



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

H.B. NO. 2476, H.D. 1, S.D. 1, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Wednesday, March 28, 2012

TIME: 9:30 a.m.

LOCATION: State Capitol, Room 211

WRITTEN COMMENTS ONLY. For more information, call

Caron Inagaki, Deputy Attorney General at 586-3967

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 twelve claims that total \$2,169,814.01. Ten claims are general fund appropriation requests that total \$1,899,814.01, and two claims are appropriation requests from departmental funds that total \$270,000.00. 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 \$5,559,107.50. Attachment B describes these claims. We request that the Committee amend the bill to appropriate funds to satisfy these new claims.

Including the new claims, the appropriation request totals \$7,728,921.51 allocated among fourteen claims. Of this total \$7,58,921.51 are general fund appropriation requests and \$270,000.00 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 ACCOUNTING AND GENERAL SERVICES:

**Elections Systems & Software, Inc. v.
Cronin, et al., CAAP-11-0000078** **\$ 1,205,000.00** *(General Fund)*
Settlement

A former chief elections officer of the State of Hawaii was found by the court to have violated chapter 103D (State Procurement Code), Hawaii Revised Statutes, when he awarded a multi-term contract for voting equipment to Hart Intercivic, Inc. without conducting the required analysis of the proposals.

**Tanaka, et al. v. State of Hawaii, et al.
Civil No. 09-00579, USDC** **\$ 73,000.00** *(General Fund)*
Settlement

Plaintiffs are employees of the Department of Accounting and General Services (DAGS). They allege that DAGS subjected them to discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-1, et. seq., and section 378-2(a) (1), Hawaii Revised Statutes. Plaintiff Liashenko applied for and was interviewed for two vacant Computer Operator III positions in DAGS in 2006. He was not selected. He later alleged he was not selected because of race and gender discrimination by DAGS. Plaintiff Tanaka was selected for one of the two Computer Operator III positions, but was not the highest-scoring candidate and, as a result, did not get to choose the work shift she wanted. She later alleged the reason she was not given the highest score was because DAGS discriminated against her on the basis of her national origin (Vietnamese).

Before filing suit in federal court, Plaintiffs complained to the Equal Employment Opportunity Commission about alleged discrimination. After more than a year, the EEOC, in March 2008, issued determinations of reasonable cause to believe that DAGS discriminated against both plaintiffs.

After DAGS partially prevailed against both Plaintiffs in a motion for summary judgment, Liashenko agreed to settle for \$23,000. Tanaka settled her claims for \$50,000.

DEPARTMENT OF EDUCATION:

**Miljkovic v. State of Hawaii, et al.
Civil No. 09-00064 ACK-KSC, USDC** **\$ 7,500.00** *(General Fund)*
Settlement

Plaintiff was an employee of the University of Hawaii under a two-year teaching contract with the Honolulu Community College. The Plaintiff was hired to teach welding and carpentry skills. The Plaintiff was assigned to two high schools to teach students skills in framing a structure and welding. He was supervised by teachers and administrators of the Department of Education. At the close of his contractual term, the Plaintiff was advised that he would not be retained for another contractual term based partly on poor performance evaluations and complaints from the high schools about his conduct. Plaintiff filed suit against the University of Hawaii, the Department of Education, and

certain teachers and administrators of the Department of Education based on negligence, negligent infliction of emotional distress, defamation, and discrimination.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Ah Loo v. State of Hawaii, et al.
Civil No. 11-1-0032, Fifth Circuit

\$ 40,000.00 (*General Fund*)
Settlement

Plaintiff, a minor, was playing with her siblings on the Hanalei pier when a portion of the composite/tile roof broke off and fell, striking the Plaintiff on the dorsal side of her left wrist and hand. Plaintiff sustained damage to the tendons and tissue in her left hand and wrist and underwent surgery to repair the damage.

Weingartner v. State of Hawaii, et al.
Civil No. 09-1-1563-07, First Circuit

\$ 90,000.00 (*General Fund*)
Settlement

Plaintiff was previously employed as the Northwestern Hawaiian Islands (“NWHI”) Monument Policy Specialist with the Department of Land and Natural Resources (“DLNR”), Division of Aquatic Resources (“DAR”). One of his duties is to ensure compliance with State and Federal laws relating to activities occurring in the Papahānaumokuākea National Marine Monument (“Monument”). Plaintiff started work on February 4, 2009 in an exempt, at-will appointment which had a not-to-exceed (“NTE”) date of June 30, 2009. Plaintiff was directly supervised by Athline Clark (“Clark”), the Monument Co-Manager. The Monument Program fell under the supervision of DAR Administrator Dan Polhemus (“Polhemus”).

Plaintiff claims that within the first month of employment, he brought concerns regarding what he perceived to be the State’s non-compliance with the Hawaii Environmental Policy Act. After two months of informing Clark and not having his concerns addressed, Plaintiff notified Polhemus about the non-compliance and difficulties in his working relationship with Clark (i.e., his role as Policy Specialist was diminished when Clark assigned him tasks outside of his position description, limiting his contact with his federal counterparts at the Monument). Plaintiff’s employment was not renewed beyond the June 30, 2009 NTE date. Plaintiff claims the non-renewal of his NTE appointment was due to his whistleblowing activities.

On July 30, 2009, Plaintiff filed a First Amended Complaint against the DLNR, Clark and Polhemus (in their official and individual capacities) alleging - violation of Hawaii Whistleblower Protection Act; Promissory Estoppel/Detrimental Reliance; Breach of Contract; Interference with Contractual Relations and/or Prospective Economic Advantage; and Punitive Damages. The latter two claims were dismissed by the Court.

DEPARTMENT OF PUBLIC SAFETY:

Gishi v. State of Hawaii, et al.
Civil No. 10-1-0198-01, First Circuit

\$ 75,000.00 (*General Fund*)
Settlement

A prison inmate was overdetailed in prison by 134 days due to the court's and his attorney's failure to provide the prison with a copy of the order dismissing his case. To the prison's knowledge, the inmate's remaining charge was still pending and they were to continue holding him. Once a copy of the order was provided to the prison, the inmate was released immediately.

Glessner v. State of Hawaii, et al.
MCCP No. 2010-066

\$ 30,000.00 (*General Fund*)
Settlement

Claimant, an inmate at Oahu Community Correctional Center, began experiencing partial loss of vision in left eye in June 11, 2009. He had had a detached retina in his other eye several years before and went to the medical unit at OCCC and said he thought his retina was detaching in his left eye since his symptoms were similar to his detached retina years before. Claimant had had "floaters" the previous year so he was advised to wait and see how his vision was in a few days. Claimant returned to the medical unit three days later and reported increased loss of vision. He was referred to an ophthalmologist, but the appointment was not scheduled until the end of June. Throughout the intervening several days, Plaintiff reported increasing loss of vision several times to nursing staff at sick call. By the time the outside ophthalmology consult was conducted on June 30, 2009, Claimant's retina had detached. Surgery was scheduled on a nonemergency basis and as a result of the surgery, Claimant regained a great deal, but not all, of his field of vision. Claimant filed a claim with the Medical Claims Conciliation Panel. The Panel rendered its decision in favor of the Claimant but did not award any damages. Claimant agreed to settle for \$30,000 before a lawsuit was filed.

Graff, et al. v. State of Hawaii, et al.
Civil No. 08-1—0975-05, First Circuit

\$ 156,814.01 (*General Fund*)
Settlement

Two inmates who were incarcerated at the Oahu Community Correctional Center were participating in a work crew that was assigned to remove the chain link cover from an enclosure. This work project was done in anticipation of an electrical contractor installing a replacement transformer. In the enclosure were various pieces of electrical equipment, including the transformer that was to be replaced. When one of the inmates stepped on the top of that transformer's enclosure, a short occurred in the cables inside the transformer cabinet. This caused sparks and flames to shoot through the metal blank plate that had been affixed to cover a rust hole. The inmate fell to the ground and sustained a fracture to his arm and compression fracture of a vertebra. The other inmate also injured his arm and eyes. The case proceeded to trial, and the court awarded the inmates \$300,000 and \$500, respectively. The Court held the State 60 percent responsible for the damages; \$180,300. The Court held the electrical contractor 40 percent responsible. The electrical contractor had settled for \$50,000 before trial. No medical expenses were awarded. The inmates agreed to accept

\$150,000 total to settle all claims. The State will pay separately the compromised Medicaid lien of \$6,815.01.

Timas v. State of Hawaii, et al.
Civil No. 10-00517, USDC

\$ 60,000.00 (*General Fund*)
Settlement

A female inmate was overdetailed in prison by 84 days due to the failure of the Department of Public Safety staff to give her all of the presentence credit she was entitled to. The mistake was made in 2000 when her sentence was calculated, but was not caught until 2008. By then, the inmate had already been overdetained by 84 days. The inmate was released immediately upon discovery of the mistake that had been made years earlier.

OFFICE OF HAWAIIAN AFFAIRS:

Tsachev v. State of Hawaii, et al.
Civil No. 09-1-1207-05, First Circuit

\$ 162,500.00 (*General Fund*)
Settlement

While riding his moped on Kapiolani Blvd., Plaintiff struck the left side of an Office of Hawaiian Affairs van pulling across Kapiolani Blvd. from Curtis street. Plaintiff sustained a fractured femur and hip, broke several teeth, and claimed to have suffered brain damage. The total amount of the settlement is \$325,000.00. The Office of Hawaiian Affairs agreed to pay one-half of the settlement.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Kuahiwinui, et al. v. Zelo's, et al.
Civil No. 08-1-0067, Fifth Circuit
Ackerman v. Kuahiwinui, et al.
Civil No. 08-1-0069

\$ 210,000.00 (*Department*
Settlement *Appropriation*)

On April 1, 2006, driver Solomon Kuahiwinui, and his two passengers Christopher Ferguson and Kristopher Kuahiwinui spent their Friday night drinking, and smoking marijuana at Hanalei Bay park, then later drinking at two bars in Hanalei town. At the bars, Ferguson had been buying drinks for his designated driver S. Kuahiwinui. At approximately 12:30 a.m. they were headed out of town, but the driver missed the left turn onto the Hanalei Bridge. The vehicle struck the approach guardrail to the bridge, went over the embankment and into the Hanalei River, flipped over, and landed upside-down. The driver was able to get out of the vehicle alive, but both passengers were drowned in the vehicle. The driver had a blood alcohol content BAC level of 0.13. K. Kuahiwinui's BAC was 0.16 whole blood, or 0.19 serum, and Ferguson's BAC was 0.26 serum. The driver and two of the bars have settled.

The bridge was built in 1912. In 1978, the U.S. Department of the Interior determined the bridge eligible for inclusion in the National Register of Historic Places. It is the only road access over the river to Hanalei and the north shore communities west of Hanalei. The Hanalei River is designated as an American Heritage River. Because the bridge was in disrepair, the State retained Wilson

Okamoto & Associates to conduct tests, host community informational meetings and design the repairs. The community strongly opposed any changes to the rural nature of the bridge, their community or the traffic. With FHWA approval of design exceptions & variance, DOT elected not to make upgrades to the bridge or approaches (including guardrails) that would adversely affect the rural nature of the community. The project was completed in 2003.

At the time of the subject accident, there were no street lights along the road from Hanalei town approaching the bridge and leading up to the guardrail. Because of the accidents during 2005, in a letter dated December 13, 2005, from DOT to the Kauai Island Utility Cooperative, DOT asked for a cost estimate for a street light because of a “high number of guardrail hits at the Hanalei Bridge”. On April 21, 2006, KIUC installed the streetlight.

This case proceeded to mediation, and on the eve of trial settlement was reached in the amount of \$210,000.00. Plaintiffs settled with the driver and one of the bars in the amount of \$160,000.00. The second bar obtained summary judgment in its favor.

DEPARTMENT OF TRANSPORTATION, AIRPORTS DIVISION:

Wolfe v. State of Hawaii, Department of Transportation, et al., Civil No. 10-1-1029-05, First Circuit **\$ 60,000.00** (*Department Settlement Appropriation*)

In 2010, two employees of the personnel office of the Airports Division filed a Complaint for Declaratory and Injunctive Relief and Damages in the First Circuit Court against the Department of Transportation (DOT), State of Hawaii, and their former supervisor personnel officer for violations of the Whistleblowers Protection Act and State and departmental workplace violence policies and for intentional infliction of emotional distress. In 2008, the employees reported two workplace violence incidents against Defendant Matsuoka primarily involving verbal intimidation. The employees also obtained a Mutual Injunction Against Harassment against Defendant Matsuoka in State District Court. Following a departmental investigation, Employer DOT suspended Matsuoka from work for 5 days, moved her to another worksite, gave her special assignments and arranged counseling and training for her. When DOT returned Matsuoka to the Airports Division personnel office to resume her supervisor position in 2010, the employees filed the instant lawsuit alleging that her reinstatement was retaliation for bringing their prior workplace violence reports. The employees went out on leave and filed workers' compensation claims. Pursuant to the employees' action, the court granted a preliminary injunction against DOT ordering that the employees and Ms. Matsuoka be physically separated at the Airports Division office. Accordingly, DOT transferred Ms. Matsuoka out of the Airports Division office to the departmental personnel office downtown. Thereafter, the employees returned to work at the Airports Division office.

ATTACHMENT “B”

DEPARTMENT OF LAND AND NATURAL RESOURCES:

**Brem, et al. v. State of Hawaii,
Civil No. 07-1-0176, Fifth Circuit**

**\$5,459,107.50 (General Fund)
Settlement**

This case arises out of the deaths of two tourists, Elizabeth Brem and Paula Ramirez, whose bodies were found at the base of Opaekaa Falls. Opaekaa Falls is located in the Waialua State Park off of Kuamoo Road in Lihue, Kauai. The falls and steep sides can be seen from the Opaekaa Falls lookout. The lookout is paved, has parking stalls and a railing around it so people can view and take photographs of the falls. People gain access to the stream and falls through the natural clearing in the trees and vegetation along the right shoulder of the road. There is a guardrail that runs along the right shoulder behind which there is a steep drop off down into Opaekaa canyon. The guardrail ends where the drop off levels out, creating a small triangular piece of land. Kuamoo Road is a ridge that rises between the Waialua River Valley on the left and Opaekaa stream canyon on the right that widens at the clearing in the trees where the guardrail ends. Through the clearing, there is a “voluntary” or “social” trail (created by hikers and not created or maintained by the State) on the left that leads across the stream down to the bottom of the falls. On the day of the accident, a “Danger Hazardous Conditions” sign was posted at the head of this trail. However, based on where the bodies of the decedents were found, they had gone to the right of the clearing along a much shorter path that drops sharply down into the canyon.

In a non-jury trial, the Honorable Kathleen N.A. Watanabe, Judge of the State Circuit Court of the Fifth Judicial Circuit, found the State 100 percent liable and found no comparative negligence on the part of the decedents. At the time of her death, Elizabeth Brem was 36 years old, married, and had two young sons. Ms. Brem had just been made an equity partner in the noted law firm of Gibson Dunn & Crutcher. In her first year as partner, her income was in excess of \$730,000.00 and it was expected that her income would increase during her tenure with the firm. On average, equity partners were compensated at approximately \$2,300,000.00 annually. The Brem Plaintiffs’ economist estimates Ms. Brem’s projected loss of earnings is in excess of \$38,000,000.00 plus loss of services in excess of \$600,000.00. In light of Judge Watanabe’s ruling on liability, the judge will also award general damages in an amount expected to be in the multiple millions. The Brem Plaintiffs and the State have reached a settlement, subject to legislative approval, in the amount of \$15,000,000.00. \$5,034,107.50 is to be funded by the State and \$9,965,892.50 is to be funded by the State’s excess insurance carrier, Chartis Insurance.

Paula Ramirez, at the time of her death, was 29 years old and unmarried. She was employed as a clerk with a corporation in Bogota, Columbia. She is survived by her mother. The Ramirez Plaintiffs’ economist estimates Ms. Ramirez’s lost future earnings at approximately \$861,000.00. Judge Watanabe is also expected to award substantial general damages to the Ramirez Plaintiffs. The State and the Ramirez Plaintiffs have reached a settlement, subject to legislative approval, in the amount of \$425,000.00

The total amount of the appropriation is \$5,459,107.50.

DEPARTMENT OF PUBLIC SAFETY:

**Kahle, et al. v. Villaflor, et al.,
Civil No. 10-00764 LEK-KSC, USDC**

**\$ 100,000.00 (General Fund)
Settlement**

This case arose from Mitchell Kahle's vocal protest and disruption of the opening invocation in the Senate on April 29, 2010, the last day of the legislative session. He was removed from the chamber by the Sergeant-at-Arms with the assistance of deputy sheriff personnel. Accompanying Mr. Kahle was Plaintiff Kevin Hughes who was filming the event with one of Mr. Kahle's professional video cameras. Outside the Senate chamber, Mr. Kahle was instructed to sit on a bench by a planter box where deputies were starting to take his information, when some sort of a scuffle occurred involving Mr. Hughes. Mr. Kahle bolted from his custodial position, presumably intending to come to the aid of Mr. Hughes, pushed aside bystanders on the rotunda and after advancing approximately 20 feet, was tackled by a deputy sheriff. Mr. Kahle was then subdued, handcuffed, and arrested. Mr. Hughes continued filming; however, in the melee, his camera was shoved into his face causing minor injuries and damaging the video camera. Kahle was transported to the sheriff's booking station at Halawa where he was booked and bailed himself out. Mr. Hughes was not arrested. The Honolulu Prosecuting Attorney's office charged Mr. Kahle with disorderly conduct under section 711-1101, Hawaii Revised Statutes, but Mr. Kahle was acquitted at trial. Mr. Kahle and Mr. Hughes then filed a lawsuit in federal court alleging, among other things, that their First Amendment rights had been violated.