

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-01-522
MICHAEL K. NOGUCHI,)	ORDER NO. 2154
Complainant,)	ORDER GRANTING RESPONDENTS'
and)	MOTION TO DISMISS
BRIAN MINAAI, Director of Transportation,)	
Department of Transportation, State of Hawaii;)	
LORI TAKAO, Affirmative Action Officer,)	
Department of Transportation, State of Hawaii;)	
and DEPARTMENT OF TRANSPORTATION,)	
State of Hawaii,)	
Respondents.)	

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

On November 12, 2002, Complainant MICHAEL K. NOGUCHI (NOGUCHI), proceeding pro se, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). NOGUCHI alleges that Respondents BRIAN MINAAI (MINAAI), Director, Department of Transportation (DOT), State of Hawaii, LORI TAKAO (TAKAO), DOT Affirmative Action Officer, and the DEPARTMENT OF TRANSPORTATION (DOT) State of Hawaii (collectively EMPLOYER) violated the provisions of Hawaii Revised Statutes (HRS) § 89-13(a) by failing to take action regarding his complaints of harassment by co-workers.

On December 20, 2002, Respondents filed Respondents' Motion to Dismiss, or in the Alternative, for Summary Judgment with the Board. Respondents contend that the instant complaint should be dismissed because it fails to state a claim upon which relief can be granted and the Board lacks jurisdiction over the complaint. Alternatively, Respondents contend there are no issues of material fact in dispute and summary judgment should be granted in their favor.

On December 30, 2002, Complainant filed a response in opposition to Respondents' motion to dismiss.

On January 22, 2003, the Board held a hearing on the motion to afford the parties both notice and an opportunity to be heard. The parties were afforded full opportunity

to submit evidence and argue their respective positions. After deliberation, the Board indicated it was inclined to grant Respondents' motion and dismiss the instant complaint.

After full consideration of the record in the case, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. NOGUCHI is employed by the DOT Airports Division, State of Hawaii, and as such is a public employee as defined under HRS § 89-2, and a member of Bargaining Unit (BU) 01.
2. At all times relevant, MINAAI and TAKAO were representatives of the DOT, State of Hawaii, a public employer as defined under HRS § 89-2.
3. On or about December 18, 2001, NOGUCHI was involved in a confrontation with his co-workers and thereafter was systematically harassed. After the incident NOGUCHI met at various times with representatives of the DOT regarding complaints concerning his co-workers and supervisors.
4. On or about April 22, 2002, NOGUCHI met with DOT personnel regarding his complaints, and provided Stanford Miyamoto with detailed notes and documentation.
5. An investigation of NOGUCHI's complaint was conducted by Gerald Tom in April and May 2002. A subsequent investigation concerning NOGUCHI's complaints and issues concerning his workplace is currently being conducted by Roscoe Butler.
6. NOGUCHI is currently undergoing treatment by Dr. Dennis B. Lind, a psychiatrist, for a workers' compensation injury. In a report to the Employer Dr. Lind states, "Talked about his frustration and growing rage and despair at supervisor not taking seriously the harassment he gets from workers on other team on his shift. I have recommended administrative remedies, now, the Labor Board, as alternative to violence but if working place does not take his problems/complaints seriously, I am concerned of adverse consequences."
7. On November 12, 2002, NOGUCHI filed the instant complaint because of his frustration with the EMPLOYER for failing to take action to alleviate the hostile work environment allegedly caused by his fellow employees and supervisors.

8. The problems and complaints raised by NOGUCHI against the EMPLOYER and his fellow employees are not because of his union membership or other protected activities under HRS Chapter 89.

DISCUSSION

The gravamen of NOGUCHI's complaint is that since December 18, 2001, following a confrontation with his co-workers, they have systematically harrassed him in the workplace. Moreover, while complaints of said harrassment have been investigated by his employer, no adverse action has been taken.

Respondents, in their motion to dismiss, contend that the Board lacks jurisdiction of the instant complaint because it is barred by the statute of limitations. Furthermore, Respondents argue that even considering the facts in the light most favorable to Complainant and assuming the allegations against his co-workers and employer are true, NOGUCHI has failed to allege any claim against Respondents to support a prohibited practice actionable under HRS § 89-13(a). Accordingly, Respondents contend NOGUCHI fails to state a claim for which relief can be granted. The Board agrees.

Statute of Limitations

The instant complaint is barred by the statute of limitations, under HRS § 377-9(1)¹ made applicable under HRS § 89-14² and incorporated in the Board's rules of practice and procedure under the Hawaii Administrative Rules (HAR) § 12-42-42(a).³

¹HRS § 377-9 states:

(1) No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of the occurrence.

²HRS § 89-14 states, in part:

Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9;

³HAR § 12-42-42 states:

(a) A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

The instant complaint was filed on November 12, 2002. As such, the alleged prohibited practice must fall within the 90-day period before November 12, 2002, or after August 14, 2002. It is a well-established practice of the Board to strictly construe the ninety day statute of limitations period under HRS § 377-9(1), and dismiss complaints even when they are one day late. Alvis W. Fitzgerald, 3 HPERB, 186, 198-99 (1983). All the incidents underlying NOGUCHI's complaint stemming from the harrassment by his co-workers and the employer's failure to take action occurred before August 14, 2002. Therefore, the Board concludes that the instant complaint is untimely.

Failure to State a Claim

Even assuming arguendo, the allegations in the instant complaint are true and timely, NOGUCHI fails to state a claim upon which relief can be granted, and, therefore dismissal is required. See, Hawaii Rules of Civil Procedure (HRCP) Rule 12(b)(6).

"The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). Such a dismissal is generally disfavored but warranted "if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief." Bertelmann v. Taas Associates, 69 Haw. 95, 99, 735 P.2d 930 (1987). While the allegations in the complaint are deemed true, the 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 (1985).

The problems faced by NOGUCHI stem from confrontations that occurred with fellow employees. He has complained to his supervisors and the DOT, but is upset as he views that his supervisors and the DOT have done nothing against these employees.

It is undisputed that the problems faced by NOGUCHI neither stem from a grievance filed under the collective bargaining agreement covering BU 01, nor are they a result of activities protected under the collective bargaining laws over which this Board has jurisdiction.⁴ Indeed, the Board can find no claim by NOGUCHI that asserts a prohibited practice against the Employer actionable under HRS § 89-13(a).⁵

⁴At the motion hearing, and upon questioning by the Board, it became clear that NOGUCHI filed the instant complaint based on the advice of his treating psychiatrist, Dr. Lind, apparently made in an effort to get the Employer to address NOGUCHI's concerns. What is unclear, is whether NOGUCHI's physician meant the Labor and Industrial Relations Appeals Board, which has jurisdiction over workers' compensation claims, rather than the Hawaii Labor Relations Board.

⁵HRS § 89-13 provides:

For instance, Respondents submit, and the Board agrees, that nowhere in the instant complaint does NOGUCHI allege that the Employer's action or inaction with respect to his complaints of harassment by co-workers is because of his union membership. It is well established that only employer discrimination or harassment affecting an employee's exercise of a protected right, may be the subject of a prohibited practice charge under HRS Chapter 89. See, Hawaii State Teachers Ass'n v. Hawaii Public Employment Relations Bd., 60 Haw. 361, 590 P.2d 993 (1970). As the Hawaii Supreme Court observed, "in order for discrimination to be a prohibited practice . . . it must be inherently anti-union or be motivated by anti-union animus." Id. at 365,n.3. Discrimination or harassment by co-workers as

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
- (6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in section 89-11;
- (7) Refuse or fail to comply with any provisions of this chapter;
- (8) Violate the terms of a collective bargaining agreement;
- (9) To replace any nonessential employee for participating in a labor dispute; or
- (10) To give employment preference to an individual employed during a labor dispute and whose employment termination date occurs after the end of the dispute, over an employee who exercised the right to join, assist, or engage in lawful collective bargaining or mutual aid or protection through the labor organization involved in the dispute.

alleged by Complainant, based upon factors other than those protected under HRS § 89-13(a) does not constitute an unfair labor practice or prohibited practice.

For these reasons, the Board dismisses the instant complaint alleging a violation of HRS § 89-13(a) for failure to state a claim against the Employer upon which relief can be granted.

CONCLUSIONS OF LAW

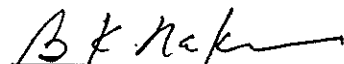
1. The instant complaint is barred by the 90-day statute of limitations period under HRS § 377-9(l) made applicable by HRS § 89-14 and incorporated in the Board's rules of practice and procedure in HAR § 12-42-42(a).
2. The instant complaint fails to state a claim upon which relief can be granted because Complainant has failed to assert a claim against Respondents actionable under HRS § 89-13(a).

ORDER

The Board hereby grants Respondents' Motion to Dismiss, or in the Alternative, for Summary Judgment, and dismisses with prejudice the instant complaint.

DATED: Honolulu, Hawaii, January 30, 2003


HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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