

SB2815

- Measure Title: RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES.
- Report Title: Professionally Licensed Or Certified Government Employees
- Description: Adds a new section to chapter 662, Hawaii Revised Statutes, providing professionally licensed or certified government employees with the same privileges and immunities as other state employees.
- Companion: [HB2286](#)
- Package: Governor
- Current Referral: CPH, JDL
- Introducer(s): KOUCHI (Introduced by request of another party)

DAVID Y. IGE
GOVERNOR

SHAN TSUTSUI
LT. GOVERNOR



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To: The Honorable Rosalyn H. Baker, Chair
and Members of the Senate Committee on Commerce, Consumer Protection, and
Health

Date: February 3, 2016

Time: 9:00 A.M.

Place: Conference Room 229, State Capitol

From: Maria E. Zielinski, Director
Department of Taxation

Re: S.B. 2815, Relating to Professionally Licensed or Certified Government Employees.

The Department of Taxation (Department) supports S.B. 2815, and offers the following comments for your consideration.

The Department has numerous employees who are also professionals and who are directly affected by the holding in *Slingluff v. State of Hawaii*. This measure will help the Department recruit and retain professional employees by ensuring those professional employees cannot be held personally liable for actions they carry out in the course and scope of their government employment.

Thank you for the opportunity to provide comments.

DAVID Y. IGE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
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No. _____

TESTIMONY ON SENATE BILL 2815
RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED
GOVERNMENT EMPLOYEES

By
Nolan P. Espinda, Director

Senate Committee on Commerce, Consumer Protection, and Health
Senator Rosalyn H. Baker, Chair
Senator Michelle N. Kidani, Vice Chair

Wednesday, February 3, 2016; 9:00 a.m.
State Capitol, Conference Room 229

Chair Baker, Vice Chair Kidani, and Members of the Committee:

The Department of Public Safety (PSD) **strongly supports** Senate Bill (SB) 2815 which will add a new section to Chapter 662, HRS, providing professionally licensed or certified government employees with the same privileges and immunities as other state employees.

These qualified privileges and immunities were withheld from PSD physicians in the Slingluff v. State of Hawaii decision, as the Intermediate Court of Appeals (ICA) ruled that the qualified privilege did not apply to the named physicians, since these physicians are subject to separate professional standards and were exercising their professional medical discretion and not their governmental discretion. The analysis set forth by the ICA does not limit its application to just physicians, as personal liability may be imposed on any state employee who is also a professional. In this decision, the ICA created an artificial distinction between medical discretion and governmental discretion that did not previously exist in Hawaii law.

PSD has always found it difficult to recruit and retain qualified physicians, psychiatrists, and advance practice registered nurses because of typically lower government salaries than in the private sector. In addition, knowing that their personal assets may be at risk has further discouraged candidates from even applying for positions with the State. A malpractice insurance policy had to be obtained to ensure that PSD physicians and other medical professionals would not be personally harmed.

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It is critical that this bill be passed to counter the harsh and unfair results of the *Slingluff* decision by the ICA, which, by ignoring existing Hawaii law, unnecessarily puts the PSD physicians at personal financial and professional risk. This bill would return the law to its original state before *Slingluff*.

Thank you for the opportunity to testify on this measure.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

S.B. NO. 2815, RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES.

BEFORE THE:

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

DATE: Wednesday, February 3, 2016 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Kendall J. Moser, Deputy Attorney General

Chair Baker and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to afford the same privileges and immunities to professionally licensed or certified state employees that are afforded to other state employees.

State employees are generally afforded qualified immunity for torts as a result of actions taken while in the course and scope of their State employment, affording them protection from individual liability. In the recent case of Slingluff v. State of Hawai'i, et al., 131 Hawaii 239, 317 P.3d 683 (App. 2013), however, the Intermediate Court of Appeals held that prison physicians are not entitled to qualified immunity for the exercise of their professional medical judgment. The Court's reasoning that these employees exercise judgment for which they are specially licensed, therefore making their judgment separate and distinct from governmental judgment, could be argued to extend to any other professionally licensed or certified employee of the State.

Through the years up until Slingluff, Hawaii's appellate courts have applied qualified immunity to many types of government employees. In none of those cases did the courts deny qualified immunity based on the distinction between professional judgment and governmental judgment. The Court's approach in Slingluff effectively nullifies qualified immunity for the very government officials to whom Hawaii's appellate courts have long granted that immunity.

An employee employed by the State to perform tasks for which he or she is professionally licensed or certified is exercising judgment for which the State hired the employee, and is therefore exercising governmental judgment and discretion. This is the position taken by a majority of jurisdictions nationwide and we seek to adopt this position legislatively.

To address the ramifications of Slingluff, and in an effort to attract and retain its doctors, including those who work in the prisons, the State has taken steps to obtain professional liability insurance covering claims of individual liability for its physicians. This comes at a cost. This cost is expected to rise over time as claims are made against such policies. The need for such insurance becomes unnecessary with the passage of this bill.

The potential for personal liability prevents good, well-qualified professionals from applying for jobs with the government. Even though the State may now carry insurance for its physicians, providing liability insurance for every licensed or certified professional employed by the State would come at an extraordinary and unnecessary cost.

We respectfully ask the Committee to pass this bill.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

AFSCME Local 152, AFL-CIO

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The Twenty-Eighth Legislature, State of Hawaii
The Senate
Committee on Commerce, Consumer Protection and Health

Testimony by
Hawaii Government Employees Association
February 3, 2016

S.B. 2815 – Relating to Professionally Licensed
or Certified Government Employees

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO supports the purpose and intent of S.B. 2815. This important legislation amends Chapter 662, Hawaii Revised Statutes, by providing professionally licensed or certified government employees the same privileges and legal immunities that other state employees currently receive.

More specifically, this bill will protect physicians, nurses, psychologists, engineers and other employees, who are employed by the State of Hawaii, when they exercise professional judgement in their capacity as public employees. Our organization represents many of these employees in various departments, statewide.

S.B. 2815, if enacted, will enable the State of Hawaii to attract and retain employees who are licensed to provide services that are essential to the public.

Thank you for the opportunity to testify in support of S.B. 2815.

Respectfully submitted,

Randy Perreira
Executive Director

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 2815

Date: Wednesday, February 3, 2016

Time: 9:00 am

To: Chair Rosalyn Baker and Members of the Senate Committee on Consumer Protection and Health:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. No. 2815, relating to Professionally Licensed or Certified Government Employees, which grants immunity for all malpractice by government doctors, lawyers, engineers, accountants and other licensed professionals.

This measure is a reaction to the Hawaii Supreme Court decision in the *Slingluff* case where State employed doctors committed malpractice. The State argued that the doctors were government employees exercising government discretion while they committed malpractice and therefore patients of government doctors would have no protection from substandard medical treatment. The court disagreed because immunity for governmental discretion applies to discretionary functions involving the act of “governing,” such as policy-making and planning. Medical treatment by government employed doctors does not involve the exercise of any governmental discretion. Doctors don’t make or implement governmental policies or functions. They treat people and their treatment is supposed to be exactly the same as they give the general public; and subject to the same professional standards.

This same principle applies to all other government workers, as well. Immunity does not apply because you work for the government. It applies only when and because you exercise governmental discretionary functions. For example, legislators have immunity to decide whether

or not to fund a new highway because that is a public policy-making decision; but DOT doesn't have discretion whether to build the highway to code standards because that is implementation of the policy. A department head exercises governmental discretion in deciding whether a department should provide government cars to employees or they should use their own cars and get reimbursed; but employees have no immunity if they disregard stop signs because they do not exercise governmental discretion when driving. Similarly, the director of the Department of Public Safety exercises governmental discretion in deciding whether to use private doctors on a contract basis or hire doctors as full time staff; but doctors do not exercise governmental policy-making discretion when deciding whether a prisoner who is having a heart attack should be admitted for treatment or improperly sent back without treatment. They exercise medical judgment that is subject to medical standards of care not governmental policy-making discretion.

It is believed that the State's claim that the doctors in *Slingsluff* case were held personally liable to pay the court award is not true. The doctors did not pay anything – the State included the award in its appropriations request for claims against the state which was funded by the legislature. The State is responsible for the negligence of its employees who are engaged in ordinary non policy-making job functions, such as running a red light and hitting a pedestrian while driving to pick-up office supplies, just like any other employer. This is how claims against the State arising out of the negligence of its employees have always been handled – those claims are included in the State's annual request for legislative funding of claims against the State – they are not paid by the employee.

Employers are responsible for liability incurred by its employees in the course of their employment. State employed doctors must remain "technically" liable for their malpractice because the state is only liable if its employee is liable. If state employed doctors are given

immunity then both the employee doctor and the state will not be liable and its doctors can malpractice at will and patients will have no recourse. It is bad public policy to encourage malpractice by giving immunity and denying protection to citizens harmed by government doctors in the routine practice of medicine. This is why the great majority of states (as discussed in the *Slingluff* decisions) do not give government doctors immunity for negligent medical treatment. Hawaii is currently doing exactly what most other states do in this regard because it reflects good public policy.

The *Slingluff* case involved prison doctors, but the amendments proposed here will apply to all government doctors, whether treating prisoners, school children, the elderly or anyone else. This will also apply to all other professions. If a State employed engineer negligently designs a bridge in violation of safety code requirements; and that bridge collapses and kills a dozen people those people will have no recourse because there will be complete immunity under this measure.

If the State wants to make sure an employed doctor (or any other professional employee) does not have to personally pay for their negligence the State can simply pay the award as it did in the *Slingluff* case or make sure there is malpractice insurance for the doctors. It is not known why the *Slingluff* doctors did not have malpractice insurance as State contracts routinely have insurance requirements – unless those doctors did not meet the minimum qualifications for affordable malpractice coverage. No legislation involving immunity is required. The employment contract can include this requirement or this measure can be amended to provide that any award against a professional acting in the course and scope of their employment with the State shall be paid by the State and not by the employee.

Thank you very much for allowing me to testify regarding this measure. Please feel free to contact me should you have any questions or desire additional information.