

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

PAULA M. MONIZ,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO and DEPARTMENT
OF TRANSPORTATION, Highways
Division, State of Hawaii,

Respondents.

CASE NOS.: CU-01-250
CE-01-626

ORDER NO. 2400

ORDER GRANTING UPW'S MOTION
TO DISMISS, FILED ON JULY 10,
2006 AND RESPONDENT
DEPARTMENT OF
TRANSPORTATION'S MOTION TO
DISMISS, FILED ON JULY 31, 2006

ORDER GRANTING UPW'S MOTION TO DISMISS,
FILED ON JULY 10, 2006 AND RESPONDENT DEPARTMENT OF
TRANSPORTATION'S MOTION TO DISMISS, FILED ON JULY 31, 2006

On July 5, 2006, PAULA M. MONIZ ("MONIZ") filed a prohibited practice complaint against the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ("UPW" or "Union") and the DEPARTMENT OF TRANSPORTATION, Highways Division, State of Hawaii ("DOT") with the Hawaii Labor Relations Board ("Board"). MONIZ alleged, *inter alia*, that UPW business agent Eddie Akau ("Akau") failed to respond to her numerous requests for assistance with a complaint she filed against her employer for sexual harassment by supervisor Clarence Preston ("Preston") and two fellow employees, Phillip Reis and Justin Katsuda ("Katsuda") between October 2, 2005 and February 17, 2006 when a first step grievance meeting was scheduled. MONIZ also alleged that the DOT retaliated against her and she was transferred to the Hauula Baseyard on May 15, 2006, where she complained about the working conditions. MONIZ thus contended Respondents violated Hawaii Revised Statutes ("HRS") §§ 89-13(a)(4) and 377-6(8); 89-13(a)(5) and 377-6(4); 89-13(b)(4), 89-8(a)(8), 89-13(b)(5), 377-6(6), and 377-7(3); and 89-13(a)(8), 89-13(b)(5), 377-6(6) and 377-7(3).

On July 10, 2006, Respondent UPW filed a motion to dismiss with the Board. The UPW contends that the instant complaint should be dismissed for lack of jurisdiction and failure to state a claim for relief. The UPW contends that the Board lacks jurisdiction over the events which occurred more than 90 days prior to the filing of the complaint or April 6, 2006 because they are time-barred. Moreover, the UPW contends that MONIZ's allegations regarding events after April 6, 2006 fail to state a claim for relief against the UPW for breach of the duty of fair representation because she did not

request the UPW's assistance with regard to the working conditions complained of. In addition, the UPW argues that MONIZ failed to establish that there has been a violation of the collective bargaining agreement.

By Notice issued on July 21, 2006, the Board scheduled a hearing on the UPW's Motion to Dismiss on August 8, 2006.

On July 31, 2006, Respondent DOT filed a Motion to Dismiss with the Board. The DOT contends that MONIZ's complaint should be dismissed as untimely because MONIZ's allegations of retaliation by Preston are time-barred because she was transferred to the Honolulu crew on January 23, 2006. In addition, the DOT contends that the Board lacks jurisdiction over MONIZ's claims of sexual harassment which would properly be before the Hawaii Civil Rights Commission. The DOT also argues that all harassment claims arising before April 6, 2006 are time-barred. The DOT further contends that the complaint fails to state a claim upon which relief can be granted regarding alleged HRS § 89-13(a)(5) refusal to bargain in good faith violations because MONIZ is not the exclusive representative and therefore lacks standing to assert such bargaining violation claims. The DOT also contends that MONIZ failed to exhaust available contractual remedies for her contractual violation claims.

Pursuant to UPW's counsel's request, the Board rescheduled the hearing on the UPW's motion to dismiss from August 8, 2006 to August 10, 2006. The Board also included the DOT's motion to dismiss for hearing.

Thereafter, the Board continued the hearing pursuant to MONIZ's request because she retained an attorney who needed additional time to investigate the facts in this case.

The Board rescheduled the hearing on Respondents' respective motions on September 7, 2006 at 9:30 a.m.

On September 7, 2006, the Board convened a hearing on the pending motions to dismiss. Respective counsel appeared at the hearing and MONIZ did not appear.

The Board heard arguments on the respective motions to dismiss. Based upon a review of the record and consideration of the arguments presented, the Board hereby issues the following findings of fact, conclusions of law, and order dismissing the instant complaint.

FINDINGS OF FACT

1. MONIZ was for all relevant times an Equipment Operator assigned to the Windward Baseyard Highway Maintenance Unit, Highways Division,

Department of Transportation, State of Hawaii. MONIZ is included in bargaining unit 01.

2. The UPW is an "employee organization" and the "exclusive representative," within the meaning of HRS § 89-2, representing the members of Unit 01 for the purposes of collective bargaining.
3. The DOT is an agency of the State of Hawaii and for all relevant times represents the interests of the Governor in dealing with its employees. As such, the DOT is an "employer" within the meaning of HRS § 89-2.
4. MONIZ filed a complaint with her employer, dated October 3, 2005, alleging a number of complaints against her co-workers, including Katsuda, for harassment.
5. MONIZ thereafter alleged her supervisor, Preston, retaliated against her after she filed the complaint.
6. MONIZ sustained a work injury on or about October 14, 2005 and did not return to work until January 23, 2006.
7. MONIZ requested assistance from Akau, her Union agent, but despite repeated attempts was unable to reach Akau. MONIZ contacted other Union agents who assisted her.
8. MONIZ filed a complaint with her employer, dated December 1, 2005, alleging sexual harassment by Preston.
9. On or about December 12, 2005, the Union filed a Step 1 grievance and an Amended Step 1 grievance on MONIZ's behalf regarding her working conditions, harassment by her co-workers, and alleging workplace violence. Also on December 12, 2005, the Union requested information from the employer regarding MONIZ's grievance.
10. On or about January 5, 2006, the Attorney General's Office commenced an investigation of MONIZ's complaint regarding harassment.
11. MONIZ was transferred to the Honolulu crew upon her return to work pursuant to her request.
12. On or about February 10, 2006, MONIZ filed a complaint with the Hawaii Civil Rights Commission alleging sexual harassment by Preston.

13. Akau contacted MONIZ on or about February 13, 2006 to advise her that there would be a Step 1 meeting on February 17, 2006. On February 17, 2006, MONIZ refused to participate in the grievance meeting and the meeting was apparently postponed.
14. On or about May 3, 2006, MONIZ wrote to Dayton Nakanelua, UPW State Director, requesting his assistance. MONIZ spoke with Laurie Santiago on or about June 3, 2006 about her concerns about the lack of Union assistance.
15. On or about May 15, 2006, MONIZ was transferred to the Hauula baseyard and complained about the lack of toilet facilities and not being given rest or lunch breaks.
16. There is no evidence that MONIZ complained to the Union about the working conditions at the Hauula baseyard or filed her own grievance on the working conditions.
17. The instant complaint was filed on July 5, 2006.
18. The allegations against the UPW for breach of the duty of fair representation regarding Akau's unresponsiveness arose from events which occurred more than 90 days prior to the filing of the instant complaint. In addition, MONIZ did not request the Union's assistance to address her working conditions at the Hauula baseyard.
19. With respect to the DOT, the allegations of sexual harassment at the Windward and Honolulu baseyards arose more than 90 days before the filing of the instant complaint. In reviewing the pleadings in the light most favorable to the nonmoving party, Complainant failed to exhaust her contractual remedies regarding her most recent claims of sexual harassment which allegedly arose after her transfer to Hauula baseyard.

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. The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. The Board's HAR § 12-42-42 provides in relevant part:
 - (a) A complaint that any public employer, public employee, or public 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. (emphasis added).
3. Additionally, HRS § 89-14 provides that “[a]ny 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[.]” In turn, HRS § 377-9, dealing with the prevention of unfair labor practices, clearly provides that, “No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.” (HRS § 377-9(1)).
4. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This limitation is jurisdictional and provided by statute; accordingly, it may not be waived by either the Board or the parties. TriCounty Tel. Ass’n., Inc. v. Wyoming Public Service Comm’n., 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, “As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do”); see generally, HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (“The law has long been clear that agencies may not nullify statutes”).
5. Accordingly, the Complaint is untimely with respect to the portions of the Complaint involving actions of the Union agent or the actions of the employer prior to 90 days before the filing of the instant complaint or April 6, 2006.
6. Federal precedent has been used to guide the interpretation of state public employment law. See Poe v. Hawai‘i Labor Relations Board, 105 Hawai‘i 97, 101, 94 P.3d 652, 656 (2004) (citing Hokama v. University of Hawai‘i, 92 Hawaii 268, 272 n.5, 990 P.2d 1150, 1154 n.5 (1999)).
7. A “hybrid § 301” suit under the federal Labor Management Relations Act comprises two causes of action: suit against the employer for a breach of collective bargaining agreement, and suit against the union for breach of its duty of fair representation. See DelCostello v. International Brotherhood of

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EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

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