

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

MICHAEL T. DOYLE,

Complainant,

and

HAWAIIAN CEMENT,

Respondent.

CASE NO. 07-1 (CE)

ORDER NO. 2440

ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS COMPLAINT
OR FOR SUMMARY JUDGMENT

ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS COMPLAINT OR FOR SUMMARY JUDGMENT

On January 25, 2007, Complainant Michael T. Doyle ("Complainant") filed an unfair labor practice complaint ("Complaint") against Respondent Hawaiian Cement ("Respondent"), alleging discrimination and hostile work and home environment caused by a union steward, and harassment and termination by Respondent's V.P. and President while Complainant was out under a doctor's care.

On February 12, 2007, Respondent filed its Answer to the Complaint in which Respondent asserted, among other things, that this Board does not have jurisdiction over this matter because exclusive jurisdiction over Respondent and its employees rests with the National Labor Relations Board ("NLRB"), and that Complainant is not an "employee" covered by the Hawaii Employment Relations Act ("HERA"), Hawaii Revised Statutes ("HRS") Chapter 77.

On February 28, 2007, Respondent filed its Motion to Dismiss Complaint or for Summary Judgment ("Motion to Dismiss"), arguing that the Board lacks jurisdiction over this matter because Respondent is an employer subject to the jurisdiction of the NLRB, and that Complainant is an executive or supervisory employee and thus excluded from coverage under HERA. Complainant did not file an opposition to the Motion to Dismiss.

On April 2, 2007, at 9:30 a.m., the Board heard argument from the parties on the Motion to Dismiss. Respondent was represented by Jennifer K. Murata, Esq., and Complainant was represented by Dennis W.S. Chang, Esq. Complainant did not dispute

the facts set forth in the Motion to Dismiss or the Declaration of Michael R. Coad and Exhibit "A" attached to the Motion to Dismiss.

After careful consideration of the record and argument presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The Complaint was filed on January 25, 2007.
2. Respondent's Answer was filed on February 12, 2007, and its Motion to Dismiss was filed on February 28, 2007.
3. Respondent is a company based in Hawaii which supplies construction materials such as cement, aggregate, and ready-mix cement. Its customers are primarily comprised of general contractors performing construction work in Hawaii. Respondent's annual gross revenues exceed \$1,000,000 a year.
4. Respondent purchases a significant portion of its raw materials and finished goods from vendors in foreign countries. These goods are shipped directly to Respondent in Hawaii from these other countries. Each year, the dollar amount of goods and materials purchased and shipped to Respondent from foreign countries exceeds \$50,000.
5. Complainant was employed by Respondent as the Maintenance/Fleet Manager since February of 2006, and was responsible for managing, directing, and implementing Respondent's equipment and plant maintenance programs of its Oahu Concrete and Aggregate Division.
6. As the Maintenance/Fleet Manager, Complainant was responsible for supervising and directing all of the employees within his department, including the shop workers at the Oahu Concrete and Aggregate Division. Complainant monitored and disciplined employees within his supervision as deemed necessary, and had authority to issue discipline up to suspension. Complainant was also expected to make recommendations to the General Manager of Quarry & Maintenance or to the Vice President of Administration when he believed harsher levels of discipline, such as termination, was warranted; Respondent gave Complainant's recommendations significant consideration.

7. Complainant was also directly involved in hiring employees for positions within his department. He reviewed application materials and interviewed candidates for vacant positions.
8. The NLRB has asserted jurisdiction in a number of labor disputes between Respondent and its employees, including unfair labor practice charges filed with the NLRB.

CONCLUSIONS OF LAW

1. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. See Yamane v. Pohlson, 111 Hawai'i 74, 81 137 P.3d 980, 987 (2006). 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. Id.
2. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion. Thompson v. AIG Hawaii Ins. Co., Inc., 111 Hawai'i 413, 422-23, 142 P.3d 277, 286-87 (2006).
3. There are no material facts in dispute in this matter.
4. Pursuant to HRS § 377-1(3), the definition of "employee" for purposes of the HERA does not include "any person employed in an executive or supervisory capacity" nor "any individual subject to the jurisdiction of the Federal Railway Labor Act or the National Labor Relations Act, as amended from time to time; provided that the term 'employee' includes any individual subject to the jurisdiction of the National Labor Relations Act, as amended from time to time, but over whom the National Labor Relations Board has declined to exercise jurisdiction or has indicated by its decisions and policies that it will not assume jurisdiction."
5. Pursuant to HRS § 377-1(13), a "person employed in an executive or supervisory capacity" means "any employee who has the authority to hire or fire other employees or whose suggestions and recommendations as to

hiring or firing and as to the advancement, promotion, or demotion of other employees will be given particular weight[.]”

6. Here, the NLRB has exercised jurisdiction in a number of labor disputes between Respondent and its employees, including unfair labor practice charges filed with the NLRB, and there is no evidence that the NLRB ever declined to exercise such jurisdiction or indicated that it will not assume jurisdiction.
7. Under 29 U.S.C. § 151 et seq., the NLRB has jurisdiction over enterprises whose operations affect interstate commerce. For non-retail enterprises such as Respondent, the NLRB’s standard is to assert jurisdiction over all non-retail enterprises which have an annual outflow or inflow across state lines of at least \$50,000, whether such outflow or inflow be regarded as direct or indirect. Siemons Mailing Service, 122 NLRB 81, 85 (1958).
8. Accordingly, the NLRB has jurisdiction over Respondent and its employees for purposes of unfair labor practice charges; thus, the Board lacks jurisdiction in the present Complaint.
9. Complainant is a person employed in an executive or supervisory capacity pursuant to HRS § 377-1(13); accordingly, pursuant to § 377-1(3), Complainant is not an “employee” for purposes of HRS Chapter 377.

ORDER

For the reasons discussed above, the Board lacks jurisdiction over this controversy. Respondent and its employees are subject to the jurisdiction of the NLRB for purposes of unfair labor practice charges; furthermore, Complainant is a person employed in an executive or supervisory capacity, and thus is not an “employee” for purposes of HRS chapter 377.

The Board hereby grants Respondent’s Motion to Dismiss or for Summary Judgment filed February 28, 2007.

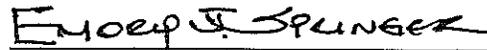
DATED: Honolulu, Hawaii, April 3, 2007

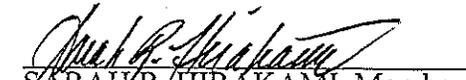
HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair

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EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

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