

**HB 1001**

**HD2, SD1**



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SIXTH LEGISLATURE, 2011**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 1001, 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 1, 2011 TIME: 9:00 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN COMMENTS ONLY. For more information, call Caron M. Inagaki, Deputy Attorney General, at 586-3967.

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Chair Ige and Members of the Committee:

The Department of the Attorney General supports this bill.

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 sixteen claims that total \$2,145,808.39. Thirteen claims are general fund appropriation requests and three claims are appropriation requests from departmental funds. Attachment A provides a brief description of each claim in the bill.

Since the last version of the bill was heard before the Senate Committee on Judiciary and Labor on March 16, 2011, six new claims have been resolved for an additional \$525,375.01. The new claims are general fund appropriation requests. Attachment B provides a brief description of the new claims in the bill. We request that the Committee amend the bill to appropriate funds to satisfy the new claims.

Including the new claims, the appropriation requests total \$2,671,173.40 allocated among twenty-two claims. Of this total,

\$1,506,173.40 are general fund appropriation requests, and \$1,165,000.00 are appropriation requests from departmental funds.

The Department has had a longstanding 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 respectfully request passage of this measure.

ATTACHMENT "A"

DEPARTMENT OF EDUCATION:

Arasato v. State of Hawaii, et al.                               \$ 33,518.32 (General Fund)  
Civil No. 07-1-2107-11, First Circuit                               Judgment

A boy was injured during an industrial arts and crafts class at Kailua Intermediate School. He injured his left thumb while using the electric buffing machine. The boy alleges that his injury was a direct and proximate result of State of Hawaii's lack of appropriate instruction, supervision, and failure to properly control the conduct of the students. The State of Hawaii denied any liability or wrongdoing. The case proceeded to trial. The court found the State 70 percent negligent and awarded Plaintiff \$32,457.90 plus costs of \$43.11. The amount requested includes post-judgment interest.

In the Matter of the Arbitration                               \$ 12,298.00 (General Fund)  
Between Hawaii State Teachers Association, Settlement  
AFSME Local 152, AFL-CIO and Kihei  
Public Charter High School

This arbitration involved a grievance filed by HSTA on behalf of a former teacher at Kihei Public Charter School who was terminated in 2002 by the then principal for failing to perform the specific task of "leveling standards" for each student project in their respective classes. The arbitrator awarded \$24,798 to the teacher. Per an agreement with HSTA, the school paid \$12,500, leaving the balance of \$12,298.00 to be submitted to the Legislature for approval.

Carvalho v. State of Hawaii, et al.                               \$ 15,000.00 (General Fund)  
Civil No. 10-00348, USDC   Settlement

Plaintiff was previously employed as a Cafeteria Cook II at Keaukaha Elementary School on the island of Hawaii. Plaintiff was hired by the Department of Education (DOE) on a full-time basis on October 10, 2005. In March 2008, Plaintiff submitted a request for reasonable accommodation under the Americans with Disability Act (ADA). In July 2008, based on responses from Plaintiff's physician, the DOE determined that Plaintiff was no longer able to perform the essential functions of his position and, thus, not eligible for reasonable accommodations under the ADA. Therefore, Plaintiff's ADA request was not approved. Plaintiff was separated from service with the DOE on July 31,

2008. Plaintiff filed a complaint with the Equal Employment Opportunity Commission, which determined that there was reasonable cause to believe the DOE failed to provide Plaintiff a reasonable accommodation for his disabilities and that Plaintiff was discharged because of his disabilities. Plaintiff filed a complaint in the United States District Court for the District of Hawaii alleging violation of Title I of the ADA, violation of chapter 378, Hawaii Revised Statutes, and Intentional Infliction of Emotional Distress.

Jemwai v. Keau, et al. \$ 250,000.00 (General Fund)  
Civil No. 09-1-0095-01, First Circuit Settlement

An educational assistant physically and sexually assaulted a special education student various times between March 1, 2007, and May 6, 2008, while the student was attending McKinley High School. The assaults occurred on McKinley High School premises. The special education student and the State of Hawaii have both filed suit against the educational assistant and obtained an entry of default against him. This case proceeded to mediation, which resulted in settlement.

McCauley v. Inouye, et al. \$ 135,000.00 (General Fund)  
Civil No. 07-01-206K, Third Circuit Settlement

A student at Konawaena High School injured his eye in the auto shop class. The teacher was removing a metal cap of a universal joint from an automobile drive shaft with the use of an air powered wrench. The metal cap broke and a portion of the metal cap was propelled into the student's eye. The student was not wearing any eye protection. The student sustained a lacerated cornea which, to date, has required two surgeries and three laser procedures. Although a corneal transplant may theoretically be available to treat the scar in the middle of the student's field of vision, the recovery period after surgical implantation is two years and its outcome is uncertain. The student has incurred medical bills of \$27,000. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the student \$168,750.00. The case later settled for \$135,000.00.

**DEPARTMENT OF HEALTH:**

Segundo v. Frederick, et al.                                 \$ 325,000.00 (General Fund)  
Civil No. 08-1-0106, Third Circuit Court                 Settlement

On April 21, 2006, Defendant Frederick, while employed by the State of Hawaii, fell asleep at the wheel of her vehicle and crossed over the center line on Highway 11 on the Island of Hawaii, into the path of Plaintiff's pickup truck and crashed into the front driver's side of Plaintiff's vehicle. Plaintiff sustained fractures to his hip and femur, requiring internal fixation, a fracture of his L4 vertebra and a nasal fracture. He was also diagnosed with Post Traumatic Stress Disorder.

**HAWAII HEALTH SYSTEMS CORPORATION:**

United Public Workers AFSCME, Local 646,    \$ 18,851.12 (General Fund)  
AFL-CIO and State of Hawaii, et al.                 Judgment  
S.P. No. 09-1-0305, First Circuit

In 2009, the United Public Workers (UPW) and several public employers were in negotiations regarding the terms of the collective bargaining agreement for Bargaining Unit 10 beginning July 1, 2009, to June 30, 2011. The public employers were the State of Hawaii, the Judiciary, the Hawaii Health Systems Corporation, and the City and County of Honolulu. When an impasse in the negotiations was reached, the parties proceeded to an interest arbitration to resolve the disputes regarding the terms of the successor agreement pursuant to chapter 89, Hawaii Revised Statutes. In November 2009, the interest arbitration was completed. On January 14, 2010, the interest arbitration award was issued to the parties.

On February 19, 2010, the UPW filed a motion for an order confirming the interest arbitration award and for entry of judgment in the First Circuit Court. This department opposed the motion because under section 89-11(g) the award is final and binding on the parties and the statute contemplates that the Legislature retains the power to approve any cost items contained in the award. On April 14, 2010, a hearing was held on the motion. At the hearing, the court granted the motion and allowed the UPW to later file a motion for fees and costs as the prevailing party on its motion.

On May 11, 2010, the UPW filed its motion for fees and costs. On September 13, 2010, the court filed the Order Granting Motion

for Allowance of Costs and Attorney's Fees. The court awarded \$417.69 in costs and \$9,748.69 in attorney's fees and later awarded additional costs and fees in the amount of \$8,327.11. The amount requested includes post-judgment interest.

**DEPARTMENT OF HUMAN SERVICES:**

Robinson v. Tripler Army Medical Center, et al. Civil No. 04-00672, USDC	\$ 20,929.57 (General Fund) Settlement
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The United States District Court, District of Hawaii, found that a Department of Human Services social worker violated the Plaintiffs' civil rights by interfering with their ability to make medical decisions for their son who was born premature in November 2002. The parties settled this case in April 2010 for \$12,000 and the 2010 Legislature appropriated funds in that amount. Following the close of the 2010 Legislature, the Plaintiffs' attorneys were awarded fees in the amount of \$20,929.57. This request is for an appropriation to cover the attorneys' fees.

**DEPARTMENT OF LAND AND NATURAL RESOURCES:**

Santiago v. County of Kauai, et al. Civil No. 08-1-0210, Fifth Circuit	\$ 18,000.00 (General Fund) Settlement
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On July 8, 2007, Plaintiff, a minor, was "sand sliding" on a boogie board along the shoreline at Poipu Beach Park, a County of Kauai beach park. As Plaintiff was sand sliding, she sustained a laceration on her right leg from a metal stake embedded in the sand. The metal stake was a fragment from a monk seal warning sign, used by the State of Hawaii in a project to protect monk seals. Plaintiff's laceration extended from her lateral knee to mid-thigh and required 18 stitches to close the wound.

**DEPARTMENT OF PUBLIC SAFETY:**

Tenney v. State of Hawaii , et al. Civil No. 09-1-0190-01, First Circuit	\$ 149,500.00 (General Fund) Settlement
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An inmate at Oahu Community Correctional Center (OCCC) was a passenger in a state van driven by a state employee. The state employee was traveling on Dillingham Boulevard when he claims that the vehicle in front of him suddenly stopped, causing the van to rear end the vehicle. The inmate alleges that the State had a duty to take reasonable steps to safely transport him back

to OCCC. The inmate was not wearing a seatbelt and was handcuffed to a belly waist chain. His ankles were also shackled. As a result of the motor vehicle accident, the inmate underwent surgery for three disc cervical discectomies and foraminotomies. Settlement was reached in the amount of \$149,500.00.

**MISCELLANEOUS CLAIMS:**

Tom Ishigo \$ 1,852.64 (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.

Nicole T. Kelley \$ 394.74 (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.

Paulette Yoshida \$ 464.00 (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, HIGHWAYS DIVISION:**

Barba v. State of Hawaii, et al. \$ 35,000.00 (Department  
Civil No. 09-1-0470-02, First Circuit Settlement Appropriation)

A Department of Transportation (DOT) employee was traveling eastbound on Nimitz Highway in a State-owned Chevy van during heavy morning traffic. The employee rear-ended a vehicle which, in turn, was pushed into the rear of another vehicle, a jeep operated by Claimant. The DOT employee was an air conditioning



mechanic who was en route to the Pier 19 Ferry Terminal to respond to a trouble call at the time of the accident. The Claimant sustained a low back injury that may require future surgery. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the Claimant \$39,271.00. The State of Hawaii appealed the award and later settled for \$35,000.00.

Labinia v. State of Hawaii, et al.                   \$ 900,000.00 (Department  
Civil No. 07-1-0075-01, First Circuit               Settlement Appropriation)

A man operating a moped was injured when a State Department of Transportation dump truck driver made a U-turn in order to pick up a dead animal along Fort Weaver Road in Ewa Beach. The moped driver suffered significant injuries, including a closed head injury, pelvic fracture, a comminuted right femur fracture that was set with a permanent rod, cervical and lumbar injuries, and post-concussion syndrome. The moped driver was certified as being medically disabled from work from the date of the accident to present. Three economists estimated his future wage loss to be between \$356,000.00 to \$481,144.00, future medical costs/life care plans at \$786,570.00 to \$1,195,579.00, and loss of household services at \$233,000 - \$342,905. His past medical special damages total \$84,413.19. This case proceeded to mediation. The mediator recommended settlement of \$1,200,000 to \$1,500,000. The case settled for \$900,000.00.

Requelman v. State of Hawaii, et al.               \$ 230,000.00 (Department  
Civil No. 06-1-0366, Third Circuit               Settlement Appropriation)

A man was driving on Route 19 on the Big Island before dawn, and his vehicle hit a tree that was growing in the State's right of way but had fallen across Route 19. The Department of Transportation had inspected these trees the year prior and, despite noting that they needed to be trimmed or cut, failed to cut these trees. The man sustained a compression fracture of his L-3 vertebrae with permanent residual symptoms and disabilities. This case proceeded to mediation, and the mediator recommended settlement in the amount of \$230,000.00.

ATTACHMENT "B"

DEPARTMENT OF HUMAN SERVICES:

Sound v. Koller, et al.	\$ 70,124.05 (General Fund)
Civil No. 09-00409 JMS/KSC, USDC	Settlement

This settlement is for attorneys' fees to the plaintiffs' counsel. Initially the State appealed the order to the Ninth Circuit Court of Appeals. Upon further review, the State chose to abandon the appeal and pay the attorneys' fees in exchange for a waiver of the costs of the appeal.

The underlying action arose out of the decision of former Director Lillian Koller to create a state-funded medical benefits program for residents of COFA (Compact of Free Association) countries in 2009. The new program was called Basic Health Hawaii (BHH). BHH reduced the medical benefits of the COFA residents. The notices sent to these residents were deemed to be in violation of their procedural due process rights by U.S. District Judge Seabright. He ordered their benefits be restored. In addition to the problem with the notices, the Department failed to complete the rulemaking process mandated by the Hawaii Administrative Procedure Act. A decision was made to not appeal the injunction issued by Judge Seabright, to complete the rulemaking process, and roll out a new version of BHH in 2010. The decision to go forward with BHH was a policy decision by DHS, approved by former Governor Lingle, and was made after consultation with the Department of the Attorney General.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Kinney v. Department of Land and Natural Resources, et al., Civil No. 03-1-0010, Fifth Circuit	\$ 52,240.96 (General Fund)
	Judgment

A woman tripped and fell in a hole that she claimed was covered by grass at Kaumualii State Park on Kauai. She injured her left shoulder, left knee, and low back, which required surgery. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded her \$51,540.57 plus interest.

DEPARTMENT OF PUBLIC SAFETY:

Botelho, et al. v. State of Hawaii,                   \$ 275,000.00 (General Fund)  
et al., Civil No. 06-00096 DAE-BMK, USDC           Settlement

This lawsuit arises from overcrowding at the Hawaii Community Correctional Center ("HCCC") in Hilo dating back to 2004. In July of that year, several inmates were injured during a fire. They and other inmates also alleged that the conditions at HCCC deprived them of their constitutional rights. Judgment was entered in favor of four representative plaintiffs and against the defendants. The parties have now settled the remaining plaintiffs' claims.

Itagaki v. Frank, et al.                                 \$ 83,000.00 (General Fund)  
Civil No. 09-00110 SOM-RLP, USDC                   Settlement

An inmate was overdetailed in prison by 83 days. A jury awarded the inmate \$83,000, or \$1,000 per day of overdetention. The Department of Public Safety took the position that because the sentencing court had not issued a written order disposing of all of the charges against the inmate the department was legally required to keep him in custody until such time as the court did so.

Kuresa v. Frank, et al.                                 \$ 25,000.00 (General Fund)  
Civil No. 09-1-0303-02 RAT, First Circuit         Settlement

An inmate at Waiawa Correctional Facility was bitten on the hand by a wild pig when he was standing in line after eating a meal. He required surgery and has suffered a permanent injury to his hand. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the inmate \$30,000.00 plus costs. The case later settled for \$25,000.00.

Maier v. State of Hawaii, et al.                     \$ 20,000.00 (General Fund)  
Civil No. 10-00449 JMS BMK, USDC                   Settlement

A woman alleges that while she was incarcerated at the Women's Community Correctional Center (WCCC), the WCCC medical staff failed to provide timely and adequate medical treatment for a cancerous lesion on her left ear. As a result, the woman alleged that she sustained additional destruction and loss of tissue to her left ear. Surgery was required to remove the cancerous lesion and to reconstruct the outer part of her left ear.