STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of JANET WEISS, Complainant, and PATRICIA CHAMPAGNE, Principal, Kohala Middle School, State of Hawaii; JANETTE SNELLING, Principal, Kohala High School, State of Hawaii; CATHERINE BRATT, Principal, Retired; and ART SOUZA, District Superintendent, Department of Education, State of Hawaii, Respondents.	CASE NO. CE-05-817 ORDER NO. 3081 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

I. PROCEDURAL AND FACTUAL BACKGROUND:

If it be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

A. THE COMPLAINT

On January 8, 2013, Complainant JANET WEISS (Complainant or Ms. Weiss), self-represented litigant (SRL or *pro se*) filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) against Respondents PATRICIA CHAMPAGNE (Champagne), Principal, Kohala Middle School (KMS), [Department of Education (DOE),] State of Hawaii; JANETTE SNELLING (Snelling), Principal, Kohala High School (KHS), [DOE] State of Hawaii; CATHERINE BRATT (Bratt), Retired Principal; and ART SOUZA (Souza), District Superintendent, DOE, State of Hawaii (collectively as Respondents), alleging violations of Hawaii Revised Statutes (HRS) §89-13(a)(4), (7), and (8). The Complaint alleged, among

other things, that Weiss can prove that: Weiss discovered on or about November 7, 2012 that "Bratt [CB] convinced Snelling [JS] in carrying [sic] on a vendetta from which the HLRB ruled in 2000 [Bratt] must cease and desist;" "[i]n 2010, [Bratt] and [Snelling] did conspire and then steal from [Weiss's] A3 classroom almost $20,000 worth of computer technology (and 5 year's worth of Weiss's work product);" on November 7, 2012, Complainant became aware that 18 computers bought with Federal Title 1 funds that she thought were being stored in the school basement in July 2010 were "wrongfully remove[d]" by Snelling from KMS and given to KHS; the replacement equipment was "totally insufficient;" there was a "causal nexus" between Respondents, two prior HLRB cases from 2000, and two recent grievances; the three principals have been "working together to create a hostile workplace, so as to make Weiss quit her job;" and fiduciary [Souza] "betrayed his trust" - the "Kohala schools have been compromised by these self-serving educational officers."

In the Complaint, Ms. Weiss alleged, as other relevant facts showing a pattern of retaliation: two previous HLRB cases CE-05-452, Decision No. 425 and CU-05-164, Decision No. 420,[i] in which she "proved Bratt conspired with teacher-union members and [her] union reps to retaliate [against] her;" an October 2010 grievance (HSTA #WH 10-12) against Snelling for removal of 18 computers and dismantling KMS' Tech Plan and a November 2012 grievance (HSTA #WH 11-10) against Champagne for removal of computer workstations and dismantling of KMS' Tech Plan; from 1990 on, Bratt retaliated against Ms. Weiss, including taking her KHS job away and "exiling" her to KMS for the School Year (SY) 1999-2000, creating bad, life-altering health conditions; after Snelling became the KMS principal in August 2008, she "re-instigated [Bratt's] vendetta against Ms. Weiss in violation of Decision No. 425, cancelled a Harvard University pilot math project, would not purchase software programs required for the Tech Plan, and gave Ms. Weiss five times more students than her "favorite yes-people;" Souza refused to intervene, except when Ms. Weiss told him about an alleged pedophile covered up from 2009; and Weiss "surmises that [Champagne] is abusing [Weiss] professionally" to elicit a response from [Weiss] like that of a fellow teacher who quit because of Champagne with the goal of replacing senior teachers, with Teach for America "rookies."

On January 9, 2013, the Board issued a Notice to Respondent(s) of Prohibited Practice Complaint; Notice of Prehearing/Settlement Conference and Notice of Hearing on the Prohibited Practice Complaint.

On January 18, 2013, Respondents filed Respondents' Answer to Complaint.

On February 1, 2013, the Board issued a Notice of Filing Deadlines; and Notice of Motion Hearing (Notice of Deadlines) setting February 5, 2013 as the deadline for Respondents to file their dispositive motion; February 19, 2013 as the postmark date for Complainant's response; and a motion hearing on February 25, 2013.

On February 4, 2013, Respondents filed Respondents' Motion to Dismiss or in the Alternative for Summary Judgment (Motion).

On February 20, 2013, Complainant filed her Memorandum in Opposition to the State's Motion to Dismiss Complaint (Complainant's Response).

On February 21, 2013, Respondents filed Respondents' Reply Memorandum to Complainant's Memorandum in Opposition to the State's Motion to Dismiss Complaint (Respondents' Reply).

On February 25, 2013, Complainant filed Complainant's Reply to Respondents' 11th hour [sic] (Complainant's Reply).

On February 25, 2013, a Motion hearing was held.

On February 27, 2013, Complainant filed a Memorandum Regarding HSTA's Collective Bargaining Agreement, Contractual Obligations, and Timelines-Poe does not apply (February 27, 2014 Memorandum).[ii]

On April 11, 2013, Ms. Weiss filed her Notice of Evidenciary [sic] Discovery with Exhibits; Motion for Summary Judgment (April 11, 2013 Notice and Motion for Summary Judgment).[iii]

On April 18, 2013, Respondents filed Respondents' Memorandum in Opposition to Motion for Summary Judgment (Respondents' Memorandum in Opposition).[iv]

On May 21, 2013, Complainant filed Notice of Activities-Update HSTA's newest Grievance WH 1208: Janet Weiss's Loss of Technology Line, Demotion to Physical Education Line for SY 2013-2014 (May 21, 2013 Notice).[v]

B. BACKGROUND FACTS:

Complainant Ms. Weiss is, and was for all relevant times, a teacher at KMS, an employee or public employee within the meaning of Hawaii Revised Statutes (HRS) §89-2,[vi] and a member of bargaining unit (BU) 5, as provided by HRS § 89-6.[vii] Prior to teaching at KMS, Ms. Weiss was a teacher at KHS.

Respondent Champagne has been the KMS principal since September 2011.

Respondent Snelling is, and was since 2011, the principal of KHS and was formerly the KMS principal from 2008-2011.

Respondent Bratt was the KHS principal from 1990 to 2011 and is now a retired KHS principal.

Respondent Souza is, and was for all relevant times, the Complex Area Superintendent for the Honokaa, Kealakehe, Kohala, and Konawaena Complex, Hawaii District, Department of Education, State of Hawaii.

The Hawaii State Teachers Association (HSTA) is, and was for all relevant times, the employee organization certified as the exclusive representative of BU 5 (teachers and other personnel of the department of education under the same pay schedule), as defined in HRS § 89-2.[viii]

On August 29, 2000, Ms. Weiss filed a prohibited practice complaint against Bratt for retaliation against Ms. Weiss for engaging in protected activity in wilfull violation of HRS § 89-13(a)(4). In Weiss v. Bratt, Board Case No. CE-05-452, Decision No. 425, 6 HLRB 188 (2001), the Board concluded that Bratt's conduct singling out Ms. Weiss to receive a letter of non-renewal of her lease for teacher housing constituted a conscious, knowing, and deliberate retaliation against Ms. Weis for testifying about her grievances involving the employer in that case and subpoenaing her employer to testify before the Board in wilfull violation of HRS § 89-13(a)(4).

In 2000, Ms. Weiss was transferred to the middle school at Halaula.

In 2010, Snelling approached Ms. Weiss regarding replacement of Ms. Weiss's classroom computers with a series of networked computer systems. The computers were removed in Summer 2010, stored in the Technology Coordinator's office, and either tagged for disposal or relocation to other KMS classrooms. Both Snelling and Bratt specifically stated in their declarations that none of these computers removed from Ms. Weiss's classroom were given to KHS.

The subsequent grievance filed by Ms. Weiss (HSTA #10-12) in 2010 did not address the removal and replacement of computers from her classroom, but rather the removal of the LEXIA program from the computers in Ms. Weiss's classroom without her knowledge or consent. On December 13, 2010, Souza denied the grievance at Step 1, after Snelling and Ms. Weiss reached an agreement on the limited use of the software program in Ms. Weiss's classes.

Snelling discontinued the Symphony Mathematics (Harvard University pilot mathematics project) in 2008.

Prior to leaving KMS to become KHS Principal in 2011, Snelling and Ms. Weiss had disagreements regarding how monies were being spent on new technology.

Snelling stated in her declaration that she assigned Ms. Weiss's student load based on Ms. Weiss's teaching line.

During the 2012 summer school session, the computers in Ms. Weiss's classroom were removed because of a class and replaced prior to the SY 2012-2013. HSTA UniServ Leroy Simms (Simms) filed two grievances against Champagne on behalf of Ms. Weiss based on this 2012 removal and replacement of computers.

On August 20, 2012, the first grievance (HSTA #WH-11-10) was filed over the failure of the computers removed from her classroom to operate following their replacement, her lack of opportunity to be a part of a technology committee to review/update the school's technology plan, and the denial of her request to purchase specific science software for her study skills class. Ms. Weiss maintained that these issues were all a part of a pattern of discrimination against her by the former KHS and KMS principals and the current KMS principal. On November 29, 2012, Souza denied the grievance at Step 1. Nonetheless, the parties entered into an agreement that Ms. Weiss would: 1) receive and have purchased an upgrade in the operating system for the computers in her classroom; 2) be invited to participate in the committee to upgrade the school's technology program; and 3) be given the opportunity to work with the principal and the Edison Learning consultant regarding discussion of appropriate curriculum for the Study Skills class.

On February 6, 2013, the HSTA filed a Step 2 grievance (HSTA #WH12-07) on behalf of Ms. Weiss regarding the lack of improvement in the situation regarding the supplies and equipment removed from the classroom and the failure of the replacement supplies and equipment to meet the needs of previous agreements. On February 7, 2013, DOE Personnel Specialist Kalei Rapoza rejected the grievance at Step 2. [ix]

On March 22, 2013, Ms. Weiss also filed a prohibited practice complaint against the HSTA, HSTA President Wil Okabe, and HSTA UniServ Director Leroy Simms (Simms) for breach of their duty of fair representation for failure to make a good faith effort to complete the process for the grievance filed on August 20, 2012 (WH-11-10). On November 12, 2014, the Board issued Weiss v. Okabe, Board Case No. CU-05-321, Order No. 3031 (2014), which, among other things, dismissed that prohibited practice complaint.

Both Snelling and Champagne stated in their declarations that apart from preparation for this case and their contact at the monthly principals meeting, their only discussion was regarding a telephone call from Ms. Weiss about a software program previously used while Snelling was at KMS. Snelling further stated that in that call, she directed Ms. Weiss to contact Champagne, as the current KMS Principal.

Bratt stated in her declaration that other than preparation for this case, she has had no discussions with Champagne or any work related discussion with Snelling regarding Complainant.

II. DISCUSSION, CONCLUSIONS, AND ORDER

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

A. STANDARDS FOR REVIEW

1. Motion to Dismiss

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b)(1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss brought under HRCP Rule 12(b)(6) for failure to state a claim, "Dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy), *(citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her

to relief. We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawaii at 107-108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008) (Young). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Paysek v. Sandvold, 127 Hawaii 390, 402-403, 279 P.3d 55, 67-68 (App. 2012) *(citing* Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); Young, 119 Hawaii at 406, 198 P.3d at 669.

2. Motion for Summary Judgment

Under Rule 56 (Rule 56) (b) of the Hawaii Rules of Civil Procedure, a party "may move with or without supporting affidavits for a summary judgment in the party's favo[r]." Ralston v. Yim, 129 Hawaii 46, 55-56, 292 P.3d 1276, 1285-1286 (2013) (Ralston). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatives, 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." Id. at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawaii 125, 129, 267 P.3d 1230, 1234 (2011) (Thomas). Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004) (French).

In addition, for cases in which the non-movant bears the burden of proof at trial, the Hawaii Supreme Court has adopted the burden shifting paradigm: The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components. First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a

genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. French, 105 Hawaii at 470, 99 P.3d at 1054.

"Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial." Ralston, 129 Hawaii at 56-57, 292 P.3d at 1286-1287; French, 105 Hawaii at 471-472, 99 P.3d at 1055-1056.

Finally, when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her]. Foronda v. Hawaii International Boxing Club, 96 Hawaii 51, 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawaii 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

B. RESPONDENTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

In support of their Motion, Respondents argue that all of the Complaint allegations, except for the filing of the grievance in November 2012, occurred prior to October 9, 2012 and are barred by the 90-day limitations period in HRS §89-13(l)[sic].[x] Further, Respondents contend that that the Complaint allegations do not establish violations of HRS §89-13(a)(4), (7), or (8).

Ms. Weiss opposes the Motion maintaining that: 1) she became aware of the alleged "collusion" on November 7, 2012, which is within the 90-day statute of limitations; 2) the Board can consider retaliatory acts prior to the 90-day period if knowledge of those previous acts was only just discovered within that period and should consider all of her evidence as part of a *prima facie* case of hostile environment based on the U.S. Supreme Court's ruling in Amtrak v. Morgan, 536 U.S. 101 (2002) (Amtrak),[xi] stating that "A charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period[.]"

In Respondents' Reply, Respondents present numerous counterarguments, including but not limited to that: 1) the Amtrak case is inapplicable because that case was brought under Title

VII in which the time requirements are not jurisdictional; 2) Respondents' counsel was unaware at the time of the filing of the Motion that the November 2012 grievance had not been resolved or would have argued that the Complaint should be dismissed for Ms. Weiss's failure to exhaust her grievance based on Poe v. Haw. Lab. Rels. Bd., 105 Hawaii 97, 100, 94 P.3d 652, 655 (2004) (Poe); 3) any claims not included in the Complaint, including events happening after that date (i.e. her prospective assignment as a physical education teacher), are not part of the Complaint; 4) Bratt should be dismissed as a party based on her retirement and lack of evidence that she received the computers; 5) the pedophile allegation should be dismissed for lack of relevance to the Complaint and a failure to articulate any reason that Respondents have violated HRS §§ 89-13 or 377-9; 6) the Board should dismiss the whistleblower allegations which have nothing to do with violations of HRS §§ 89-13 and 377-9 for lack of jurisdiction; 7) the allegations against Champagne for the July 2012 removal of the computers are barred by the 90-day statute of limitation; 9) the allegations about the 2010 original technology plan against Snelling were not discovered in November 2012 and are barred by the 90-day statute of limitations; 10) the allegations regarding Champagne's treatment of other KMC teachers are irrelevant or barred by the 90-day period; 11) any alleged factual disputes raised by Ms. Weiss regarding the declarations should be disregarded because such allegations have nothing to do with the statute of limitations and whether Ms. Weiss's Complaint has articulated and identified her HRS §§ 89-13 and 377-9 claims against Respondents; and 12) the hostile work environment allegation should be dismissed because Ms. Weiss fails to articulate how the alleged hostile work environment violated her HRS §§ 89-13 and/or 377-9 rights.

1. The Board Has No Jurisdiction Over The Complaint Allegations Not Involving HRS Chapter 89.

The Board's specific powers and functions regarding HRS Chapter 89 are set forth in HRS § 89-5(i). The relevant portions of this provision state:

> (i) In addition to the powers and functions provided in other sections of this chapter, the board shall:
> ***
> (3) Resolve controversies under this chapter; [and]
> (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper[.]

The Board concurs with Respondents' arguments that some of the Complaint allegations contained in the Complaint and issues raised in Ms. Weiss's pleadings opposing the Motion are not within the Board's jurisdiction under HRS Chapter 89 and should be dismissed. The

allegations that Souza "betrayed his trust;" the "Kohala schools have been compromised by these self-serving educational officers; the creation of Ms. Weiss's bad health conditions; and the alleged "pedophile [cover] up," are simply not within the Board's jurisdiction under HRS §§ 89-5 or 89-13 and are dismissed. Ms. Weiss has failed to introduce any admissible evidence through a declaration or other means to support the Board's jurisdiction under HRS § 89-5(i) or a finding of a violation of HRS § 89-13(a) for the allegations regarding: the replacement of senior teachers with Teach for America "rookies;" the cancellation of the Symphony Math (Harvard University pilot math project); the failure to purchase software programs; the treatment of other teachers; and Ms. Weiss's student load. The claims referring to retaliation involving HRS § 378-2 and the failure to accommodate Ms. Weiss for her skin cancer and back condition are with the Department of Labor and Industrial Relations' jurisdiction under HRS § 378-4; and therefore, must be dismissed. The claims and/or arguments regarding the conduct of the HSTA, such as the lack of HSTA representation in this prohibited practice case and in her grievances and the breach of confidentiality by HSTA UniServ representative are not claims against the Respondents and must be dismissed. Further, any claims not included in the Complaint, such as those pertaining to issues arising after the filing of the Complaint are also not relevant and will not be considered.[xii] Finally, any arguments or evidence relied on regarding these claims and issues dismissed will simply not be considered by the Board.

2. The Remaining Allegations Must Be Dismissed For Untimeliness and For Failure to State A Claim.

The Board's jurisdiction is governed by HRS Chapters 89 and 377. HRS § 377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." (Emphasis added) This provision is made applicable to prohibited practice complaints by HRS § 89-14.[xiii] The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This time requirement has been held jurisdictional and provided by statute, and may not be waived by either the Board or the parties. Hikalea v. Department of Environmental Services, City and County of Honolulu, Board Case No. CE-01-808, Order No. 3023 at *5-6 (October 3, 2014) (*citing* Thomas v. Commonwealth of Pennsylvania Lab. Rels. Bd., 483 A.2d 1016 (Pa. 1984) (failure to comply with the statute of limitations for unfair labor practice goes to the subject matter jurisdiction of the labor relations board)). In construing and applying this time limit requirement, the Board's approach has been to adhere to the principles that statutes of limitations are to be strictly construed; and that because time limits are jurisdictional, the defect of missing the deadline even by one day is unable to be waived. Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (2014) (*citing* Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-199 (1983); Cantan v. Dep't. of Evtl. Waste Mgmt., Board Case No. CE-01-698, Order No. 2599, at *8-9 (2009); Kang v. Hawaii State Teachers Ass'n., Board Case No. CE-05-440, Order No. 1825, at *4 (1999)). Lastly, in applying this requirement, the Board has conformed to the

rule that the limitations period begins to run when "an aggrieved party knew or should have known that his [or her] statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443, 6 HLRB 319, 330 (2003) (*citing* Metromedia, Inc. KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

In this case, there is no dispute that the only two acts of retaliation or hostile environment alleged in the Complaint, which may have occurred within the 90-day period, are the November 29, 2012 grievance and the November 7, 2012 discovery that computers taken from her classroom in 2010 by Snelling were given to Bratt. Based on Amtrak, Ms. Weiss contends that because the November 7, 2012 discovery occurred within the 90-day limitations period, the Board should consider all the alleged retaliatory acts prior to the limitations period as part of her *prima facie* case of hostile environment. Respondents assert that because Amtrak was a Title VII case involving nonjurisdictional filing time limitations that this decision has no application to HRS Chapter 89 prohibited practice complaints that are subject to a jurisdictional 90-day filing requirement. Based on a review of Amtrak, the Board not only concurs with the Respondents' position but further concludes that even under the guidance of Amtrak, the remaining Complaint allegations are required to be dismissed.

In Amtrak, the respondent employee brought a charge of discrimination and retaliation under Title VII. The respondent alleged that while working for Amtrak, he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment. The charges relied on allegedly discriminatory acts occurring both prior to and within the relevant statutory time period. On an appeal arising from a motion for summary judgment filed by Amtrak on all incidents occurring before the filing of the respondent's charge, the Court considered whether acts falling outside of the statutory time period for filing charges set forth in Title VII are actionable. In ruling, the Court distinguished between claims of discrete retaliatory or discriminatory acts and allegations of hostile work environment. Quite simply, the Court ruled that because a discrete retaliatory or discriminatory act occurred on the day that it happened, a charge must be filed within the appropriate time from the date of the act. The Court held, on the other hand, that because a hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. Accordingly, with such a claim, the employee need only file a charge within the relevant time period of any act that is part of a hostile work environment.

The Board concurs with the Respondents that Amtrak is distinguishable from the present case because the statutory time limitations provision for Title VII, unlike HRS § 377-9(l), is nonjurisdictional. In Amtrak, the Court specifically stated that the provision for timely filing a Title VII charge of discrimination,[xiv] at issue in that case is not jurisdictional. Amtrak, 536 U.S. at 113. However, even assuming that the principles set forth in Amtrak provide appropriate

guidance for interpretation of the HRS § 377-9(l) limitations requirement, for all of the alleged incidents prior to the 90-day limitations period to be relied on for the prohibited practice claims in the Complaint, Ms. Weiss would have to show that the timely filed claims regarding the November 29, 2012 grievance or the November 7, 2012 discovery of the disposition of the computers removed from her classroom in 2010 were part of a hostile work environment claim. A hostile work environment is defined as "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working condition[.]" Amtrak, 536 at 116. While Ms. Weiss has made a myriad of arguments that she has been subjected to a hostile work environment, she has produced no legally sufficient evidence that either the November 29, 2012 grievance or her November 7, 2012 discovery of what happened to the computers removed in 2010 constitute acts that are "sufficiently severe or pervasive to alter the conditions her employment and create an abusive working condition." Removal and replacement of computers from her classroom and the Respondents' alleged hostile conduct regarding the grievance, whether the denial of the grievance or the agreements made to resolve the issues, do not constitute evidence of a workplace that is "permeated with discriminatory intimidation, ridicule, and insult."

Moreover, Ms. Weiss has not even made a showing that either the November 29, 2012 grievance or her November 7, 2012 discovery regarding the removal and replacement of computers constitute retaliatory acts. To establish a *prima facie* case of retaliation, a complainant must show that: (1) the complainant engaged in protected activity; (2) the employer subjected the complainant to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action. *Id.*; *see also,* Lales v. Wholesale Motors Co., 133 Hawaii 332, 356-57, 328 P.3d 341, 365-66 (2014). While it appears that Ms. Weiss is relying on her history of filing of grievances and prohibited practice complaints for the "protected activity," significantly missing from the appropriate showing is the second element that she was subjected to an "adverse employment action." A tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus. V. Ellereth, 524 U.S. 742, 761 (1998). The removal and replacement of computers in 2010 at the heart of the November 7, 2012 discovery and the removal and replacement of computers at 2012 at the heart of the November 29, 2012 grievance have not been shown to be and are simply not adverse employment actions.

In addition, even viewing the Complaint in the light most favorable to her, Ms. Weiss has failed to make a showing of fact sufficient to make a good claim or of law to support a claim that these alleged November 7, and 29,[xv] 2012 actions constitute prohibited practices on any other grounds.

For all of these reasons, the Board holds that: 1) the Board has no jurisdiction over any Complaint allegations not involving HRS Chapter 89, and these claims must be dismissed; 2) the claims regarding incidents that occurred more than 90-days prior to January 8, 2013, the date on which the Complaint was filed, are untimely and must be dismissed; and 3) the claims regarding the November 7 and 29, 2012 acts are not retaliatory, do not create a hostile work environment, and are insufficient in both facts to make a good claim and of law to support a prohibited practice violation and must be dismissed.

ORDER

For all of the foregoing reasons, the Board grants the Respondents' Motion to Dismiss or in the Alternative for Summary Judgment.

DATED: Honolulu, Hawaii July 30, 2015.

HAWAII LABOR RELATIONS BOARD

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Janet Weiss
James E. Halvorson, Deputy Attorney General

[i] The Complaint references Board Decision No. 420 in Weiss v. Husted, Board Case No. CU-05-164, 6 HLRB 151 (2001) as a relevant fact. In that case, Ms. Weiss filed a prohibited practice complaint against the HSTA for breach of duty of fair representation in wilfull violation of HRS § 89-13(b)(4) and (5) regarding the processing of a grievance over Ms. Weiss's transfer from her teaching assignment at KHS to the middle school at the Halaula campus. The Board held that the HSTA committed a prohibited practice and ordered a reimbursement to Ms. Weiss for her salary lost in pursuing the instant claim in lieu of rescission of her transfer to Halaula School because: the

employer was not a party to this case and not found to have committed a prohibited practice; and the arbitration award involved was not challenged and appeared on its face to be consistent with HRS Chapter 89. However, because this case involves the breach of the duty of fair representation against the HSTA, the Board finds that Decision No. 420 has no relevance or bearing on the present prohibited practice case against the Respondents in this case.

[ii] On February 1, 2013, the Board issued a Notice of Deadlines that stated in relevant part:

> At the prehearing/settlement conference held in this matter on February 1, 2013, the Hawaii Labor Relations Board (Board) set February 5, 2013 as the deadline for Respondents to file their dispositive motion and February 19, 2013 as the postmark date of Complainant's response. The Board also....scheduled a hearing on the motion on February 25, 2013 at 10:00 a.m.....

However, subsequent to the February 19, 2013 date, the parties filed additional pleadings not provided for by the Notice of Deadlines. Accordingly, because the Motion was timely filed by the Respondents in accordance with the February 1, 2013 Notice, the Board will consider any pleadings filed prior to the February 25, 2013 Motion hearing. However, based on the deadlines established in the February 1, 2013 Notice, the February 27, 2013 Memorandum, the April 11, 2013 Notice and Motion for Summary Judgment filed by Ms. Weiss, the Respondents' Memorandum in Opposition filed on April 18, 2013, and the May 21, 2013 Notice filed by Ms. Weiss will not be considered.

[iii] *See* note ii, *supra.*

[iv] *See* note ii, *supra.*

[v] *See* note ii, *supra.*

[vi] HRS § 89-2 governing definitions states in relevant part:

> "Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].
>
> "Employer" or "public employer" means...the board of education in the case of the department of education,...and any individual who represents one of these employers or acts in their interest in dealing with public employees....

[vii] HRS § 89-6 (a) governing appropriate bargaining units, provides in relevant part:

> (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
> ***
> (5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent[.]

[viii] Under HRS § 89-2 "Exclusive representative" means "the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership."

[ix] Accordingly, at the time of the February 4, 2013 filing of the Motion, the issue of the Summer 2012 removal and replacement of the computers from Ms. Weiss classroom had not been resolved.

[x] There is no HRS § 89-13(l). The 90-day limitations period is contained in HRS §377-9(l), which as discussed below, is made applicable to HRS Chapter 89 by HRS § 89-14. Despite Respondents' reference to HRS § 89-13(l) being erroneous, the Board is required to nevertheless address the issue because "The lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties do not raise the issue, [the Board] *sua sponte* will, for unless jurisdiction of the [Board] over the subject matter exists, any judgment rendered is invalid." Tamashiro v. Dep't of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103, 113 (2006) (*citing* Chun v. Employees' Ret. Sys. of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992)).

[xi] The National v. Morgan case referenced by Ms. Weiss is Amtrak v. Morgan, 536 U.S. 101 (2002).

[xii] Even under the Amtrak case relied on by Ms. Weiss, claims occurring after the Complaint was filed would not be brought in for the reasons discussed below regarding that decision. Since the timely filed November 7 and 29, 2013 allegedly discriminatory acts do not constitute evidence of a hostile work environment, other alleged acts of hostile work environment occurring subsequently also cannot be relied on. Amtrak, 536 U.S. at 116-117.

[xiii] HRS § 89-14 states in pertinent part that, "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[.]"

[xiv] The Court noted that the relevant statutory provision 42 U.S.C. § 2000e et. seq. (1994 ed. and Supp. V) requires that a Title VII plaintiff file a charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days "after the alleged unlawful employment practice occurred."

[xv] One other reason that Ms. Weiss would be unable to establish a prohibited practice regarding the November 29, 2012 grievance is that this grievance is a follow-up to HSTA #WH-11-10 involving the removal and replacement of the computers from her classroom in Summer 2012. As stated above, Ms. Weiss filed a prohibited practice complaint against HSTA on March 22, 2013 for breach of the duty of fair representation regarding this grievance, which was dismissed by the Board in Order No. 3031. Hence, the allegations on the November 29, 2012 grievance may run afoul of the Hawaii Supreme Court's ruling in Poe, 105 Haw. at 102, 94 P.3d at 657 that "To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. Based on the Board's determination in Order No. 3031 that the HSTA failed to breach its duty of fair representation regarding the grievance over the Summer 2012 removal of computers, it appears that Ms. Weiss is unable to prevail against the Respondents on a prohibited practice case arising out of this same alleged act by the Respondents, albeit on a follow-up grievance.