for all employees to show the alleged discrimination against Hall and damages.	The requested information is not relevant.	The motion is denied as not reasonably calculated to lead to the discovery of relevant and admissible evidence.
The contract between AOA and/or Touchstone with any cellular telephone company regarding the transmission tower or other equipment,	The requested information is not relevant.	The motion is denied as not reasonably calculated to the discovery of relevant and admissible evidence and not alleged in the original OSHA/HIOSH complaint.
Original On-Site Manager's Log for inspection because the copies provided are not "true and accurate", "complete", and/or other reasons.	The requested information was provided in the form of copies because originals are not available.	The Board grants the motion to the extent that the original Log is available and orders AOA to perform a diligent and thorough search to locate the original Log. <u>Von Brimer</u> , 536 F.2d at 842-43 (9 th Cir. 1976).

ORDER

1. The Board orders AOA to produce for inspection all documents for which the Motion to Compel was granted above within thirty (30) days of service of this Order; and

2. Hall shall inspect the documents ordered for production and inspection above within seven (7) days after AOA produces the documents ordered for inspection above or waive his right to production and inspection of these documents.

NOTICE OF STATUS CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will hold a Status Conference in this matter to determine the status of this case on January 29, 2017 at 9:00 a.m. in the Board's hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii 96813.

All parties have the right to appear in person and to be represented by counsel or any other authorized person in all Board proceedings. However, the Board encourages the parties to have a representative, who is familiar with the dispute, appear at the Status Conference.

Auxiliary aids and services are available upon request to parties and representatives with disabilities. For TTY, dial 711; then, ask for (808) 586-8616, the Hawaii Labor Relations Board. For any other reasonable accommodation, or to make arrangements to appear telephonically where permitted by the Board, call the Board at (808) 586-8616 within seven (7) days prior to the conference.

DATED: Honolulu, Hawaii, Dec. 8, 2017.

HAWAII LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair



SESNITA A.D. MOEPONO, Member



J.N. MUSTO, Member



Copies to:
James H. Hall, SRL
David R. Major, Esq.
James G. Diehl, Esq.

Herbert Lau, Deputy Attorney General

ⁱ The Board has ruled that the Hawaii Rules of Civil Procedure govern discovery procedures. Dir., Dep't of Lab. and Indus. Rels. v. Aloun Farms, Inc., Board Case No. OSH 2012-16, Order No. 494, at *6 (1/24/13).