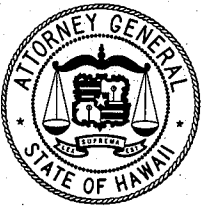


HB 1016



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:

H.B. NO. 1016, H.D. 2, S.D. 1, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Friday, April 3, 2009 **TIME:** 9:45 AM

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN TESTIMONY ONLY
(For more information, call Caron M. Inagaki,
Deputy Attorney General, at 586-1300.)

Chair Kim and Members of the Committee:

The Department of the Attorney General supports this measure.

The purpose of this bill is to appropriate funds to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

The bill in its present form contains twenty-nine claims that total \$7,409,751.73. Of this total, \$4,263,751.73 are general fund appropriation requests and \$3,146,000.00 are appropriation requests from departmental funds. Attachment A provides a brief description of each claim in the bill.

Since the bill was last amended, two new claims have been resolved for an additional \$20,871.18. Both of these claims are general fund appropriation requests. Attachment B describes these claims. We request that the Committee amend the bill to appropriate funds to satisfy these two new claims.

Including the new claims and amendment, the appropriation request totals \$7,430,622.91 allocated among thirty-one claims. Of this total \$4,284,622.91 are general fund appropriation

requests and \$3,146,000.00 are appropriation requests from departmental funds.

In addition to the new claims described in Attachment B, we are requesting an amendment to page 4, line 5 of the present draft of the bill. The word "under" should be changed to "out of".

The Department has had a long-standing policy of advising agencies as to how to avoid claims such as those in this bill. The Department has also complied with section 37-77.5, Hawaii Revised Statutes, which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

We therefore respectfully request passage of this measure.

ATTACHMENT "A"

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES:

Starr v. State of Hawaii, et al. **\$ 75,000.00** (*General Fund*)
Civil No. 05-00665, USDC

Claimant alleges disability discrimination against the Department of Accounting and General Services. She alleges violations of the following: (1) Americans With Disabilities Act; (2) Retaliation; (3) Rehabilitation Act; and (4) Hawaii Revised Statutes Chapter 378. The case proceeded to trial, and the case settled for \$75,000.00.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS:

Amarino, et al. v. Diego Mortuary, **\$ 142,592.80** (*General Fund*)
Inc., et al., Civil No. 04-1-1582-08, **Settlement**
First Circuit

Plaintiffs in this case sought monetary damages from the State as a result of allegedly fraudulent conduct perpetrated by Defendants Diego Mortuary, Inc., Memorial Mortuary Funeral Plan, Inc., Robert Diego, Momi Diego, and Bobbi Jean Diego (hereinafter "Mortuary Defendants"). Plaintiffs alleged that they did not receive products and services contracted for from the Mortuary Defendants, or that they had purchased prepaid burial plans with the Mortuary Defendants that the Mortuary Defendants had insufficient funds to fulfill.

Plaintiffs alleged that the State, through the Department of Commerce and Consumer Affairs, failed to comply with chapter 441, Hawaii Revised Statutes, by not reporting the shortfalls in the funeral trusts to the Department of the Attorney General. Specifically, Plaintiffs alleged that had the State "complied with its duties to Plaintiffs, the Attorney General's office would have investigated, indicted, prosecuted and convicted the Mortuary Defendants, and the Plaintiffs herein would not have suffered any of the injuries, losses and damages they have suffered." Plaintiffs alleged that the State's actions constituted negligence.

Hawaii Insurers Council v. Lingle, **\$3,500,000.00** (*General*)
et al., Civil No. 02-1-2295-09, **Judgment** **Fund)**
First Circuit, S.Ct. No. 27840

Plaintiff Hawaii Insurers Council ("Plaintiff") sued Defendants Linda Lingle, et al. alleging that the Insurance Division's

assessments of insurers were unconstitutional taxes and not regulatory fees. In particular, Plaintiff alleged that the Legislature's transfers of moneys in the amounts of \$2,000,000 in 2002 (Act 178, Session Laws of Hawaii 2002, section 40 at page 793) and \$1,500,000 in 2003 (Act 178, Session Laws of Hawaii 2003, section 28 at page 407) from the compliance resolution fund to the general fund were unconstitutional. Plaintiff also alleged that the Insurance Division's payments of moneys from that fund for the overhead of the Department of Commerce and Consumer Affairs (DCCA) and the Department of Budget and Finance were unconstitutional.

Ultimately, the Hawaii Supreme Court decided that the Legislature's transfer of \$3,500,000 of those funds into the general fund was unconstitutional under the separation of powers doctrine. That Court also held that the Insurance Division's use of moneys from that fund to pay for the overhead of the Department of Commerce and Consumer Affairs and the Department of Budget and Finance was proper.

In relevant part, the Hawaii Supreme Court stated that "the \$3,500,000 that was moved into the general fund pursuant to the transfer bills must be returned to the CRF so that they may be used for the regulation or benefit of the parties upon whom the assessments were imposed. (Citation omitted.) Given that the amount that must be returned is readily ascertainable, we see no need for an accounting on remand." *Hawaii Insurers Council v. Lingle*, No. 27840, 2008 WL 5255926 at 20 (Hawaii Dec. 18, 2008).

The following wording should be included:

There is appropriated out of the general revenues of the State of Hawaii the sum of \$3,500,000 or so much thereof as may be necessary for fiscal year 2009-2010, to reimburse the compliance resolution fund of the department of commerce and consumer affairs pursuant to Hawaii Insurers Council v. Lingle, No. 27840, 2008 WL 5255926 (Hawaii Dec. 18, 2008). The sum appropriated shall be expended by the department of budget and finance.

DEPARTMENT OF EDUCATION:

Hoshijo v. State of Hawaii, et al.	\$ 35,000.00 (General Fund)
HCRC No. 12617, EEOC No. 37B-A4-00211	Settlement

A female cafeteria helper employed at Waiakea Elementary School was subjected to harassment by a male co-worker based on her gender and race. The Executive Director of the Hawaii Civil Rights Commission had found that the female employee was

subjected to derogatory comments by a male co-worker based on her gender and race made on a daily basis for a substantial length of time. Further, the Executive Director had found that she had reported these matters to the cafeteria manager, her immediate supervisor, and later the principal. However, no corrective action was taken.

Tort Claim of Dominic Quimbao **\$ 20,000.00** (General Fund)

A kindergarten student at Kaimiloa Elementary School smashed his finger in a swinging gate. He placed his hand on top of the pole hinge of the gate, when suddenly, an unknown student swung the gate and Dominic's ring finger on his right hand was caught between the post and the gate. At the time of the subject accident the gate was in its open position and not secured because refuse collection was suppose to come to the school that day.

The school's procedure was to have the gate secured with a padlock and in a closed position. However, on the day of the incident, the school was on a half-day schedule and the area where the gate was located was where many students waited to get picked up. Because the refuse collection had not yet been picked up that day, the gate remained unsecured while the students were waiting to be picked up.

Additionally, the area where the incident occurred was generally supervised by the school's advisor and a crossing guard. However, the crossing guard was out sick that day and there was no substitute available positioned near the gate. The other school advisor was not directly near the gate and therefore did not witness the incident.

The student is right handed. As a result of the subject incident, he sustained a fracture to his right ring finger which required him to undergo surgery. Although he is able to write, Dominic claims that at times he is unable to bend his finger, which makes it difficult and uncomfortable for him to write and hold objects.

Wiley, et al. v. State of Hawaii, et al. **\$175,000.00** (General Fund)
Civil No. 04-1-1895-10, First Circuit **Settlement**

Claimant alleges she tripped and fell on an uneven sidewalk outside Aliamanu Elementary School, resulting in extensive injuries to nearly every part of her body. She allegedly required multiple surgeries. Claimant asserted a negligence claim against the State and the City. She claimed economic losses in excess of \$600,000 plus general damages. Claimant's

husband asserted a claim for loss of consortium. The City was dismissed by stipulation. The case settled for \$175,000. The sidewalk was repaired after the accident.

DEPARTMENT OF HUMAN SERVICES:

Martinez v. State of Hawaii, et al. **\$ 35,000.00 (General Fund)**
Civil No. 06-1-1658-09, First Circuit **Settlement**

Claimant slipped and fell on a metal drain cover that spanned across the sidewalk at the Puuwai Momi housing area operated at the time by the Housing and Community Development Corporation of Hawaii, now being operated by the Hawaii Public Housing Authority. Claimant walked on the metal drain cover in the rain at the time he slipped. Claimant sustained a torn rotator cuff injury to his dominant shoulder. This required surgery and a lengthy period of rehabilitation during which he was unemployed.

The drain cover upon which the Claimant slipped had been installed approximately 35 years prior when this low income housing was originally built. Claimant's liability expert witness tested the drain cover for slip resistance and, based on his testing, would have testified that the coefficient of friction of the drain cover is low enough to cause the drain cover to be hazardous when wet. He would have testified that the corrugated surface of the drain cover has worn down over the years, contributing to the surface's lack of slip resistance when wet. The Claimant and Claimant's liability expert will also testify that, when wet, the drain cover is essentially the same color as the sidewalk, thus not alerting the pedestrian to the difference in walking surfaces with different degrees of slip resistance. The State's expert confirmed the slip resistance test results reached by the Claimant's expert.

This case proceeded to the Court Annexed Arbitration, and the arbitrator awarded the Claimant \$60,000.00. The lawsuit later settled for \$35,000.00.

Morris v. Kihara, et al. **\$ 39,617.28 (General Fund)**
Civil No. 06-1-0063, Fifth Circuit **Settlement**

Claimant's vehicle was rear-ended by a Department of Human Services employee driving a state vehicle. The accident occurred on Kuhio Highway near Lihue. Claimant suffered whiplash and soft tissue lower back injuries. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the Claimant \$46,617.28. The State appealed the arbitrator's decision, and the case later settled for \$39,617.28.

DEPARTMENT OF PUBLIC SAFETY:

Ayala v. State of Hawaii, et al. \$ 50,000.00 (General Fund)
Civil No. 06-1-0142-01, First Circuit Settlement

A female deputy sheriff was assigned to provide security and law enforcement at the Honolulu International Airport. Based on Section 378-2, Hawaii Revised Statutes, the deputy sheriff alleged that she was subjected to employment discrimination based on her sexual orientation. Upon review, the Director of Public Safety determined that the action taken against Plaintiff was erroneous and should not have been taken.

Becker v. State of Hawaii, et al. \$ 50,000.00 (General Fund)
Civil No. 05-1-1485-08, First Circuit Settlement

Claimant, an inmate at Oahu Community Correctional Center (OCCC), fell while he was trying to get off a bunk bed. He injured his head, neck, and shoulder. The ladder was removed from his bed by OCCC staff the day before. The inmate had surgery on both his neck and his shoulder for injuries allegedly sustained in the fall, and he further claims to be suffering from chronic pain, requiring ongoing treatment and medication. The case settled for \$50,000.00.

Hernandez v. State of Hawaii, et al. \$ 22,000.00 (General Fund)
Civil No. 06-1-1628-09, First Circuit Settlement

Claimant, a 55-year-old inmate at Kulani Correctional Facility, severely sprained his calf while playing frisbee. Claimant stepped into a hole that had been created by a wild pig digging in the outfield. He claims that pigs digging around the facility was a constant problem. He reported to the medical unit of the facility where he was seen by a nurse. He was not referred to an emergency room or an orthopedist. The nurse considered it a minor sprain of the calf muscle and told him to elevate the leg and apply ice to it. The PSD physician who made periodic visits to Kulani saw Claimant for the first time twelve days post injury on December 28, 2004. The PSD physician diagnosed a severe strain of the calf muscle. Since Claimant had a history of diabetes and vascular compromise in his lower extremities, the examining physician was most concerned with deep vein thrombosis. Claimant was therefore sent to Hilo for a venous Doppler test, which was negative. There was no further follow-up.

The Claimant sustained permanent atrophy and deformity of the right calf muscle. He claims this atrophy causes him difficulty

in running, walking, going up and down stairs and standing for prolonged periods. He claims he has an uneven gait.

This case settled for \$22,000.00.

Rosa v. State of Hawaii **\$ 23,685.05** (General Fund)
Civil No. 07-1-1143-06, First Circuit **Judgment**
Amount of Judgment: \$22,675.00
4% interest from 6/19/08: \$ 1,010.05

Claimant, an inmate at Waiawa Correctional Facility, severed a portion of his left index and middle fingers while operating a meat saw in the Waiawa Correctional Facility kitchen. This case proceeded to the Court Annexed Arbitration Program, and the arbitrator found in favor of the Claimant in the amount of \$22,400.00 in damages plus \$275.00 in costs plus interest.

MISCELLANEOUS CLAIMS:

Ejima, Inc. **\$ 587.75** (General Fund)

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. Although the claim was not filed within six years from the date in which the claim for payment matured, as required by section 37-77, Hawaii Revised Statutes, there is sufficient reason the delay was caused by circumstances beyond the claimant's control and, therefore, good cause exists to pay the claim.

Gladys Hayashi **\$ 223.43** (General Fund)

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

Kay Y. Kawatani **\$ 107.40** (General Fund)

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

Georgia K. Char Lyman as Personal Representative of the Estate of Keakealani L. Char \$ 9,114.42 (General Fund)

Claimant requests reissuance of outdated checks that were misplaced. The checks when found were outdated and could no longer be cashed. Although the claim was not filed within six years from the date in which the claim for payment matured, as required by section 37-77, Hawaii Revised Statutes, there is sufficient reason the delay was caused by circumstances beyond the claimant's control and, therefore, good cause exists to pay the claim.

Lottie L. Mar \$ 22,895.25 (General Fund)

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. Although the claim was not filed within six years from the date in which the claim for payment matured, as required by section 37-77, Hawaii Revised Statutes, there is sufficient reason the delay was caused by circumstances beyond the claimant's control and, therefore, good cause exists to pay the claim.

Elaine Mock \$ 353.62 (General Fund)

Claimant requests reissuance of outdated checks that were misplaced. The checks when found were outdated and could no longer be cashed. Although the claim was not filed within six years from the date in which the claim for payment matured, as required by section 37-77, Hawaii Revised Statutes, there is sufficient reason the delay was caused by circumstances beyond the claimant's control and, therefore, good cause exists to pay the claim.

Eleanor K. Ohnaga \$ 450.00 (General Fund)

Claimant requests reissuance of outdated checks that were misplaced. The checks when found were outdated and could no longer be cashed. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

Karen M. Radius \$ 1,853.15 (General Fund)

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. Although the claim was not filed within

six years from the date in which the claim for payment matured, as required by section 37-77, Hawaii Revised Statutes, there is sufficient reason the delay was caused by circumstances beyond the claimant's control and, therefore, good cause exists to pay the claim.

Paul T. Sakuma **\$ 271.58** (General Fund)

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

DEPARTMENT OF TRANSPORTATION, AIRPORTS DIVISION

Freitas, et al. v. State of Hawaii **\$ 60,000.00** (General Fund)
Civil No. 05-1-0514(1), Second Circuit **Settlement**

This lawsuit was filed by two airport firefighters assigned to the Lanai Airport based on the Hawaii Whistleblower Protection Act. The firefighters alleged they were subjected to employment retaliation after they complained of the conduct of an airport maintenance worker. The department was vulnerable to liability because the alleged retaliation was allowed to occur over an extended period of time without effective action being taken.

DEPARTMENT OF TRANSPORTATION, HARBORS DIVISION:

Haole v. State of Hawaii **\$ 275,000.00** (Department
Civil No. 03-1-0876-04, First Circuit **Settlement** Appropriation)

Plaintiff, a longshoreman employed by McCabe, Hamilton & Renny ("McCabe"), was injured in an automobile accident that occurred on a State-owned pier in Honolulu Harbor. The accident took place at approximately 1:00 a.m., as Plaintiff and his co-workers were loading and unloading automobiles from the barge Waialeale. McCabe was Matson's subcontractor; Matson had hired McCabe to perform stevedoring work, including the loading and unloading of the Waialeale at the time of the accident.

Plaintiff was on the barge when Defendant Eric Rapoza ("Defendant Driver"), the McCabe foreman, offered Plaintiff a ride in a white, two-door Pontiac Firebird convertible that was being off-loaded. As the vehicle crossed the open space, the car entered an area with three fixed light posts. The car then struck a post extending upward from the ground and stopped suddenly.

The pipe that the vehicle struck was part of an old vapor extraction system installed on Pier 26 when Young Brothers previously occupied the premises. The State took the position that the pipe should have been removed by the contractors as part of the State's contract under the Shed Demolition Project. The contractors were also named defendants in this case.

Plaintiff underwent two surgeries for injuries to his right shoulder and continues to feel lower back pain for which he indicated he was contemplating future surgery to relieve the pain. As a result of the injuries he attributed to the subject accident, Plaintiff did not return to work for more than one year following the accident and continued to miss work from time to time due to his low back pain.

Plaintiff incurred medical expenses totaling \$60,181.00. He also claimed past wage loss as a longshoreman in the amount of \$180,781.00. Had this case proceeded to trial, Plaintiff intended to make a future wage loss and future medical claim.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Cuson v. Department of Transportation \$ 230,000.00 (*Department*
Civil No. 06-1-1855-10, First Circuit **Settlement** *Appropriation*)

Plaintiff, who was 25 years old at the time of the accident, was driving her 1997 Chevrolet Blazer east bound on the H-1 freeway headed to town for a Thanksgiving gathering. According to the police report, Plaintiff was traveling in the right lane when she drove through a water puddle and loss control of her vehicle, striking a light post. The light post crushed down above the right front passenger's seat across to the left rear passenger seat. The fire department was called to the scene and Plaintiff was extricated using the "jaws of life."

Plaintiff underwent surgery for the removal of her eleventh left rib, and the implantation of a titanium cage to restore vertebral integrity for the T12/L1 discectomy. According to the operative notes, she underwent a T11/12 and T12/L1 discectomy, insertion of a 27 mm cage, fixation of a 58 mm plate, and had 22 and 24 mm screws inserted into T11 vertebral body, as well as 24 and 26 mm screws inserted into the L1 vertebral body. Intraoperative, there was removal of crushed bone and ultimately reconstruction of the T12 vertebral body integrity. Plaintiff spent several days postoperatively in the intensive care unit, and required epidural medication and intravenous medication to relieve her pain. Plaintiff's medical bills totaled \$82,999.35. Plaintiff also made a claim for past wage loss in the amount of \$5,832.00.

a "no left turn" sign at the intersection, which would have prevented Prosniewski from making a left turn. This case proceeded to mediation, which resulted in settlement.

Parel v. Kanui, et al. \$ 25,000.00 (Department
Civil No. 07-1-0290, Third Circuit Settlement Appropriation)

A State of Hawaii employee caused a four-vehicle chain-reaction accident when he struck the rear end of the vehicle in front of him while traveling at approximately 45 miles per hour. At the time of the accident the State employee was performing his duties as a supervisor for the State of Hawaii Department of Transportation, Highways Division, in Hawaii County. The employee was driving a State of Hawaii DOT pick-up truck destined for his base yard at the time of the accident. The employee admits that his inattention at the time of the accident caused the accident. The Claimant sustained various injuries and lost one of his jobs due to his injuries.

Punsalan, et al. v. State of Hawaii, et al. \$350,000.00 (Department
Civil No. 05-1-0389(1), Second Circuit Settlement Appropriation)

This case initially involved three one-car accidents on the same segment of Route 190, the Mamalahoa Highway, north of Kona on the island of Hawaii. The Punsalan accident involving Steven Punsalan, as driver, and Kathy Punsalan, his passenger, occurred on January 9, 2005. The Lactaoen accident involving Kawehilani Lactaoen, as driver, and her minor son, Kauahe Lactaoen, as passenger, occurred on November 6, 2004. Plaintiff Liliukalani Ross' accident occurred on November 26, 2002. The Ross claim was dismissed on the State's motion for summary judgment based on the statute of limitations.

All of these accidents occurred as the plaintiffs' vehicles were traveling in a northerly direction while it was raining. All of the plaintiffs claim that they were traveling between 30-35 m.p.h. while they were driving through a series of uphill "S" curves. They all claim that at basically the same point in the road their vehicle lost traction and slid, or hydroplaned, across the paved oncoming lane of travel, across the narrow unpaved shoulder and over the crest of the 200-foot steep hill or cliff. After leaving the paved surface and crossing the dirt shoulder, all of the plaintiffs' vehicles tumbled down the hill causing the plaintiffs' varying severity of injuries.

Roberson v. State of Hawaii \$ 91,000.00 (Department
Civil No. 06-1-0248(1), Second Circuit Settlement Appropriation)

Claimant was injured in an automobile accident on Hana Highway (Route 360) at .3 mile east of Ulalena Loop near Hoolawa Bridge,

also referred to as Twin Falls Bridge. The scene of the accident consisted of two lanes of traffic, one in each direction.

Claimant alleges that he encountered rain water runoff on the highway, lost control of his vehicle and collided into an oncoming vehicle. Plaintiff had to be extricated from the vehicle. He filed a lawsuit against the State of Hawaii for injuries he claimed he sustained as a result of the accident and that his injuries were caused by the State's negligence in designing, constructing, and maintaining the highway.

An investigation of the roadway was conducted soon after the incident. The state engineer who investigated the roadway concluded that, based on his field observation of the accident site, vehicles had a tendency to speed in the area and, because water would accumulate during heavy rainfall, there was a potential to cause vehicles to hydroplane. Claimant presented evidence that the Department of Transportation received complaints from residents about the hazardous roadway where he was injured.

This case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the Plaintiff \$100,887.56 plus \$11,095.13 in costs. The case later settled for \$91,000.00.

ATTACHMENT "B"

DEPARTMENT OF EDUCATION:

Romero v. State of Hawaii, et al.	\$ 20,000.00 <i>(General Fund)</i>
Civil No. 05-1-2112-11, First Circuit	Settlement

A student at Aiea High School slipped and fell and broke his right ankle during physical education class. He was playing soccer on the tennis courts at Aiea District Park. The student alleges that the class should not have been held on the tennis courts because the courts were wet and slippery due to rainfall and debris. This case proceeded to the Court Annexed Arbitration Program, and the arbitrator found the State 100 percent liable and awarded him \$28,408 in damages, medical expenses, and costs. The case later settled for \$20,000.00.

MISCELLANEOUS CLAIM:

Mary K. Texeira	\$ 871.18 <i>(General Fund)</i>
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Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.