



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014**

ON THE FOLLOWING MEASURE:

S.B. NO. 2246, S.D. 2, H.D. 1, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Thursday, March 27, 2014

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): David M. Louie, Attorney General, or
Caron M. Inagaki, Deputy Attorney General

Chair Luke and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to seek appropriations 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 contains eighteen claims that total \$1,319,111.35. Fifteen claims are general fund appropriation requests that total \$1,196,611.35, and three claims are appropriation requests from departmental funds that total \$122,500.00. Attachment A provides a brief description of each claim in the bill.

Since this bill was last amended, five new claims have been resolved for an additional \$1,193,190.68. Four claims are general fund appropriations that total \$493,190.68, and one claim is an appropriation request from a departmental fund in the amount of \$700,000.00. Attachment B provides a brief description of the new claims. We request that the Committee amend the bill to appropriate funds to satisfy the new claims.

Including the new claims, the appropriation request totals \$2,512,302.03 allocated among twenty-three claims. Of this total \$1,689,802.03 are general fund appropriation requests and \$822,500.00 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 bill with amendments to add the new claims.

ATTACHMENT "A"

DEPARTMENT OF EDUCATION:

Barnett v. State of Hawaii, et al.
Civil No. 10-1-0236, Fifth Circuit

\$ 41,511.54 (*General Fund*)
Judgment

A female soccer player at Kapaa High School on Kauai cut her knee on a metal base plate from a temporary goal set up by the coach. The soccer player continues to suffer some disability from the accident. This case proceeded to trial, and the judge found that the coach was liable for having used the temporary goal.

In the Matter of the Arbitration Between Hawaii State Teachers Association and Na Wai Ola (Waters of Life) Public Charter School, State of Hawaii, Grievance of Ginger Krauss

\$ 44,951.43 (*General Fund*)
Judgment

A teacher was terminated from the Waters of Life Public Charter School for cause. The teacher was a member of HSTA and filed a grievance challenging the termination. After hearings on the merits, the Arbitrator concluded that the termination was without proper cause and issued: (1) the Arbitrator's Decision and Award for back pay, back EUTF benefit contributions, back ERS contributions and interest on all of the amounts for a total of \$33,649.66 and (2) the Arbitrator's Supplemental Award for the arbitrator's fees and costs and interest for a total of \$11,301.77.

DEPARTMENT OF HEALTH:

Johnson v. Rainbow Rehabilitation, et al.
Civil No. 07-1-1855-10, First Circuit

\$ 221,080.66 (*General Fund*)
Judgment

In 2002, the Department of Health (DOH) referred 15-year-old public high school student Michael Johnson to Rainbow House with which the DOH had a contract. Mr. Johnson had been diagnosed with mild mental retardation, ADHD, Tourette's Syndrome, and other mental and behavioral problems. Mr. Johnson was supposed to receive community-based mental health services at Rainbow House. During his six months there, Mr. Johnson engaged in a sexual relationship with one of the male staffers. After these sexual encounters came to light, suit was brought against Rainbow Rehabilitation, the employee, and the State. Following a bench trial in 2009, the State was found liable and damages were awarded against it.

DEPARTMENT OF HUMAN SERVICES:

Kolio, et al. v. State of Hawaii, et al.
Civil No. 11-00266 LEK RLP, USDC

\$ 20,000.00 (*General Fund*)
Settlement

This case was filed by three Plaintiffs as a class action for injunctive relief and incidental damages, alleging violation by Defendants of the ADA, section 504 of the Rehabilitation Act and the Amendments to the Fair Housing Act as pertains to Mayor Wright Housing. Plaintiffs' Motion for

Class Certification on behalf of mobility impaired residents of Mayor Wright Homes was denied by the Court. The Defendants included the State of Hawaii, Hawaii Public Housing Authority, and its Executive Director, Hakim Ouansafi. During the pendency of the lawsuit, one Plaintiff was evicted from housing for unrelated reasons and two other Plaintiffs accepted “reasonable accommodations” within Mayor Wright Homes. The deadlines for adding or substituting parties passed. Significant legal questions remained particularly whether due to the age of the buildings at Mayor Wright Homes, Defendants were required to make them compliant with the ADA, section 504, and/or the Fair Housing Act Amendments.

With the assistance of the Federal Magistrate Judge, a settlement was reached for the claims of the remaining individual Plaintiffs in the total sum of \$20,000, inclusive of attorney’s fees.

Louis, et al. v. State of Hawaii, et al.
Civil No. 05-1-0935-05, First Circuit

\$ 180,000.00 (*General Fund*)
Settlement

This case arises out of alleged mistreatment of four former wards of the Hawaii Youth Correctional Facility (HYCF). The claims against the State are a failure to properly train and supervise the Youth Correctional Officers (YCOs). As to the four individually named Defendant YCOs, three of the four have denied assaulting the youths. Although physical force was used on the youths in many instances, the YCOs have asserted that the force used was reasonable and necessary under the circumstances, and was not excessive. As to the remaining YCO, he did assault one of the youths. He was prosecuted for that assault by the Department of the Attorney General, and a conviction was secured. (The Department of the Attorney General declined to represent that YCO, based on the YCO’s action being outside the scope of his employment.) The State denies it failed to properly train and supervise any of the YCOs involved. There were six instances of abuse alleged involving the four former wards. The youths claim to have suffered physical injuries and emotional distress as a result of the alleged mistreatment. The case proceeded to court-ordered mediation, and the mediator believed that the case had a settlement value of approximately \$200,000.00. The case later settled for \$180,000.00.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS:

Hawaii Pacific Health, et al. v. Dwight Takamine,
Civil No. 11-00706 SOM/RLP, USDC

\$ 89,645.15 (*General Fund*)
Settlement

This is a declaratory action initiated by Plaintiffs that sought orders to declare that Hawaii Revised Statutes (HRS) § 378-32(b) is preempted by the National Labor Relations Act (NLRA) and is unconstitutional under the Equal Protection Clause. Plaintiffs also sought to obtain permanent injunctive relief to bar enforcement of HRS § 378-32(b). The court heard the parties’ motions for summary judgment. The court held that HRS § 378-32(b) is preempted by the NLRA and is unconstitutional under the Equal Protection Clause.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Coziar v. State of Hawaii \$ **30,000.00** *(General Fund)*
Civil No. 13-1-0018(1), Second Circuit **Settlement**

An employee of the Department of Land and Natural Resources was turning mauka in Lahaina, Maui, and his vision was momentarily blocked by the early morning sunlight shining in his eyes. He did not see Plaintiff, who is legally blind, walking in the crosswalk. Plaintiff's special damages exceeded \$10,000, therefore, the parties agreed to settle for \$30,000.

Imig v. State of Hawaii, et al. \$ **60,000.00** *(General Fund)*
Civil No. 13-1-2995-11 (ECN), First Circuit **Settlement**

On February 5, 2013, Plaintiff tripped and fell on the sidewalk fronting the Ala Wai Yacht Harbor, adjacent to Holomoana Street, behind the Hawaii Prince Hotel. At the area in question, a steel plate, which appears to house a storm drain, sits on top of the sidewalk. A concrete patch in front of the steel plate (to eliminate the edge of the plate) was missing on half of the width of the plate, creating a one-inch discrepancy on the sidewalk. Plaintiff sustained a fractured right wrist that required surgical repair.

DEPARTMENT OF PUBLIC SAFETY:

Buan v. State of Hawaii, et al. \$ **50,000.00** *(General Fund)*
Civil No. 11-1-1222-06, First Circuit **Settlement**

Plaintiff, a former nurse working for the Department of Public Safety, claims that she was discriminated against by her immediate supervisor because of the Filipino portion of her ancestry and because their religious beliefs differed. She further claims that she was discriminated or retaliated against because she filed complaints about a wide range of issues. Plaintiff's economic expert calculated potential damages of \$2,700,000, and the Department's economic expert calculated worse case potential damages of \$250,000 including attorney's fees. This settlement was inadvertently not included in the appropriations bill in 2013, which resulted in the Department of Public Safety being forced to pay the agreed upon amount to Plaintiff out of its general operating funds in order to preserve the settlement. Accordingly, the purpose of this appropriation is to reimburse the Department of Public Safety.

Fontanilla v. State of Hawaii, et al. \$ **35,000.00** *(General Fund)*
Civil No. 12-00641 BMK, USDC **Settlement**

Plaintiff alleges that his rights were violated during a traffic stop and filed a section 1983 civil rights claim. Plaintiff was being pursued by deputy sheriffs from the Airport Sheriff Division as he was driving an allegedly stolen vehicle. He was driving erratically and resisted an order to stop the vehicle. When the vehicle Plaintiff was driving ceased to operate, Plaintiff got out of the vehicle and proceeded on foot running up an embankment on the H-1 Freeway off ramp with a deputy sheriff in pursuit. A physical altercation occurred between Plaintiff and the deputy sheriff. The deputy sheriff

claims that Plaintiff attacked him with a knife causing the deputy to draw his service pistol. The deputy then slipped on the uneven ground on the embankment and fired just as he lost his footing. Simultaneously, Plaintiff turned and the bullet struck him in the buttocks. The deputy did not know he had shot the Plaintiff and still had to tackle, subdue, and handcuff Plaintiff, to prevent Plaintiff from escaping. At the time, Plaintiff was high on crystal methamphetamine. Plaintiff claimed that he never attacked the deputy and was simply trying to walk away when he was shot in the buttocks. The accounts of Plaintiff and the deputy markedly differ and there were no eye witnesses to the sequences of events. The physical evidence was equivocal.

MISCELLANEOUS CLAIMS:

Yoshikatsu Asano **\$ 1,939.00** (*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.

Aimee Clay **\$ 497.48** (*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.

Marie-Gertrude N. Leopoldo **\$ 417.00** (*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.

Bruce A. Menin **\$ 421,346.13** (*General Fund*)

Claimant requests reissuance of an outdated check that he claims he never received in 2009. 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.

Thomas K. Nagano **\$ 222.96** (*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:

Adams, et al. v. Yokooji, et al.
Civil No. 07-1-1567, First Circuit

\$ 25,000.00 (*Department
Settlement Appropriation*)

A pedestrian was struck by a vehicle near the intersection of Kalanianaʻole Highway and Kanapuu Drive in Kailua. There is a crosswalk across the highway located on the Kailua side of the intersection. On that night, Plaintiff took a cab to visit her children who lived in Waimanalo. When the cabbie learned that she did not have enough money for the fare, he dropped Plaintiff off at a bus stop on the Kailua bound side instead of the Waimanalo bound side of the highway. Plaintiff crossed the highway to get to the bus stop on the Waimanalo bound side. A vehicle heading toward Waimanalo hit Plaintiff and claims it was too dark to see Plaintiff. Plaintiff intends to prove that the site was dangerously dark because the State should have had increased footcandles/lumens of the street lights and that overgrown tree branches obscured the street lights.

The State would likely prevail at trial because of the strength of its expert witnesses when compared with the weaknesses of Plaintiffs' expert witnesses, and the fact that an independent witness had adequate street lighting to see Plaintiff crossing the highway. However, it would be a non-jury trial before a trial judge who has a history of sympathizing with Plaintiffs. Therefore, it was recommended that the State counter Plaintiffs' settlement demand of \$750,000, with the amount of one-half of the costs to bring the State's four expert witnesses from the mainland for trial, rather than risk a possible judgment in a wrongful death case, the State's proportionate share of which could be in excess of \$100,000.

Booth v. State of Hawaii, et al.
Civil No. 12-1-0262, Fifth Circuit

\$ 65,000.00 (*Department
Settlement Appropriation*)

Plaintiff was walking on the sidewalk of Rice Street in Lihue, Kauai, and he tripped over the edge of the drainage culvert installed adjacent to the sidewalk. The drainage culvert had been constructed so that its surface was two inches higher than the adjacent surface of the sidewalk. Although this difference in the height of the surfaces was contrary to the specifications of the contract to construct that facility, the Department of Transportation accepted the contract work. This trip hazard existed for eleven years without any effort to modify it to make it less hazardous. As a result of the trip and fall, Plaintiff tore his left rotator cuff and sustained other injuries. He was required to undergo surgery and physical therapy. His medical expenses were approximately \$44,000 and his lost income claims was approximately \$30,000. This case proceeded to Court Annexed Arbitration, and the arbitrator awarded Plaintiff \$70,000. The case later settled for \$65,000.

Nakandakare, et al. v. State of Hawaii, et al.
Civil No. 11-1-1740-08, First Circuit

\$ 32,500.00 (*Department
Settlement Appropriation*)

A man was riding his bicycle over the Halawa stream bridge, town-bound, when his bicycle tire got caught in the groove of an expansion joint on the bridge, causing him to fall off his bicycle, resulting in personal injuries. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the man \$80,491.00 plus costs. The case later settled for \$32,500.00.

ATTACHMENT “B”

ALOHA TOWER DEVELOPMENT CORPORATION:

In the Matter of the Application of Honolulu Construction and Draying Company, Limited v. State of Hawaii, et al., Land Court Application No. 787, Hawaii Supreme Court No. SCWC-30484 **\$ 165,929.42** *(General Fund)*
Judgment

In 2001, Aloha Tower Development Corporation (ATDC) filed a petition in land court to expunge the deed restriction on Irwin Park, the small piece of land in between the Tower Marketplace and Nimitz Highway. When the land was originally conveyed to the Territory in the 1930s, it had been with a restriction requiring that it be used for public park purposes. Ultimately, the land court rejected that petition, essentially because of a factual dispute about whether the deed restrictions had been lifted in the 1950s. ATDC elected not to appeal the merits ruling.

Just after the petition in land court was filed, Scenic Hawaii and several other environmental organizations intervened, looking to preserve Irwin Park as a park. They succeeded and the land court granted them just over \$135,000 in attorneys’ fees under the private attorney general doctrine. We appealed and prevailed before the ICA. The Hawaii Supreme Court accepted certiorari and reversed. That opinion was issued in August 2013. Scenic Hawaii moved for about \$38,000 more in fees for their appellate work. The State filed an opposition. The motion was pending for months without a ruling from the Hawaii Supreme Court. The parties elected to settle that motion (for \$25,000) in order to secure funding during this legislative session. An additional \$5,929.42 is owed on interest that accrued on the original amount of the judgment.

DEPARTMENT OF EDUCATION:

Garner, et al. v. State of Hawaii, et al. **\$ 132,819.00** *(General Fund)*
Civil No. 03-1-000305, First Circuit **Settlement**

This case involves the underpayment of substitute teachers over a multiple-year period. The Supreme Court ruled in favor of the substitute teachers on liability and remanded the case to the circuit court to determine damages. With the assistance of experts, the parties agreed on the amount owed and that amount was appropriated in 2013. This appropriation is requested to cover the cost of calculating and mailing the checks to the almost 9,000 class members, as provided in Paragraph C.4 in the Amended Settlement Agreement Regarding Class Action Damages and Distribution. The checks were mailed in March 2014.

Javier, et a. v. State of Hawaii, et al. **\$ 124,169.60** *(General Fund)*
Civil No. 07-1-0160(1), Second Circuit **Settlement**

This case arises out of an altercation between two students at Kalama Intermediate School on November 28, 2006. A student from another school came into the Plaintiff’s classroom and began fighting with him. Plaintiff sustained a fractured left orbital floor (the bone under his left eye), and alleged emotional injuries. There was evidence that there was some “bad blood” between the two boys. Following a jury trial, judgment was entered in favor of Plaintiff in the amount of

\$186,935.78, plus costs in the amount of \$93,849.44. The State appealed this judgment and the case settled before appellate briefing was completed.

OFFICE OF THE GOVERNOR:

Oahu Publications, Inc., dba Honolulu Star-Advertiser v. Abercrombie, Civil No. 11-1-1871-08 KKS, First Circuit **\$ 70,272.66** *(General Fund)*
Judgment

The Honolulu Star-Advertiser sued the Governor under the UIPA to compel him to disclose the names on the list of nominees the Judicial Selection Commission (JSC) submitted to the Governor from which Justice McKenna was appointed to the Hawaii Supreme Court. The Circuit Court entered summary judgment in favor of the Star-Advertiser, ordered the Governor to make the list public, and awarded the Star-Advertiser \$67,849.19 in attorneys' fees and \$1,177.87 in costs. Because the JSC changed its rules and disclosed its list two days after the Circuit Court's ruling, the Governor was only able to appeal the fee award. The Intermediate Court of Appeals (ICA) affirmed the fee award by a 2-1 summary disposition order, but vacated the award of \$564.60 in costs for printing and remanded for further proceedings. The ICA also awarded the Star-Advertiser \$1,810.20 in fees for the appeal.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Shaya, et al. v. Franco, et al. Civil No. 11-1-0551, Second Circuit **\$ 700,000.00** *(Department Settlement Appropriation)*

This case arose out of a motor vehicle accident that occurred at the driveway to Mama's Fish House Restaurant on January 4, 2010. Defendant Franco was driving east on Hana Highway, and made a left turn into Plaintiff's vehicle, which was traveling west. Franco did not stop or slow down before making the turn. Plaintiff sustained a severe left frontal lobe injury to the brain, was admitted to Maui Memorial Hospital for one month, and then discharged to the Rehabilitation Hospital of the Pacific for another month. Since then, Plaintiff's son and ex-wife have provided the in-home 24-hour attendant care. Plaintiff's expert opined that because of the curve in the highway and overgrown vegetation on an embankment, there was inadequate sight distance for Franco. The State's experts opined that the highway met design criteria for sight distance and that Franco had more than adequate sight distance to slow or stop before initiating the turn. All experts agreed that there was nothing Plaintiff could have done to prevent the accident. Therefore, comparative negligence of Plaintiff is not an issue.

It is possible that the judge could find the State jointly and severally liable with Franco under section 663-10.9(4) or section 663-10.9(3), Hawaii Revised Statutes. Plaintiff's liability case against the State is not strong, but he was not at fault for the accident. Under such circumstances, there is a probability that the trial judge, as the finder of fact, may desire to do what other judges have done in the past in similar cases, which is to award at least damages sufficient to cover future health care needs as well as some general damages which could be substantial.