

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. 94-5(CE)
PHILIP A. RIVERA,)	ORDER NO. 1143
Complainant,)	ORDER GRANTING RESPONDENT'S
and)	MOTION TO DISMISS
GORDON CLEMENT,)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On August 18, 1994, Complainant PHILIP A. RIVERA (RIVERA), by and through his attorney, filed an unfair labor practice complaint with the Hawaii Labor Relations Board (Board) against Respondent GORDON CLEMENT (CLEMENT). RIVERA alleged that on May 23, 1994, CLEMENT, the sole owner and officer of Computer Supply and Repair Discounters, Inc., a Hawaii corporation, fired RIVERA in retaliation for informing the police that CLEMENT engaged in harassment of strikers during the strike by public employees, which occurred in that time period.¹ RIVERA therefore alleged that CLEMENT committed unfair labor practices in violation of §§ 377-6(2), 377-6(8), and 377-8, Hawaii Revised Statutes (HRS).

On September 26, 1994, CLEMENT, by and through his attorney, filed a motion to dismiss the instant complaint on the

¹RIVERA apparently refers to the strike by members of the Hawaii Government Employees Association (HGEA), which occurred between April 18 and April 29, 1994. See, e.g., references to the HGEA strike in Complainant's Opposition to Respondents [sic] Motion to Dismiss Filed September 26, 1994, filed on October 5, 1994.

grounds that RIVERA failed to state a claim upon which relief can be granted. CLEMENT contends that RIVERA must allege that CLEMENT interfered or retaliated against RIVERA for exercising rights protected by § 377-4, HRS, in order to state a cognizable claim under Chapter 377, HRS.

On October 5, 1994, RIVERA filed a memorandum in opposition to CLEMENT's motion to dismiss. RIVERA contends that CLEMENT addressed only a statutory provision which RIVERA did not cite or rely upon and ignored the statutory provisions cited by RIVERA in his complaint and prehearing statement.

On October 6, 1994, the Board held a hearing on CLEMENT's motion to dismiss. At the hearing, CLEMENT argued that § 377-4, HRS, establishes certain employee rights and that RIVERA failed to assert that any of those rights had been violated. See Transcript of proceedings on October 6, 1994 (Tr.), p. 5. CLEMENT also argued that RIVERA's allegation of retaliation by CLEMENT is not within the scope of coverage of Chapter 377, HRS. Tr., pp. 5-8.

RIVERA argued to the contrary that the Board has jurisdiction to oversee the economic power that a third-party employer such as CLEMENT has over his employees. Tr., pp. 10-11, 13-16. With respect to this contention, RIVERA argued that the Chapter 377, HRS, definition of employer includes not only organized employers but all employers, and the definition of an employee includes not only union members but all employees. Tr., p. 11. In addition, RIVERA argued that § 377-8, HRS, is very broadly worded and refers not just to some people, but to any

person who attempts to impact an employer-union relationship.
Tr., pp. 11-12.

RIVERA contended that CLEMENT violated § 377-8, HRS, by "trying to influence the strike by harassing the strikers, driving through their picket lines, blowing his horn at them, and generally giving them a very hard time." Tr., p. 12. Furthermore, RIVERA contended that CLEMENT violated § 377-6(2), HRS, by harassing the public employee strikers and violated § 377-6(8), HRS, because he terminated RIVERA in retaliation for making a statement to the police regarding CLEMENT's alleged harassment of the strikers.
Tr., pp. 18-21.

Based upon the memoranda of the parties and the arguments of counsel, the Board ruled at the close of the hearing that it would dismiss RIVERA's complaint. Tr., p. 21.

Section 377-6, HRS, sets forth unfair labor practices of employers and provides in relevant part:

§377-6 Unfair labor practices of employers. It shall be an unfair labor practice for an employer individually or in concert with others:

* * *

- (2) To initiate, create, dominate, or interfere with the formation or administration of any labor organization or contribute financial support to it, but an employer shall not be prohibited from reimbursing employees at their prevailing wage rate for time spent conferring with the employer, nor from cooperating with representatives of at least a majority of the employer's employees in a collective bargaining unit, at their request, by permitting employee organizational activities on employer premises or the use of

employer facilities where the activities or use create no additional expense to the employer;

* * *

- (8) To discharge or otherwise discriminate against an employee because the employee has filed charges or given information or testimony under the provisions of this chapter

Section 377-8, HRS, sets forth unfair labor practices of any person and provides:

§377-8 Unfair labor practices of any person. It shall be an unfair labor practice for any person to do or cause to be done, on behalf or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by sections 377-6 and 377-7.

In addition, § 377-4, HRS, sets forth rights of employees and provides in relevant part:

§377-4 Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection

In Case No. 85-1, Fernandez v. Andrade & Co. Ltd., Decision and Order, dated October 4, 1985, the Hawaii Employment Relations Board (HERB)² accepted the recommendation of its Hearings Officer and adopted his discussion and conclusion in the Report and Recommended Order, dated September 11, 1985, as its own opinion and conclusion.

²In 1985, the Legislature abolished HERB and transferred its functions to the Board, effective January 1, 1986.

In the Report and Recommended Order, dated September 11, 1985, HERB's Hearings Officer concluded that "Section 377-4 is the basic right which the Hawaii Employment Relations Act [Chapter 377, HRS] accords to all employees; and is the right which is protected by Section 377-6 in the case of employers and Section 377-7 in the case of employees." See Case No. 85-1, Fernandez v. Andrade & Co. Ltd., Report and Recommended Order, dated September 11, 1985 (RRO) at 3.

In Fernandez, the Complainant alleged that she was wrongfully discharged from employment in violation of §§ 377-7(1) and 377-8, HRS, because she was accused of selling marijuana at one of the Respondent's retail shops. RRO at 1-2. The issues considered in that case were (1) whether the Complainant could invoke §§ 377-7(1) and 377-8, HRS, to protect her rights as an employee of the Respondent and (2) whether under the facts and circumstances of the case the Complainant was wrongfully discharged in violation of Chapter 377, HRS. RRO at 2.

There, the Hearings Officer concluded that the Complainant could not invoke Chapter 377, HRS, and that the Respondent did not commit an unfair labor practice within the meaning of Chapter 377, HRS, because the Complainant's discharge "had nothing whatsoever to do with those rights which are protected by Section 377-4." RRO at 4. The Hearings Officer therefore concluded that §§ 377-4, 377-6, 377-7, and 377-8, HRS, were inapplicable to the circumstances of the case. Id.

Similarly, the Board in the instant case finds that RIVERA failed to establish a connection between his discharge and

the exercise of his right of self-organization and to form, join or assist labor organizations; to bargain collectively through representatives of his own choosing; or to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Thus, the Board finds that RIVERA cannot invoke §§ 377-6(2), 377-6(8), and 377-8, HRS, to protect his rights as an employee of CLEMENT.


Accordingly, the Board finds that RIVERA failed to state a claim upon which relief can be granted and hereby grants CLEMENT's motion to dismiss.

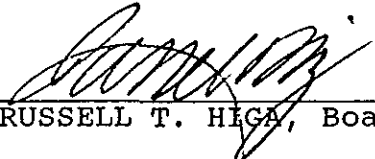
ORDER

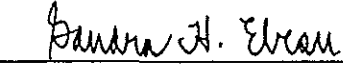
The Board hereby dismisses the instant unfair labor practice complaint.

DATED: Honolulu, Hawaii, January 24, 1995.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


SANDRA H. EBESU, Board Member

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