

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)

LORI KWOCK,)

Complainant,)

and)

DEPARTMENT OF EDUCATION, State of Hawaii; PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii; DONNA WHITFORD, Complex Area Superintendent, Maui District Office, Department of Education, State of Hawaii; ROBYN HONDA, Personnel Regional Officer, Maui District Office, Department of Education, State of Hawaii; MAUREEN SUZUKI, Personnel Management Specialist, Maui District Office, Department of Education, State of Hawaii; and JAMIE YAP, Principal, Maui Waena Intermediate School, Department of Education, State of Hawaii,

Respondents.)

CASE NO. CE-05-554

ORDER NO. 2262

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS COMPLAINT

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On February 26, 2004, Complainant LORI KWOCK (KWOCK), *pro se*, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents DEPARTMENT OF EDUCATION (DOE), State of Hawaii; PATRICIA HAMAMOTO (HAMAMOTO), Superintendent, DOE, State of Hawaii; DONNA WHITFORD (WHITFORD), Complex Area Superintendent, Maui District Office, DOE, State of Hawaii; ROBYN HONDA (HONDA), Personnel Regional Officer, Maui District Office, DOE, State of Hawaii; MAUREEN SUZUKI (SUZUKI), Personnel Management Specialist, Maui District Office, DOE, State of Hawaii; and JAMIE YAP (YAP), Principal, Maui Waena Intermediate School, DOE, State of Hawaii. KWOCK alleged that Respondents, *inter alia*, breached contractual provisions, violated her rights guaranteed by Hawaii Revised Statutes (HRS) Chapter 89 by discriminating against her in regards to her disability, failed to provide reasonable accommodations in accordance with the Americans with Disabilities Act (ADA), and threatened her and retaliated against her resulting in a projected termination date of March 18, 2004. KWOCK contends that Respondents thereby committed prohibited practices in violation of HRS §§ 89-13(a)(1), (3), (5), (6), (7), and (8).

On March 29, 2004, the Board scheduled a prehearing conference in this matter on April 8, 2004 and a hearing on April 16, 2004.

At the April 8, 2004 prehearing conference, Respondents indicated they would file a motion to dismiss the instant complaint. Based on Respondents' representation, the Board cancelled the April 16, 2004 hearing date and scheduled a hearing on Respondents' motion to dismiss on April 29, 2004.

On April 12, 2004, Respondents filed Respondents' Motion to Dismiss Prohibited Practice Complaint, or in the Alternative, for Summary Judgment. Respondents contend that Complainant failed to state a claim upon which relief can be granted; the Board lacks jurisdiction over the claims; Complainant failed to exhaust contractual remedies; and Complainant is estopped from asserting her claims by virtue of her own actions in dealing with Respondents. In the alternative, Respondents contend that there are no genuine issues of material fact in dispute and summary judgment should be granted in their favor.

On April 27, 2004, KWOCK's counsel filed a Notice of Appearance with the Board. Subsequently, pursuant to KWOCK's counsel request that he be given additional time to prepare for the hearing on the motion to dismiss, the Board continued the hearing from April 29, 2004 to May 5, 2004.

On May 5, 2004, the Board conducted a hearing on Respondents' motion to dismiss or in the alternative, for summary judgment. The parties were represented by counsel and were afforded full opportunity to be heard on the motion. After a thorough review of the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. KWOCK was for all times relevant, a business education teacher employed by the DOE, included in bargaining unit 05, and a public employee as defined in HRS § 89-2.
2. The DOE, WHITFORD, HAMAMOTO, HONDA, SUZUKI, and YAP are public employers or the representatives of a public employer as defined in HRS § 89-2.
3. At all times relevant to this complaint the exclusive representative of Unit 05, the Hawaii State Teachers Association (HSTA), and the public employer were parties to a Collective Bargaining Agreement (CBA) covering Unit 05 employees. The CBA contains a grievance procedure that culminates in final and binding arbitration.
4. On or about December 10, 1999, KWOCK sustained an injury to her voice allegedly arising out of and in the course of her employment. On or about

April 19, 2001, KWOCK filed a claim for workers' compensation benefits. Respondents voluntarily accepted liability for the injury and the Director of the Department of Labor and Industrial Relations issued a decision dated August 9, 2001, concluding that KWOCK had sustained a compensable work related injury.

5. For the school year 2002-2003, pursuant to doctor's recommendation and Complainant's request, the DOE placed KWOCK in a High Risk Counselor position at Maui Waena Intermediate School to accommodate her medical limitations.
6. On or about August 18, 2003, the DOE's Workers' Compensation Section referred KWOCK's case for participation in the Return to Work Priority Program (Program) based on her treating physician's medical opinion that she was unable to return to work as a teacher.¹
7. On September 19, 2003, Respondent HONDA met with KWOCK to explain her employment status, her rights, responsibilities, and options on the Program. If Complainant elected to participate in the Program a District job search would be conducted once a month for six months. After three months, if no placement was made, a Statewide DOE job search would be conducted once a month for the remaining three months. HONDA explained to KWOCK that if no placement was made within the six-month job search period, KWOCK would be terminated due to medical disqualification, and referred to the workers' compensation claims manager for vocational rehabilitation services.²
8. KWOCK was informed that if she elected to participate in the Program, she would need to submit a completed medical release form and a completed teacher application by October 17, 2003.
9. Complainant executed and submitted a medical release form and a teacher application form to HONDA on October 2, 2003. Complainant indicated that the only geographical area that she was interested in being placed was the island of Maui.
10. Respondents conducted monthly job searches for Complainant from October 2003 through March 2004. None of the job searches identified positions that Complainant could perform given her medical restrictions.

¹See, Respondents' Motion to Dismiss Prohibited Practice Complaint, or in the Alternative, for Summary Judgment, Exhibit (Ex.) "A;" Declaration of Robyn Honda.

²Id., Exs. "B" and "C."

11. On or about March 1, 2004, KWOCK was designated for placement for the Computer/Tech Coordinator teaching position at Maui Waena Intermediate School for the 2004-2005 school year. According to HONDA, the reason for placement was to ensure that KWOCK would continue to be paid in a timely manner should she continue to be a DOE employee for the 2004-2005 school year. By letter dated March 18, 2004, Respondents informed KWOCK that her participation in the Program would end on March 19, 2004 in accordance with Governor's Administrative Directive No. 94-02, "which provide[s] that an employee may be discharged when no suitable placement can be made for a disabled employee, [KWOCK] will be separated from employment."³
12. On or about February 19, 2004, KWOCK filed a Step 2 grievance, Case No. 04-078, over her termination from the counselor position. KWOCK alleged in the grievance, among other things, that DOE was unwilling to accommodate the special needs of a disabled teacher and the DOE continued to discriminate against a teacher for job-related disability resulting in a termination date of March 18, 2004. As remedial relief, KWOCK sought (1) for the DOE to cease and desist from all discriminating activities against her; (2) to continue in the current counseling position for the remainder of the school year with no termination as a result of her disability; (3) full accommodations provided to her and placement in an appropriate position; and (4) no reprisals, retaliation, or harassment directed towards her.
13. On or about March 1, 2004, KWOCK filed two step 2 grievances, Case Nos. 04-081 and 04-082. These grievances are basically on the same subject matter, i.e., her separation from employment, as Case No. 04-078.
14. The Employer and the HSTA mutually agreed to schedule Step 2 meetings on all three of KWOCK's grievances on May 27, 2004.⁴

DISCUSSION

HRS § 89-13(a) states in relevant part that 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;

* * *

³Id., Ex. "D."

⁴See, Declaration of Susan La Vine.

- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in 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 and arbitration procedures set forth in section 89-11;
- (7) Refuse or fail to comply with any provision of this chapter;
- (8) Violate the terms of a collective bargaining agreement;

Respondents contend Complainant failed to allege specific facts in support of her claims against them. Respondents also contend that the Board lacks jurisdiction over the instant HRS §§ 89-13(a)(5), (6), (7) and (8) claims alleging violations of the Unit 05 CBA. Respondents further contend that assuming the facts of Complainant's claims to be true, HRS §§ 89-13(a)(1) and (3) should be dismissed because Complainant's claims fail to state a claim of interference or discrimination based upon union membership or the exercise of concerted activities.

Failure to State a Claim for Relief

“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). A dismissal is clearly warranted under Rule 12(b)(6), HRCPP, if the claim is clearly without merit due to “an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.” Rosa v. CWJ Contractors, Ltd., 4 Haw.App. 210, 215, 664 P.2d 745 (1983) (internal quotes and citation omitted). 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).

HRS §§ 89-13(a)(1) and (3)

After reviewing the record and considering the arguments presented, it is clear that the arguments made on behalf of KWOCK relate to her work-related disability and her alleged discrimination because of such disability or injury. There were no facts presented

which support a claim that the employer or its representatives interfered, restrained or coerced KWOCK in the exercise of her rights under HRS Chapter 89, the prohibited practice identified under HRS § 89-13(a)(1).

Likewise, HRS § 89-13(a)(3) prohibits discrimination by the employer to encourage or discourage membership in any employee organization. KWOCK's claims against the Respondents are based upon alleged discrimination based on disability and not because of the exercise of concerted activities or membership in the union. Thus, after reviewing the record, it appears beyond a reasonable doubt that Complainant can prove no set of facts entitling her to relief on the foregoing claims. The Board thus concludes that Complainant fails to state a claim for which relief can be granted as to those alleged violations. See, Richard Hunt v. Catherine Bratt, et al., Case No. CE-05-521, Order No. 2153, Order Granting Respondents' Motion to Dismiss and Denying Complainant's Request for Reconsideration, 1/29/03, where the Board, inter alia, dismissed Complainant's HRS § 89-13(a)(3) claims of discrimination which were based on gender and age rather than on the basis of union membership; and Nena B. Pattugalan v. Department of Health, et al., Case No. CE-10-516, Order No. 2136, Order Granting Respondents' Motion to Dismiss Prohibited Practice Complaint, 12/10/02, where Complainant, inter alia, failed to allege sufficient facts which would give rise to a claim of discrimination under HRS § 89-13(a)(3).

HRS §§ 89-13(a)(5) and (6)

In the same way, HRS § 89-13(a)(5) prohibits the employer from refusing to bargain in good faith with the exclusive representative as required in HRS § 89-9 and HRS § 89-13(a)(6) prohibits the employer from refusing to participate in good faith in the mediation and arbitration procedures set forth in HRS § 89-11. HRS § 89-11 refers to the resolution of impasse disputes over the terms of renewed or reopened collective bargaining agreements and does not pertain to grievance arbitrations. The Board finds that KWOCK failed to set forth any facts in her complaint to support a claim that the employer refused to bargain in good faith with the union or refused to participate in the mediation and arbitration procedures of HRS § 89-11. See, Bert Sam Fong v. Ted Sakai, et al., Case No. CE-10-503 and Bert Sam Fong v. Gary Rodrigues, et al., Case No. CU-10-201, Order No. 2113, Order Granting UPW's Motion for Summary Judgment and Employer's Motion to Dismiss Prohibited Practice Complaint, 9/12/02, where the Board, inter alia, dismissed Complainant's HRS § 89-13(a)(6) claims recognizing that HRS § 89-11 involved impasses in negotiations over the terms of the agreement and was therefore inapplicable to the complaint. In the same way, these provisions are clearly inapplicable to KWOCK and the Board further finds that Complainant lacks standing to raise these claims before the Board.

HRS § 89-13(a)(7)

HRS § 89-13(a)(7) prohibits the employer from refusing to comply with the provisions of Chapter 89. In argument before the Board, however, KWOCK's counsel argued that the Respondents violated HRS Chapter 386, Workers' Compensation Law, over which the

Board has no jurisdiction. Assuming KWOCK's allegations in her complaint are true, the Board finds that she has failed to set forth sufficient facts entitling her to relief based on a claim of a Chapter 89 statutory violation.

HRS § 89-13(a)(8)

Lastly, Complainant seeks relief for alleged violations of the applicable collective bargaining agreement. Generally, such alleged violations are adjudicated through the bargaining agreement's grievance process. And Chapter 89 expressly authorizes parties to a collective bargaining agreement to establish a "grievance procedure culminating in final and binding decision..." (Emphasis added.) HRS § 89-11(a). Chapter 89, however, also provides the Board with jurisdiction over alleged contractual violations by either an employer or exclusive representatives via its authority to adjudicate prohibited practices complaints. HRS §§ 89-13(a)(8) and 89-13(b)(5). This jurisdictional dilemma is usually resolved by the Board's deferral to the arbitration process.⁵ Thus the Board has deferred to the contractual grievance process⁶ except where there exists countervailing policy considerations⁷ or the union's failure to satisfy its duty of fair representation effectively deprived the claimant of access to the grievance process.⁸ See, Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 145 LRRM 2668 (9th Cir. 1994).

Such voluntary declination of jurisdiction is akin to the requirement that parties exhaust contractual remedies before access is afforded by the Board. The Hawaii Supreme Court in Santos v. State, Dept. of Transp., Kauai Div., 64 Haw. 648, 655, 646 P.2d 962 (1982) has stated that "It is the general rule that before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the [union]. (citation omitted) The rule is in keeping with the prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism." (citations omitted.) Application of this rule permits a voluntary declination of jurisdiction and has often been adopted and applied by this Board when a claimant has failed to fully exhaust available contractual remedies. See, e.g., Hawaii State Teachers Association, 1 HPERB 253 (1972) (HSTA).

⁵"It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties." Hawaii State Teachers Association, 1 HPERB 253, 261 (1972).

⁶See, e.g., State of Hawaii Organization of Police Officers, 6 HLRB 25 (1998).

⁷See, e.g., Hawaii State Teachers Association, *supra*, (arbitration fruitless and parties waive arbitration); Hawaii State Teachers Association, 1 HPERB 442 (1974) (speed); and Hawaii Government Employees Association, 1 HPERB 641 (1977) (subject not covered by contract).

⁸Vaca v. Sipes, 386 U.S. 171, 190-91, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

In the instant case, the Board finds no allegations of the union's breach of duty in pursuing her grievances or any countervailing policy considerations which mitigate in favor of assuming jurisdiction. In fact, Complainant has filed several grievances with the Employer raising claims regarding her termination which are pending resolution. The Board will therefore defer KWOCK's contractual claims to the grievance process and decline jurisdiction over Complainant's claims of HRS § 89-13(a)(8) contractual violations. See, Hawaii Fire Fighters Association v. Honolulu Fire Department, Case No. CE-11-543, Order No. 2234, Order Granting Respondent's Motion to Dismiss Complaint, 3/1/04, where the Board deferred the union's complaints of contract violations arising from the conduct of multi-company night exercises without compensation to the grievance procedure where a grievance was pending; and Vincent Walker v. Benjamin J. Cayetano, et al., CE-10-510, Order No. 2137, Order Granting Respondents' Motion to Dismiss Prohibited Practice Complaint, 12/10/02, where the Board deferred Complainant's claims of improper discharge to the contractual grievance procedure.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. A dismissal is clearly warranted under Rule 12(b)(6), HRCP, if the claim is clearly without merit due to "an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Rosa, supra. 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, supra.
3. KWOCK failed to state a claim for relief against the Respondents under HRS § 89-13(a)(1) in that she failed to set forth a set of facts sufficient to support a claim that Respondents interfered with her rights under Chapter 89.
4. KWOCK failed to state a claim for relief against the Respondents under HRS § 89-13(a)(3) in that she failed to set forth a set of facts sufficient to support a claim that Respondents discriminated against her with regard to the terms of her employment to discourage her membership in the union.
5. KWOCK failed to state a claim for relief under HRS § 89-13(a)(5) as she failed to set forth a set of facts sufficient to support a claim that the employer refused to bargain in good faith.
6. KWOCK failed to state a claim for relief that Respondents violated HRS § 89-13(a)(6) because the provisions of HRS § 89-11 pertain to the mediation

and arbitration of impasses in negotiations over the terms of the collective bargaining agreement.

7. KWOCK failed to state a claim for relief that the Respondents violated HRS §§ 89-13(a)(7) because her alleged violations of Chapter 386 are outside the Board's jurisdiction.
8. The Board defers the contractual claims raised by KWOCK to the grievance procedure. The record is clear that she filed several grievances involving her termination with the Employer which are pending resolution. Further there is no proof that the union has breached its duty of fair representation in the processing of the grievances or any countervailing policy considerations for the Board to assert its jurisdiction over her contractual claims.

ORDER

The Board grants Respondents' motion to dismiss the instant complaint.

DATED: Honolulu, Hawaii, June 8, 2004.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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