

**"CHAPTER 378
EMPLOYMENT PRACTICES**

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Law Journals and Reviews

Federal Labor Law Preemption and Hawaii's Work-Injury Discharge Law. 16 HBJ, no. 1, at 37 (1981).

Employee Rights Under Judicial Scrutiny: Prevalent Policy Discourse and the Hawai'i Supreme Court. 14 UH L. Rev. 189 (1992).

Caught in the Backdraft: The Implications of Ricci v. DeStefano on Voluntary Compliance and Title VII. 32 UH L. Rev. 463 (2010).

Case Notes

Does not bar common law remedies; exclusive remedy for constructive discharge claim based on sexual harassment. 634 F. Supp. 684 (1986).

If plaintiff was alleging public policy wrongful discharge claim based on Parnar v. Americana Hotels, Inc., and §378-32(2), plaintiff's claim was barred, since this chapter provided sufficient remedy for its violation. 938 F. Supp. 1503 (1996).

Plaintiff's resort to a possible common law action of violation of public policy barred, where plaintiff was making claims of retaliation through wrongful denial of promotion based upon § [sic] 378; that type of claim was analogous to a wrongful discharge claim and § [sic] 378 provided a sufficient remedy for retaliation. 75 F. Supp. 2d 1113 (1999).

Defendant's countermotion for partial summary judgment denied as to claim premised under this chapter of the Hawaii Discriminatory Employment Practices Act [sic] (HDEPA), where defendant could be held individually liable under the HDEPA barring application of other defenses. 112 F. Supp. 2d 1041 (2000).

Plaintiff did not have to obtain a right to sue letter from Hawaii civil rights commission to bring plaintiff's chapter 378 claims for sexual harassment. 159 F. Supp. 2d 1211 (2001).

Plaintiff failed to properly state a claim for relief under the Americans with Disabilities Act or this chapter, where plaintiff argued that reference to general "statutory civil rights" in the title of the second count of the complaint was sufficient. 284 F. Supp. 2d 1261 (2003).

Plaintiff asserted discrimination claims against plaintiff's supervisor and employer, and the alleged parent company of the employer, pursuant to this chapter and federal law. Defendants' motion for partial dismissal or alternatively, for partial summary judgment granted in part (e.g., claims based on national origin and aiding and abetting) and denied in part (e.g., claims based on color). 322 F. Supp. 2d 1101 (2004).

Where plaintiff asserted viable claims against defendants under 42 U.S.C. §1981, Title VII, and this chapter, and each of the statutes provided a sufficient remedy such that the court did not need to fashion any further remedy under the public policy exception, defendants' motion for partial summary judgment granted on plaintiff's claim for violation of public policy. 322 F. Supp. 2d 1101 (2004).

Plaintiff's [chapters] 368 and 378 state law claims against the county were time-barred under §46-72, where plaintiff never provided the county written notice of plaintiff's claim. 504 F. Supp. 2d 969 (2007).

Plaintiff could not state a claim for wrongful termination in violation of public policy based on the same conduct as alleged in plaintiff's federal claims under Title VII of the Civil Rights Act of 1964 and state claims under this chapter because these statutes already provide a sufficient remedy. 721 F. Supp. 2d 947 (2010).

The Hawaii supreme court in French did not demonstrate a clear attempt to keep Hawaii law distinct from the federal Americans with Disabilities Act (ADA) such that a claim under the Hawaii discrimination law raises issues sufficiently distinct from an ADA claim so as to prevent application of the first-to-file-rule. 728 F. Supp. 2d 1096 (2010).

Defendant employer's motion for summary judgment granted on plaintiff's allegation of termination in violation of public policy where plaintiff could not show that plaintiff's opposition to defendant's program was anything more than a disagreement with company management regarding an internal business decision. 760 F. Supp. 2d 1005 (2010).

For Eleventh Amendment purposes, a suit against a state official in that official's capacity is no different from a suit against the State itself; Hawaii has not consented to suit in federal court for claims under this chapter, and sovereign immunity thus barred plaintiff teacher's §378-2 claims against the Hawaii department of education and the department of education superintendent in the superintendent's official capacity. 855 F. Supp. 2d 1155 (2012).

Plaintiff's charges filed with the equal employment opportunity commission were deemed "dual-filed" with the Hawaii civil rights commission. Plaintiff timely filed the charge for claims under this chapter based on plaintiff's termination within the 180-day time limitation. 907 F. Supp. 2d 1143 (2012).

Genuine issue of material fact existed as to plaintiff's hostile work environment claims based on national origin and age, where plaintiff said that supervisor called plaintiff, among other things, "dumb Mexican" and "wetback", and referred

to plaintiff and other older workers as "old bags" and "old clunkers". 927 F. Supp. 2d 978 (2013).

Plaintiff failed to establish a prima facie case of retaliation where the fifteen year span of time between plaintiff's 1985 discrimination complaint and the adverse employment action of the case was too long to permit a causal connection to be inferred between the protected activity and the adverse employment action. 119 H. 288 (App.), 196 P.3d 290 (2008).

Exceptions enumerated by the Ninth Circuit Court of Appeals in *Sosa v. Hiraoka* apply when determining whether a plaintiff may proceed with a suit for violations of part I of this chapter against a party not named in a Hawaii civil rights commission charge; adopting the Ninth Circuit's precedent would be consistent with the legislature's intention of providing employment discrimination victims with the same remedies under state and federal law. 130 H. 325 (App.), 310 P.3d 1026 (2013).

"PART I. [OLD] DISCRIMINATORY PRACTICES

§§378-1 to 378-10 REPEALED. L 1977, c 85, §2; L 1981, c 94, §2.

PART I. DISCRIMINATORY PRACTICES

Cross References

Civil rights commission, see chapter 368.

Law Journals and Reviews

Sexual Harassment in the Workplace: Remedies Available to Victims in Hawai'i. 15 UH L. Rev. 453 (1993).

Caught in the Backdraft: The Implications of *Ricci v. DeStefano* on Voluntary Compliance and Title VII. 32 UH L. Rev. 463 (2010).

Real Men. 37 UH L. Rev. 107 (2015).

Case Notes

Section 368-17 permits a court to award compensatory and punitive damages in civil actions brought under part I of this chapter. 85 H. 7, 936 P.2d 643 (1997).

Plaintiff failed to establish a prima facie case of retaliation where the fifteen year span of time between plaintiff's 1985 discrimination complaint and the adverse employment action of the case was too long to permit a causal

connection to be inferred between the protected activity and the adverse employment action. 119 H. 288 (App.), 196 P.3d 290 (2008).

§378-1 Definitions. As used herein:

"Arrest and court record" includes any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to any law enforcement or military authority.

"Because of sex" shall include, but is not limited to, because of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other individuals not so affected but similar in their ability or inability to work.

"Being regarded as having such an impairment" includes but is not limited to employer consideration of an individual's genetic information, including genetic information of any family member of an individual, or the individual's refusal to submit to a genetic test as a condition of initial or continued employment.

"Commission" means the civil rights commission.

"Disability" means the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment.

"Domestic or sexual violence victim" or "victim" means an individual who is the victim of domestic or sexual violence as defined in section 378-71.

"Employer" means any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States.

"Employment" means any service performed by an individual for another person under any contract of hire, express or implied, oral or written, whether lawfully or unlawfully entered into. Employment does not include services by an individual employed as a domestic in the home of any person, except as provided in section 378-2(a)(9).

"Employment agency" means any person engaged in the business of providing employment information, procuring employment for applicants, or providing employees for placement with employers upon request.

"Family member" means, with respect to a certain individual, another individual related by blood to that individual.

"Gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.

"Genetic information" means information about genes, gene products, hereditary susceptibility to disease, or inherited characteristics that may derive from the individual or family member.

"Genetic test" means a laboratory test which is generally accepted in the scientific and medical communities for the determination of the presence or absence of genetic information.

"Labor organization" means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

"Marital status" means the state of being married or being single.

"Person" means one or more individuals, and includes, but is not limited to, partnerships, associations, or corporations, legal representatives, trustees, trustees in bankruptcy, receivers, or the State or any of its political subdivisions.

"Sexual orientation" means having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences. "Sexual orientation" shall not be construed to protect conduct otherwise proscribed by law. [L 1981, c 94, pt of §2; am L 1986, c 223, §§1, 2; am L 1989, c 386, §§3, 17; am L 1991, c 2, §2; am L 1992, c 33, §5; am L 2002, c 217, §1; am L 2011, c 34, §3 and c 206, §1; am L 2013, c 248, §1]

Law Journals and Reviews

Privacy and Genetics: Protecting Genetic Test Results in Hawai'i. 25 UH L. Rev. 449 (2003).

Case Notes

Individuals are subject to liability under §378-2 when they act as agents of an employer. 396 F. Supp. 2d 1138 (2005).

Based on the plain language of this section and §378-2(2), plaintiff may not proceed under §378-2(2) against defendant, an individual employee. 405 F. Supp. 2d 1225 (2005).

The Hawaii supreme court in French did not demonstrate a clear attempt to keep Hawaii law distinct from the federal Americans with Disabilities Act (ADA) such that a claim under the Hawaii discrimination law raises issues sufficiently distinct from an ADA claim so as to prevent application of the first-to-file-rule. 728 F. Supp. 2d 1096 (2010).

Based on the definition of "employer" in this section, legislature intended all employers, regardless of size, to be subject to the provisions of this chapter. 89 H. 269, 971 P.2d 1104 (1999).

The issue of whether a plaintiff's major life activity is substantially limited must be resolved on a case-by-case basis; thus, the determination of whether the lifting restriction on employee was substantial required an individualized inquiry that was inappropriate for summary judgment. 105 H. 462, 99 P.3d 1046 (2004).

- " **§378-2 Discriminatory practices made unlawful; offenses defined.** (a) It shall be an unlawful discriminatory practice:
- (1) Because of race, sex including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status if the domestic or sexual violence victim provides notice to the victim's employer of such status or the employer has actual knowledge of such status:
 - (A) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment;
 - (B) For any employment agency to fail or refuse to refer for employment, or to classify or otherwise to discriminate against, any individual;
 - (C) For any employer or employment agency to print, circulate, or cause to be printed or circulated any statement, advertisement, or publication or to use any form of application for employment or to make any inquiry in connection with prospective employment, that expresses, directly or indirectly, any limitation, specification, or discrimination;
 - (D) For any labor organization to exclude or expel from its membership any individual or to

discriminate in any way against any of its members, employer, or employees; or

- (E) For any employer or labor organization to refuse to enter into an apprenticeship agreement as defined in section 372-2; provided that no apprentice shall be younger than sixteen years of age;
- (2) For any employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against any individual because the individual has opposed any practice forbidden by this part or has filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practices prohibited under this part;
- (3) For any person, whether an employer, employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the discriminatory practices forbidden by this part, or to attempt to do so;
- (4) For any employer to violate the provisions of section 121-43 relating to nonforfeiture for absence by members of the national guard;
- (5) For any employer to refuse to hire or employ or to bar or discharge from employment any individual because of assignment of income for the purpose of satisfying the individual's child support obligations as provided for under section 571-52;
- (6) For any employer, labor organization, or employment agency to exclude or otherwise deny equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
- (7) For any employer or labor organization to refuse to hire or employ, bar or discharge from employment, withhold pay from, demote, or penalize a lactating employee because the employee breastfeeds or expresses milk at the workplace. For purposes of this paragraph, the term "breastfeeds" means the feeding of a child directly from the breast;
- (8) For any employer to refuse to hire or employ, bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment of any individual because of the individual's credit history or credit report, unless the information in the individual's credit history or credit report

- directly relates to a bona fide occupational qualification under section 378-3(2); or
- (9) For any employer to discriminate against any individual employed as a domestic, in compensation or in terms, conditions, or privileges of employment because of the individual's race, sex including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, or marital status.
 - (b) For purposes of subsection (a)(1):
 - (1) An employer may verify that an employee is a victim of domestic or sexual violence by requesting that the employee provide:
 - (A) A signed written statement from a person listed below from whom the employee or the employee's minor child has sought assistance in relation to the domestic or sexual violence:
 - (i) An employee, agent, or volunteer of a victim services organization;
 - (ii) The employee's attorney or advocate;
 - (iii) The attorney or advocate of the employee's minor child;
 - (iv) A medical or other health care professional; or
 - (v) A member of the clergy; or
 - (B) A police or court record supporting the occurrence of the domestic or sexual violence; and
 - (2) An employer may verify an employee's status as a domestic or sexual violence victim not more than once every six months following the date the employer:
 - (A) Was provided notice by the employee of the employee's status as a domestic or sexual violence victim;
 - (B) Has actual knowledge of the employee's status as a domestic or sexual violence victim; or
 - (C) Received verification that the employee is a domestic or sexual violence victim;
- provided that where the employee provides verification in the form of a protective order related to the domestic or sexual violence with an expiration date, the employer may not request any further form of verification of the employee's status as a domestic or sexual violence victim until the date of the expiration or any extensions of the protective order, whichever is later. [L 1981, c 94, pt of §2; am L 1985, c 177, §1; am L 1986, c 223, §3; am L 1991, c 2,

§3; am L 1992, c 33, §5; am L 1994, c 88, §1; am L 1999, c 172, §3; am L Sp 2009, c 1, §2; am L 2011, c 34, §4 and c 206, §2; am L 2013, c 248, §2]

Note

L 1999, c 172, §5 provides:

"SECTION 5. Nothing in this Act [amending §378-2 and enacting §378-10] prohibits employers from establishing internal rules and guidelines for employees who may wish to breastfeed or express breastmilk in the workplace."

Law Journals and Reviews

Canadian Pacific Cases: Kinoshita & Nakashima: What Really Happened to the Employer? 22 HBJ, no. 1, at 75 (1989).

Two Growing Procedural Defenses in Common Law Wrongful Discharge Cases--Preemption and Res Judicata. 11 UH L. Rev. 143 (1989).

The Protection of Individual Rights Under Hawai'i's Constitution. 14 UH L. Rev. 311 (1992).

Privacy and Genetics: Protecting Genetic Test Results in Hawai'i. 25 UH L. Rev. 449 (2003).

Viability of the Continuing Violation Theory in Hawai'i Employment Discrimination Law in the Aftermath of Ledbetter. 30 UH L. Rev. 423 (2008).

Case Notes

Not violated where employer discharged employees not merely because of their drug-related arrests but because of perceived harm to employer's reputation and business contracts. 803 F.2d 471 (1986).

Monocular pilot applicant's disability discrimination claim and retaliation claim not preempted by Airline Deregulation Act of 1978; pilot applicant's success or failure on the discrimination claim had no bearing on pilot applicant's retaliation claim. 128 F.3d 1301 (1997).

Not unlawful for employer to discharge wife, who along with husband, violated employer's policy by forming own company while still working for employer. 558 F. Supp. 1229 (1983).

Plaintiff alleged that employer contravened letter and purpose of section. 737 F. Supp. 1104 (1990).

Purpose is to protect claimants under workers' compensation law. 749 F. Supp. 1023 (1990).

Because this section and §378-62 did not contain limitation periods, court invoked State's general personal injury statute

of limitations, §657-7; plaintiff's state law claims barred where neither the collective bargaining proceedings nor the equal employment opportunity commission proceedings tolled the statute of limitations. 874 F. Supp. 1095 (1994).

Plaintiff brought forth evidence of a continuing series of conduct which affected plaintiff and plaintiff's work environment; plaintiff's sexual harassment claims may proceed using the evidence, even though much of it predated limitations period; plaintiff may not rely on other proffered evidence because to extent those actions raised claims, statute of limitations had passed. 125 F. Supp. 2d 1224 (2000).

Defendant could not be liable in defendant's individual capacity under paragraph (1)(A). 159 F. Supp. 2d 1211 (2001).

Plaintiff with diabetes was not substantially limited in any major life activity and, therefore, was not disabled under this section or the ADA. 161 F. Supp. 2d 1135 (2000).

Plaintiff asserted discrimination claims against plaintiff's supervisor and employer, and the alleged parent company of the employer, pursuant to chapter 378 and federal law. Defendants' motion for partial dismissal or alternatively, for partial summary judgment granted in part (e.g., claims based on national origin and aiding and abetting) and denied in part (e.g., claims based on color). 322 F. Supp. 2d 1101 (2004).

Defendant limited partner's motion to dismiss granted; among other things, plaintiff did not allege sufficient facts in the second amended complaint that would establish defendant's liability under paragraph (3). 351 F. Supp. 2d 1025 (2004).

Individuals are subject to liability under this section when they act as agents of an employer. 396 F. Supp. 2d 1138 (2005).

Based on the plain language of §378-1 and paragraph (2), plaintiff may not proceed under paragraph (2) against defendant, an individual employee. Plaintiff stated no claim under paragraph (3), where plaintiff claimed that defendant had incited, compelled, or coerced defendant into discriminating. 405 F. Supp. 2d 1225 (2005).

Summary judgment granted for defendants (plaintiff's former employer and former supervisor) regarding plaintiff's state law sexual harassment claim brought pursuant to this section, where plaintiff did not meet the statutory filing deadline pursuant to chapter 378 or the tort statute of limitations for the claim. 468 F. Supp. 2d 1210 (2006).

The "single-filing" or "piggyback" rule applied under Hawaii law, where the "dual-filed" equal employment opportunity commission administrative complaints of four plaintiffs-intervenors were filed after the 180-day deadline in §368-11(c) and the plaintiffs-intervenors sought to "piggyback" on the

timely administrative complaints of three other plaintiffs-intervenors. 504 F. Supp. 2d 1008 (2007).

Where plaintiffs-intervenors' intentional infliction of emotional distress/negligent infliction of emotional distress claims were premised on a violation of this section, which provides a nonnegotiable state right, and the alleged conduct at issue involved discrimination on the basis of national origin and religion, the claims were not preempted by §301 of the Labor Management Relations Act. 535 F. Supp. 2d 1149 (2008).

Plaintiff asserted claims for violation of Title I of the Americans with Disabilities Act (ADA) and this section; plaintiff did not establish a genuine issue of material fact that plaintiff was disabled pursuant to any of the definitions of "disability" pursuant to the ADA and this section. 586 F. Supp. 2d 1213 (2008).

Pre-2011 amendment to subsection (1): Hawaii supreme court would apply the test prescribed by the United States Supreme Court in *Oncale* in evaluating same-sex harassment and whether or not same-sex harassment constitutes discrimination "because of sex" under this section. 721 F. Supp. 2d 947 (2010).

The Hawaii supreme court in *French* did not demonstrate a clear attempt to keep Hawaii law distinct from the federal Americans with Disabilities Act (ADA) such that a claim under the Hawaii discrimination law raises issues sufficiently distinct from an ADA claim so as to prevent application of the first-to-file-rule. 728 F. Supp. 2d 1096 (2010).

For Eleventh Amendment purposes, a suit against a state official in that official's capacity is no different from a suit against the State itself; Hawaii has not consented to suit in federal court for chapter 378 claims, and sovereign immunity thus barred plaintiff teacher's claims under this section against the Hawaii department of education and the department of education superintendent in the superintendent's official capacity. 855 F. Supp. 2d 1155 (2012).

Where plaintiff claimed defendants aided and abetted the commission of a discriminatory act prohibited by this chapter, plaintiff's second amended complaint sufficiently pled factual allegations that stated a plausible argument that defendants acted with malice. 892 F. Supp. 2d 1245 (2012).

Defendant's motion for summary judgment on plaintiff's claims under paragraph (3) (2008) denied, where there were genuine issues of material fact whether some of the conduct alleged by plaintiff resulted in an adverse employment action. 907 F. Supp. 2d 1143 (2012).

Plaintiff could pursue claims under paragraph (3) (2008) against defendants even though they were not named respondents in the equal employment opportunity commission (EEOC) charges,

where: (1) the county, a named respondent in the charges, and defendant prosecuting attorney were substantially identical parties and plaintiff had listed defendant as one of the persons responsible for the alleged discrimination against plaintiff in the EEOC questionnaire; and (2) other defendant was involved in the acts giving rise to the claims in the charges. 907 F. Supp. 2d 1143 (2012).

Where defendants argued that plaintiff did not exhaust administrative remedies as to claims under paragraph (3) (2008) because the aid and abet allegation was not contained in any of plaintiff's equal employment opportunity commission charges, plaintiff's claims were reasonably related to allegations in the charge to the extent those claims were consistent with certain claims expressly alleged against the county. 907 F. Supp. 2d 1143 (2012).

An age-based remark not made directly in the context of an employment decision or uttered by a non-decisionmaker may be relevant, circumstantial evidence of discrimination. However, the court did not find a relationship between the remarks and the employment practices at issue that was sufficient to establish discriminatory animus. 919 F. Supp. 2d 1101 (2013).

Plaintiff made a prima facie case of age and sex discrimination by demonstrating that plaintiff: (1) belonged to a protected class (male and 59 years old during the relevant time period); (2) performed the job adequately; (3) suffered an adverse employment action; and (4) a similarly situated, younger, female employee was treated differently. However, defendant was entitled to summary judgment on plaintiff's age and sex discrimination claims where plaintiff did not establish that defendant's legitimate business reasons for selecting the younger, female candidate were pretextual. 919 F. Supp. 2d 1101 (2013).

Defendant's motion for summary judgment denied where plaintiff raised genuine issue of material fact as to whether plaintiff's demotion was a result of national origin/ancestry or age discrimination. Even though plaintiff was not actually from Mexico, plaintiff may maintain a "perceived as" national origin claim if plaintiff was discriminated against based on characteristics that led others to connect plaintiff to Mexico, such as plaintiff's accent. Supervisor's alleged references to "old bags" and "old clunkers", combined with statements such as "you old people don't learn", raised an issue of fact as to whether supervisor had an animus toward older individuals that may have played a role in supervisor's decision to demote plaintiff. 927 F. Supp. 2d 978 (2013).

Defendant's motion for summary judgment granted as to plaintiff's retaliation claims where plaintiff failed to

identify the adverse employment action plaintiff suffered in retaliation for plaintiff's exercise of rights, and further, there was no causal link between the supposed adverse employment action and plaintiff's exercise of rights. 927 F. Supp. 2d 978 (2013).

Plaintiff failed to demonstrate a prima facie case of sex discrimination because plaintiff failed to identify any similarly situated person outside of plaintiff's protected class who was treated more favorably. 937 F. Supp. 2d 1237 (2013).

Plaintiff failed to exhaust administrative remedies with respect to certain events to the extent plaintiff sought relief in connection with the events and presented the court with no applicable law that excused exhaustion on the basis of futility. 937 F. Supp. 2d 1237 (2013).

Plaintiff submitted no evidence that raised a question of fact regarding whether defendant former employer or former supervisor thought plaintiff had a mental impairment. 937 F. Supp. 2d 1237 (2013).

Summary judgment granted to defendants on plaintiff's disparate impact claims based on race, ancestry, and age, where, among other things, plaintiff did not provide evidence that allowed the court to draw even the inference that the former supervisor's criticism flowed from some discriminatory animus on the former supervisor's part. 937 F. Supp. 2d 1237 (2013).

Evidence regarding claims of disparate treatment based on age was direct; the alleged comment by the chief investigator regarding plaintiff's age not only reflected a negative attitude toward older workers, it indicated an intent to fill plaintiff's former supervisory position with a younger person because plaintiff was simply "too old"; summary judgment in favor of defendant denied. 938 F. Supp. 2d 1000 (2013).

Summary judgment granted to defendant regarding: (1) any "hostile work environment" claims plaintiff may have been trying to assert, as plaintiff provided no evidence establishing that plaintiff's workplace was permeated with discriminatory intimidation relating to plaintiff's national origin or age; and (2) plaintiff's retaliation claims, as plaintiff failed to show evidence that plaintiff engaged in protected activity, was thereafter subjected to an adverse employment action, and that there was a causal link between the protected activity and the adverse employment action. 938 F. Supp. 2d 1000 (2013).

Treating plaintiff's evidence relating to national origin discrimination, i.e., the alleged comment by the chief investigator and/or administrator reportedly referring to a need "to make the office safe" from plaintiff because plaintiff was "a typical Samoan", as "specific" and "substantial", plaintiff raised questions of fact as to plaintiff's claims of disparate

treatment based on national origin in violation of this section and Title VII. 938 F. Supp. 2d 1000 (2013).

Plaintiff presented no evidence regarding adverse employment actions taken against any other employee of defendant, much less any employee who could fall within the protected class for an age discrimination claim, regarding plaintiff's age discrimination claims based upon theories of disparate impact or "pattern-or-practice". 963 F. Supp. 2d 1002 (2013).

Employee's motion for summary judgment denied, where plaintiff claimed disparate treatment in violation of the age discrimination provision in this section; among other things, (1) there was sufficient evidence from which a fact-finder could conclude that plaintiff's demotion was not voluntary; (2) the combination of plaintiff's supervisor's alleged statements of animus and the allegedly better treatment of a co-worker constituted sufficient evidence to meet the minimal burden required to defeat summary judgment; there was at least a question of fact as to whether age-based discrimination was the "but for" cause of plaintiff's demotion; and (3) drawing all reasonable inferences in plaintiff's favor, the court could not determine that the "same actor" inference applied. 979 F. Supp. 2d 1069 (2013).

Employer's motion for summary judgment granted as to plaintiff's hostile work environment claims, where plaintiff failed to meet plaintiff's burden of showing that there was a triable issue as to whether the work environment was permeated with discriminatory intimidation. Among other things, while plaintiff detailed several instances in which plaintiff was allegedly harassed or mistreated by plaintiff's supervisor, plaintiff did not provide evidence from which a jury could tell that these were incidents of "discriminatory intimidation" rather than just bad treatment. 979 F. Supp. 2d 1069 (2013).

Defendant employer was entitled to summary judgment as to plaintiff's discrimination claims based on race, where, among other things, plaintiff did not allege any facts linking supervisor's conduct to race-based animus, and plaintiff identified only sporadic or unquantified incidents over a three-year period of alleged racial harassment by other employees. 979 F. Supp. 2d 1083 (2013).

Defendant employer was not entitled to summary judgment on plaintiff's disability discrimination claims under the Americans with Disabilities Act and this section, where a reasonable jury could find that plaintiff's back and shoulder injuries substantially limited plaintiff's ability to stand, and there were genuine issues of fact as to whether plaintiff was a qualified individual (e.g., plaintiff's evidence raised a triable issue of fact as to whether standing and rarely sitting

was an essential function of the armed security guard position, defendant never engaged in any interactive process, and the record established that an accommodation was reasonable and available). 979 F. Supp. 2d 1083 (2013).

Plaintiff's motion for reconsideration regarding plaintiff's retaliation claims under Title VII, Age Discrimination in Employment Act, and this section denied; although statements indicated that there may be causation between plaintiff's termination and an internal problems letter, the complaints in the internal problems letter about another in-house salesperson's alleged attempts to manipulate managers and the managers' alleged favoritism did not concern a protected trait; thus, plaintiff's submission of the letter and plaintiff's related complaints did not constitute a protected activity under this section. 988 F. Supp. 2d 1184 (2013).

Defendant's application of the "Staffing Policy SH-2" to plaintiff and plaintiff's husband in 2011 and defendant's finding a violation of the policy raised a genuine issue of material fact whether they constituted circumstantial evidence that the policy was applied in a discriminatory manner. 19 F. Supp. 3d 1012 (2014).

Defendant's "Staffing Policy SH-2" as applied to plaintiff violated the plain language and purpose of this section, unless the termination or other adverse action fell within one of the exceptions in §378-3. Because there was a genuine issue of material fact as to whether an exception in §378-3 applied, the court denied defendant's motion for summary judgment with respect to plaintiff's marital status discrimination claim. 19 F. Supp. 3d 1012 (2014).

Genuine issue of material fact existed as to whether defendant's proffered reasons for finding a violation of the working relationship of plaintiff and plaintiff's husband, and removing plaintiff from a project where plaintiff's husband was the program manager, were pretextual. Plaintiff created a triable issue of material fact concerning discrimination under the McDonnell Douglas burden-shifting framework. Defendant's motion for summary judgment with respect to plaintiff's marital status discrimination claim denied. 19 F. Supp. 3d 1012 (2014).

Where plaintiff brought several retaliation claims against defendant, (1) plaintiff offered sufficient evidence to raise a genuine issue of material fact as to whether defendant's reasons for not actively deploying plaintiff were pretextual; (2) there was a genuine issue of material fact as to whether there were any available engineering positions available for plaintiff on Kauai, and there was a triable issue of material fact as to whether defendant's reason for beginning the termination process was pretextual; and (3) defendant's motion for summary judgment

granted with respect to plaintiff's retaliation claim arising from alleged instances of protected activity in January and February 2011, where, among other things, plaintiff was required to, but failed to, exhaust plaintiff's administrative remedies. 19 F. Supp. 3d 1012 (2014).

Violated by company policy requiring termination of person married to someone in same department unless termination falls under exception in §378-3. 72 H. 350, 816 P.2d 302 (1991).

Defendant's policy prohibiting persons related by blood or marriage from working in the same department, as applied to plaintiff, violated plain language and purpose of this section, unless the termination fell within one of the exceptions in §378-3. 76 H. 454, 879 P.2d 1037 (1994).

In action alleging unlawful discharge in violation of this section, time for filing administrative complaint begins to run on date that employee is actually discharged, that is, on date that employment terminates. 76 H. 454, 879 P.2d 1037 (1994).

Where record contained numerous instances of both physical and verbal conduct of a sexual nature by doctor towards complainant and others, complainant never solicited or incited doctor's conduct, and conduct had effect of creating an intimidating, hostile, and offensive work environment, there was sufficient evidence to support commission's determination that doctor violated paragraph (1)(A) and Hawaii administrative rule §12-46-109(a)(3). 88 H. 10, 960 P.2d 1218 (1998).

Based on definition of "employer" in §378-1, legislature intended all employers, regardless of size, to be subject to the provisions of this chapter, including paragraph (1)(A). 89 H. 269, 971 P.2d 1104 (1999).

Employer's policy of denying any extended leave during employee's first year of employment violated Hawaii administrative rule §12-46-108, which was adopted to enforce the legislative mandate of paragraph (1)(A) and Hawaii's constitutional prohibition against sex discrimination in the exercise of a person's civil rights in employment. 89 H. 269, 971 P.2d 1104 (1999).

Where plaintiff in age discrimination suit did not meet plaintiff's burden of establishing that defendant's articulated reason for taking adverse employment action against plaintiff was pretextual, and plaintiff did not give any other evidence that would give rise to a genuine issue of material fact, trial court properly granted summary judgment. 94 H. 368, 14 P.3d 1049 (2000).

A compensation discrimination claim under paragraph (1) must satisfy the following three-part test: (1) plaintiff must first establish a prima facie case of discrimination; (2) defendant must then provide a legitimate, nondiscriminatory reason for the

pay differences; and (3) if defendant articulates such a reason, plaintiff must then show that the reason given by defendant is pretextual. 96 H. 408, 32 P.3d 52 (2001).

A retaliation claim under paragraph (2) is subject to a three-part test: (1) plaintiff must first establish a prima facie case of retaliation; (2) defendant must then provide a legitimate, nondiscriminatory reason for the adverse employment action; and (3) if defendant articulates such a reason, plaintiff must then show that the reason given by defendant is pretextual. 96 H. 408, 32 P.3d 52 (2001).

To establish a "hostile environment" sexual harassment claim, claimant must show that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct or visual forms of harassment of a sexual nature; the conduct was unwelcome, severe or pervasive, and had the purpose or effect of either unreasonably interfering with claimant's work performance or creating an intimidating, hostile, or offensive work environment; that claimant actually perceived the conduct as having such purpose or effect; and claimant's perception was objectively reasonable to a person of claimant's gender in same position. 97 H. 376, 38 P.3d 95 (2001).

Plaintiff was, as a matter of law, unable to maintain a sex discrimination claim based on retaliation under paragraph (2) where allegations described by plaintiff did not involve any discrimination based on sex, and plaintiff clarified that female co-worker's conduct created a hostile work environment not only for plaintiff, but for plaintiff's staff, which included both males and females. 100 H. 149, 58 P.3d 1196 (2002).

Where co-worker sexually assaulted employee by grabbing employee's buttocks, conduct was sufficiently severe to constitute actionable sexual harassment; trial court erred in granting summary judgment for employer where there were genuine issues of material fact as to whether employer's response to buttock-grabbing incident was reasonably calculated to end co-worker's harassment. 104 H. 423, 91 P.3d 505 (2004).

Trial court correctly ruled that appellant was precluded from bringing a claim of gender discrimination under this section where, under the circumstances, gender discrimination alleged in the civil complaint could not be said to be "consistent with appellant's original theory of the case" as submitted to the Hawaii civil rights commission. 105 H. 462, 99 P.3d 1046 (2004).

Trial court properly granted summary judgment where appellant failed to establish a prima facie showing of a violation of this section, either on a theory of pattern or practice

discrimination or of disparate treatment age discrimination. 105 H. 462, 99 P.3d 1046 (2004).

An employee may bring action against employer for intentional infliction of emotional distress caused by discrimination in violation of this section, and this action is not barred by exclusivity provision of §386-5. 87 H. 57 (App.), 951 P.2d 507 (1998).

Where unclear from record that appropriate elements of discriminatory employment discharge claim based on race or ancestry under this section were considered, summary judgment improper. 87 H. 57 (App.), 951 P.2d 507 (1998).

Where plaintiff's disability prevented plaintiff from being qualified to perform the essential functions of the ACO IV (prison guard) position, with or without reasonable accommodation, plaintiff failed to establish a prima facie case that plaintiff had lost plaintiff's position due to disability discrimination; also, because plaintiff could not show that plaintiff was qualified for the ACO IV position, plaintiff also failed to establish a prima facie case that plaintiff had lost plaintiff's position due to race or gender discrimination under this section. 119 H. 288 (App.), 196 P.3d 290 (2008).

Circuit court erred in granting summary judgment against plaintiff employee on plaintiff's claim under this section where a genuine issue of material fact existed as to whether defendant employer's stated reasons for plaintiff employee's termination, undertaking cost-cutting restructuring measures following bankruptcy, lacked credibility and were pretextual. 130 H. 325 (App.), 310 P.3d 1026 (2013).

Cited: 760 F. Supp. 2d 1005 (2010).

Mentioned: 800 F. Supp. 882 (1992).

" **[§378-2.3] Equal pay; sex discrimination.** No employer shall discriminate between employees because of sex, by paying wages to employees in an establishment at a rate less than the rate at which the employer pays wages to employees of the opposite sex in the establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions. Payment differentials resulting from:

- (1) A seniority system;
- (2) A merit system;
- (3) A system that measures earnings by quantity or quality of production;
- (4) A bona fide occupational qualification; or
- (5) A differential based on any other permissible factor other than sex

do not violate this section. [L 2005, c 35, §2]

" **§378-2.5 Employer inquiries into conviction record.** (a) Subject to subsection (b), an employer may inquire about and consider an individual's criminal conviction record concerning hiring, termination, or the terms, conditions, or privileges of employment; provided that the conviction record bears a rational relationship to the duties and responsibilities of the position.

(b) Inquiry into and consideration of conviction records for prospective employees shall take place only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position.

(c) For purposes of this section, "conviction" means an adjudication by a court of competent jurisdiction that the defendant committed a crime, not including final judgments required to be confidential pursuant to section 571-84; provided that the employer may consider the employee's conviction record falling within a period that shall not exceed the most recent ten years, excluding periods of incarceration. If the employee or prospective employee claims that the period of incarceration was less than what is shown on the employee's or prospective employee's conviction record, an employer shall provide the employee or prospective employee with an opportunity to present documentary evidence of a date of release to establish a period of incarceration that is shorter than the sentence imposed for the employee's or prospective employee's conviction.

(d) Notwithstanding subsections (b) and (c), the requirement that inquiry into and consideration of a prospective employee's conviction record may take place only after the individual has received a conditional job offer, and the limitation to the most recent ten-year period, excluding the period of incarceration, shall not apply to employers who are expressly permitted to inquire into an individual's criminal history for employment purposes pursuant to any federal or state law other than subsection (a), including:

- (1) The State or any of its branches, political subdivisions, or agencies pursuant to sections 78-2.7 and 831-3.1;
- (2) The department of education pursuant to section 302A-601.5;
- (3) The department of health with respect to employees, providers, or subcontractors in positions that place them in direct contact with clients when providing non-witnessed direct mental health services pursuant to section 321-171.5;
- (4) The judiciary pursuant to section 571-34;

- (5) The counties pursuant to section 846-2.7(b)(5), (33), (34), (35), (36), and (38);
- (6) Armed security services pursuant to section 261-17(b);
- (7) Providers of a developmental disabilities domiciliary home pursuant to section 321-15.2;
- (8) Private schools pursuant to sections 302C-1 and 378-3(8);
- (9) Financial institutions in which deposits are insured by a federal agency having jurisdiction over the financial institution pursuant to section 378-3(9);
- (10) Detective agencies and security guard agencies pursuant to sections 463-6(b) and 463-8(b);
- (11) Employers in the business of insurance pursuant to section 431:2-201.3;
- (12) Employers of individuals or supervisors of individuals responsible for screening passengers or property under title 49 United States Code section 44901 or individuals with unescorted access to an aircraft of an air carrier or foreign carrier or in a secured area of an airport in the United States pursuant to title 49 United States Code section 44936(a);
- (13) The department of human services pursuant to sections 346-97 and 352-5.5;
- (14) The public library system pursuant to section 302A-601.5;
- (15) The department of public safety pursuant to section 353C-5;
- (16) The board of directors of a cooperative housing corporation or the manager of a cooperative housing project pursuant to section 421I-12;
- (17) The board of directors of an association of owners under chapter 514A or 514B, or the manager of a condominium project pursuant to section 514A-82.1 or 514B-133; and
- (18) The department of health pursuant to section 321-15.2. [L 1998, c 175, §1; am L 2003, c 95, §12; am L 2004, c 79, §5 and c 164, §10; am L 2005, c 93, §7; am L 2006, c 220, §4; am L 2008, c 28, §7; am L 2012, c 299, §1; am L 2013, c 159, §15; am L 2014, c 18, §1; am L 2015, c 190, §7]

Law Journals and Reviews

Employment Discrimination Because of One's Arrest and Court Record in Hawai'i. 22 UH L. Rev. 709 (2000).

Case Notes

This section is not limited in application solely to prospective employees; rather, the statute applies to both current and prospective employees. 111 H. 401, 142 P.3d 265 (2006).

" **[§378-2.7] Employer inquiries into and consideration of credit history or credit report.** (a) Notwithstanding section [378-2(a)(8)]:

- (1) Inquiry into and consideration of a prospective employee's credit history or credit report may take place only after the prospective employee has received a conditional offer of employment, which may be withdrawn if information in the credit history or credit report is directly related to a bona fide occupational qualification;
- (2) The prohibition against an employer's refusal to hire or employ, barring or terminating from employment, or otherwise discriminating on the basis of credit history shall not apply to employers who are expressly permitted or required to inquire into an individual's credit history for employment purposes pursuant to any federal or state law;
- (3) The prohibition against an employer's refusal to hire or employ, barring or terminating from employment, or otherwise discriminating on the basis of credit history shall not apply to managerial or supervisory employees; and
- (4) The prohibition against an employer's refusal to hire or employ, barring or terminating from employment, or otherwise discriminating on the basis of credit history shall not apply to employers that are financial institutions in which deposits are insured by a federal agency having jurisdiction over the financial institution.

(b) For the purposes of this section:

"Managerial employee" means an individual who formulates and effectuates management policies by expressing and making operative the decisions of the individual's employer.

"Supervisory employee" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [L Sp 2009, c 1, §1]

" **§378-3 Exceptions.** Nothing in this part shall be deemed to:

- (1) Repeal or affect any law, ordinance, or government rule having the force and effect of law;
- (2) Prohibit or prevent the establishment and maintenance of bona fide occupational qualifications reasonably necessary to the normal operation of a particular business or enterprise, and that have a substantial relationship to the functions and responsibilities of prospective or continued employment;
- (3) Prohibit or prevent an employer, employment agency, or labor organization from refusing to hire, refer, or discharge any individual for reasons relating to the ability of the individual to perform the work in question;
- (4) Affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan that is not intended to evade the purpose of this chapter; provided that this exception shall not be construed to permit any employee plan to set a maximum age requirement for hiring or a mandatory retirement age;
- (5) Prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised, or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or denomination or from making a selection calculated to promote the religious principles for which the organization is established or maintained;
- (6) Conflict with or affect the application of security regulations or rules in employment established by the United States or the State;
- (7) Require the employer to execute unreasonable structural changes or expensive equipment alterations to accommodate the employment of a person with a disability;
- (8) Prohibit or prevent the department of education or private schools from considering criminal convictions in determining whether a prospective employee is suited to working in close proximity to children;
- (9) Prohibit or prevent any financial institution in which deposits are insured by a federal agency having jurisdiction over the financial institution from denying employment to or discharging from employment

any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, unless it has the prior written consent of the federal agency having jurisdiction over the financial institution to hire or retain the person;

- (10) Preclude any employee from bringing a civil action for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto; provided that notwithstanding section 368-12, the commission shall issue a right to sue on a complaint filed with the commission if it determines that a civil action alleging similar facts has been filed in circuit court; or
- (11) Require the employer to accommodate the needs of a nondisabled person associated with or related to a person with a disability in any way not required by title I of the Americans with Disabilities Act. [L 1981, c 94, pt of §2; am L 1984, c 85, §4; am L 1985, c 162, §1; am L 1990, c 257, §3 and c 262, §2; am L 1992, c 33, §3 and c 275, §1; am L 1994, c 88, §2; am L 1997, c 365, §§2, 4; am L 1998, c 175, §2]

Attorney General Opinions

Prohibits board of regents from adopting a mandatory retirement policy. Att. Gen. Op. 84-6.

Law Journals and Reviews

Sexual Harassment in the Workplace: Remedies Available to Victims in Hawai'i. 15 UH L. Rev. 453 (1993).

Case Notes

The Hawaii supreme court in French did not demonstrate a clear attempt to keep Hawaii law distinct from the federal Americans with Disabilities Act (ADA) such that a claim under the Hawaii discrimination law raises issues sufficiently distinct from an ADA claim so as to prevent application of the first-to-file-rule. 728 F. Supp. 2d 1096 (2010).

Where employer's decision to discharge pregnant employee and subsequent refusal to reinstate employee was unrelated to employee's ability to perform the job, bona fide occupational qualification defense under paragraph (2) was inapplicable to employer. 89 H. 269, 971 P.2d 1104 (1999).

Mentioned: 800 F. Supp. 882 (1992).

" **§378-4 Enforcement jurisdiction.** The commission shall have jurisdiction over the subject of discriminatory practices made unlawful by this part. Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may file with the commission a complaint in accordance with the procedure established under chapter 368. [L 1981, c 94, pt of §2; am L 1989, c 386, §8]

Case Notes

In action alleging unlawful discharge in violation of §378-2, time for filing administrative complaint begins to run on date that employee is actually discharged, that is, on date that employment terminates. 76 H. 454, 879 P.2d 1037 (1994).

" **§378-5 Remedies.** (a) The commission may order appropriate affirmative action, including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without backpay, restoration to membership in any respondent labor organization, or other remedies as provided under chapter 368, which in the judgment of the commission, will effectuate the purpose of this part, including a requirement for reporting on the manner of compliance.

(b) In any civil action brought under this part, if the court finds that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this part, the court may enjoin the respondent from engaging in such unlawful discriminatory practice and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement, hiring, or upgrading of employees, with or without backpay, or restoration of membership in any respondent labor organization, or any other equitable relief the court deems appropriate. Backpay liability shall not accrue from a date more than two years prior to the filing of the complaint with the commission.

(c) In any action brought under this part, the court, in addition to any judgment awarded to the plaintiff or plaintiffs, shall allow costs of action, including costs of fees of any nature and reasonable attorney's fees, to be paid by the defendant. [L 1981, c 94, pt of §2; am L 1989, c 386, §9]

Case Notes

Subsection (f) (1985) plainly limited available relief to appropriate equitable remedies; it did not authorize recovery of either compensatory or punitive damages, both of which were traditional legal remedies. 76 H. 454, 879 P.2d 1037 (1994).

Chapter 386 does not bar relief on claims filed with the commission. 85 H. 7, 936 P.2d 643 (1997).

Section 368-17 permits a court to award compensatory and punitive damages in civil actions brought under part I of this chapter. 85 H. 7, 936 P.2d 643 (1997).

Satisfaction of judgment did not bar plaintiff's claim for attorney's fees under this section. 87 H. 86, 952 P.2d 374 (1997).

Unemployment benefits should not be deducted from awards of back pay under Hawaii's employment discrimination law; thus, trial court did not have discretion to reduce back pay award by the amount of unemployment benefits received by employee. 89 H. 269, 971 P.2d 1104 (1999).

Hawaii courts should be given discretion to enhance the lodestar fee when an attorney has been retained on a contingency fee basis; a "reasonable fee" under Hawaii fee-shifting statutes is an amount of fees that "would attract competent counsel," in light of all the circumstances, and that under certain circumstances the lodestar fee may be multiplied by a factor to achieve a "reasonable" award of fees. 96 H. 408, 32 P.3d 52 (2001).

Where a court awards attorney's fees pursuant to fee-shifting statutes in cases involving contingency fee arrangements, a trial judge should not be limited by the contingency fee arrangement between a plaintiff and his or her counsel in determining a reasonable fee; plaintiff is thus not necessarily barred from recovery of a doubled lodestar fee. 96 H. 408, 32 P.3d 52 (2001).

Where appellate court's judgment only permitted plaintiff to retry plaintiff's case, plaintiff had not established that discrimination had occurred, and plaintiff was legally in the same position as before trial, plaintiff had not been awarded a "judgment" within the meaning of subsection (c) and was thus not entitled to fees under this section. 99 H. 262, 54 P.3d 433 (2002).

" **§378-6 Inspection; investigation; records.** (a) In connection with an investigation of a complaint filed under this part, or whenever it appears to the commission that an unlawful discriminatory practice may have been or is being committed, the commission's authorized representative shall have access to the premises of the parties or persons reasonably connected thereto, records, documents, and other material relevant to the complaint and shall have the right to examine, photograph, and copy that material, and may question employees and make investigation to determine whether any person has violated this part or any rule

issued hereunder or which may aid in the enforcement of this part.

(b) Every employer, employment agency, and labor organization shall:

- (1) Make and keep records relevant to this part, and
- (2) Make such reports therefrom, as the commission shall prescribe by rule or order. [L 1981, c 94, pt of §2; gen ch 1985; am L 1989, c 386, §10]

" **§§378-7 to 378-9 REPEALED.** L 1989, c 386, §§18 to 20.

" **§378-10 REPEALED.** L 2013, c 249, §3.

"PART II. [OLD] LIE DETECTOR TESTS

§§378-21 and 378-22 REPEALED. L 1985, c 241, §2.

"PART II. LIE DETECTOR TESTS

[§378-26] Definitions. As used in this part:

"Department" means the department of labor and industrial relations.

"Director" means the director of labor and industrial relations.

"Employee" means any individual in the employment of an employer.

"Employer" includes any individual, partnership, association, corporation, business trust, legal representative, receiver, trustee, or successor of any of the same, or any organized group of persons, acting directly or indirectly in the interest of any employer in relation to an employee.

"Lie detector test" means a test to detect deception or to verify the truth of statements through the use of any psychophysiological measuring device, such as, but not limited to, polygraph tests and voice stress analyzers.

"Person" means one or more individuals, and includes, but is not limited to, a partnership, association, or corporation, legal representative, trustee, trustee in bankruptcy, receiver, or the State or any of its political subdivisions.

"Prospective employee" means any individual who has applied for or otherwise actively expressed interest in employment with an employer. [L 1985, c 241, pt of §1]

" **[§378-26.5] Unlawful practices.** It shall be unlawful for any employer to:

- (1) Require a prospective employee or employee to submit to a lie detector test as a condition of employment or continued employment;
- (2) Terminate or otherwise discriminate against any employee or prospective employee for refusing to submit to a lie detector test;
- (3) Ask an employee or prospective employee whether the employee or prospective employee is willing to submit to a lie detector test unless the employee or prospective employee is informed orally and in writing that the test is voluntary and the refusal to submit to the test will not result in termination of the employee or will not jeopardize the prospective employee's chance of a job;
- (4) Subject a prospective employee to a lie detector test which includes inquiries deemed unlawful under section 378-2;
- (5) Utilize any device that intrudes into any part or cavity of the body for the purpose of truth verification; or
- (6) Discharge or otherwise discriminate against any employee or prospective employee because such person has filed a complaint, testified, or assisted in any proceeding respecting the unlawful practices prohibited under this part. [L 1985, c 241, pt of §1]

" **[§378-27] Exception.** Nothing in this part shall be deemed to:

- (1) Repeal or affect any law or ordinance or government rule or regulation having the force and effect of law;
- (2) Apply to lie detector tests administered by any law enforcement agency;
- (3) Apply to the United States and any subdivision thereof;
- (4) Conflict with or affect the application of security regulations in employment established by the United States or the State; or
- (5) Apply to psychological tests administered by a law enforcement agency to determine the suitability of a candidate for employment with the law enforcement agency. [L 1985, c 241, pt of §1]

" **[§378-27.5] Enforcement jurisdiction; complaint against unlawful practice.** (a) The department shall have jurisdiction over practices made unlawful by this part. Any prospective employee or employee claiming to be aggrieved by an unlawful practice may file with the department a verified complaint in

writing which shall state the name and address of the prospective employer or employer alleged to have committed the unlawful practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the department. The attorney general, or the department upon its own initiative, in like manner, may make and file such a complaint.

(b) A complaint may be filed on behalf of a class by the attorney general or the department, and a complaint so filed may be investigated, conciliated, and litigated on a class action basis.

(c) No complaint shall be filed after the expiration of thirty days after the date upon which the alleged unlawful practice occurred or is discovered to have occurred, whichever is later. [L 1985, c 241, pt of §1]

" **[§378-28] Power of department to prevent unlawful practice.** (a) After the filing of any complaint, or whenever it appears to the department that an unlawful practice may have been committed, the department shall conduct an investigation in connection therewith. At any time after the filing of a complaint, but prior to the issuance of a determination as to whether there is or is not cause to believe that this part has been violated, the parties may agree to resolve the complaint through a settlement.

(b) If the department determines after such investigation that there is cause to believe that this part has been violated, the department shall demand that the respondent cease such unlawful practice. In addition to the penalty specified in section 378-29.3 the department may order appropriate affirmative action, including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without backpay, as, in the judgment of the department, will effectuate the purpose of this part.

(c) The department may commence a civil action in circuit court seeking appropriate relief. In a civil action brought pursuant to this subsection:

- (1) The director may join various complainants in one cause of action;
- (2) The director shall not be required to pay the filing fee or other costs or fees of any nature or to file a bond or other security of any nature in connection with such action or with proceedings supplementary thereto, or as a condition precedent to the availability to the director of any process in aid of such action or proceedings;

(3) In no event shall any action be brought more than three years after the complaint was filed with the department.

(d) In any action brought pursuant to this part, if the court finds that a respondent has engaged in or is engaging in an unlawful practice as defined in this part, the court may enjoin the respondent from engaging in such unlawful practice and order such affirmative action as may be appropriate, including, but not limited to fines, reinstatement, hiring, or upgrading of employees and prospective employees, with or without backpay, or any other equitable relief as the court deems appropriate.

(e) In any action brought pursuant to this part, if any judgment obtained by the director against the respondent remains unsatisfied for a period of thirty days after such judgment is entered, the director may request the circuit court to compel the respondent to comply with the judgment, including, but not limited to, an order directing the respondent to cease doing business until the respondent has complied with the judgment.

(f) Whenever it appears to the director that an employer is engaged in any act or practice which constitutes or may constitute, now or later, a violation of this part, or any related rule, the director may bring an action in the circuit court of the circuit in which it is charged that the act or practice complained of occurred or is about to occur to enjoin the act or practice and to enforce compliance with this part or with the rule, and upon a proper showing, a permanent or temporary injunction or decree or restraining order shall be granted without bond.

(g) In any action brought under this part, the court may in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs of action, and reasonable attorney's fees, to be paid by the defendant. [L 1985, c 241, pt of §1]

" **[§378-28.5] Investigation; oaths; affidavits; subpoena; witnesses; immunities.** (a) In connection with an investigation of a complaint filed under this part, or whenever it appears to the department that an unlawful practice may have been or is being committed, the director or an authorized representative shall have access to the premises of the parties or persons reasonably connected thereto, records, documents, and other material relevant to the complaint and shall have the right to examine, photograph, and copy such material, and may question such employees and make such investigation to determine whether any person has violated this part or any rule or regulation issued under this part or which may aid in the enforcement of this part.

(b) The director or an authorized representative may administer oaths and may issue subpoenas or subpoena duces tecum to compel the attendance and testimony of witnesses or the production of books, payrolls, records, correspondence, documents, or any other material relating to any matter under investigation.

(c) If a person fails to comply with a subpoena issued under this section, any circuit court, upon application of the director or the director's authorized representative, may issue an order requiring compliance. [L 1985, c 241, pt of §1]

" **[§378-29] Rules.** The director shall make such rules under chapter 91, not inconsistent with this part as in the judgment of the director are appropriate to carry out this part and for the efficient administration thereof. [L 1985, c 241, pt of §1]

" **[§378-29.3] Penalties.** (a) Civil. Any employer found in violation of this part shall be subject to a fine of not less than \$100 nor more than \$1,000 to be collected by the director and such fine shall not be suspended. Each violation shall constitute a separate offense. Amounts so collected by the director shall be paid into the general fund.

(b) Criminal. Whoever intentionally resists, prevents, impedes, or interferes with the department or any of its agents or representatives in the performance of duties pursuant to this part, or who in any manner intentionally violates the law, shall be fined not more than \$1,000, or imprisoned not more than one year, or both.

(c) All criminal actions for violations of this part or any rule issued pursuant thereto, shall be prosecuted by the attorney general or public prosecutor. [L 1985, c 241, pt of §1]

"PART III. UNLAWFUL SUSPENSION OR DISCHARGE

§378-31 Definitions. As used in this part:

"Appeal board" means the labor and industrial relations [appeals] board.

"Department" means the department of labor and industrial relations.

"Director" means the director of labor and industrial relations.

"Employee" includes any person suffered or permitted to work.

"Employer" includes any individual, partnership, association, joint-stock company, trust, corporation, the personal representative of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same,

employing any persons, but shall not include the State or any political subdivision thereof or the United States.

"Wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation. It shall include the reasonable cost, as determined by the director under chapter 387, to the employer of furnishing an employee with board, lodging, or other facilities if the board, lodging, or other facilities are customarily furnished by the employer to the employer's employees but shall not include tips or gratuities of any kind. [L 1967, c 22, pt of §1; HRS §378-31; am L 1976, c 200, pt of §1; gen ch 1985]

Revision Note

Numeric designations deleted and definitions rearranged pursuant to §23G-15.

" **§378-32 Unlawful suspension, barring, discharge, withholding pay, demoting, or discrimination.** (a) It shall be unlawful for any employer to suspend, discharge, or discriminate against any of the employer's employees:

- (1) Solely because the employer was summoned as a garnishee in a cause where the employee is the debtor or because the employee has filed a petition in proceedings for a wage earner plan under chapter XIII of the Bankruptcy Act;
- (2) Solely because the employee has suffered a work injury which arose out of and in the course of the employee's employment with the employer and which is compensable under chapter 386 unless the employee is no longer capable of performing the employee's work as a result of the work injury and the employer has no other available work which the employee is capable of performing. Any employee who is discharged because of the work injury shall be given first preference of reemployment by the employer in any position which the employee is capable of performing and which becomes available after the discharge and during the period thereafter until the employee secures new employment. This paragraph shall not apply to any employer in whose employment there are less than three employees at the time of the work injury or who is a party to a collective bargaining agreement which prevents the continued employment or reemployment of the injured employee;

- (3) Because the employee testified or was subpoenaed to testify in a proceeding under this part; or
- (4) Because an employee tested positive for the presence of drugs, alcohol, or the metabolites of drugs in a substance abuse on-site screening test conducted in accordance with section 329B-5.5; provided that this provision shall not apply to an employee who fails or refuses to report to a laboratory for a substance abuse test pursuant to section 329B-5.5.

(b) It shall be unlawful for an employer or a labor organization to bar or discharge from employment, withhold pay from, or demote an employee because the employee uses accrued and available sick leave; provided that:

- (1) After an employee uses three or more consecutive days of sick leave, an employer or labor organization may require the employee to provide written verification from a physician indicating that the employee was ill when the sick leave was used;
- (2) This subsection shall apply only to employers who:
 - (A) Have a collective bargaining agreement with their employees; and
 - (B) Employ one hundred or more employees; and
- (3) Nothing in this subsection shall be construed to supersede any provision of any collective bargaining agreement or employment benefits program or plan that provides greater employee benefits or rights. [L 1967, c 22, pt of §1; HRS §378-32; am L 1970, c 64, §2; am L 1981, c 10, §1 and c 13, §1; gen ch 1985; am L 2007, c 179, §3; am L 2011, c 118, §1]

Law Journals and Reviews

Commentary on Selected Employment and Labor Law Decisions Under the Lum Court. 14 UH L. Rev. 423 (1992).

Case Notes

Policy of this section discussed; section does not prohibit termination or other discrimination against employees who are not capable of performing their own or other available work. 680 F. Supp. 1456 (1988).

Not violated by discharge of employee allegedly in retaliation for participating in union grievance meeting and complaining about understaffing. 779 F. Supp. 1265 (1991).

If plaintiff was alleging public policy wrongful discharge claim based on Parnar v. Americana Hotels, Inc., and paragraph (2) of this section, plaintiff's claim was barred, since chapter

378 provided sufficient remedy for its violation. 938 F. Supp. 1503 (1996).

Employee may file complaint before employee is able to return to work; section not preempted by federal law. 67 H. 25, 677 P.2d 449 (1984).

Section grants employee whose employment is terminated due to a work related injury first preference to reemployment if employee regains capacity to perform some type of work with the employer; preference is voided if there is some provision preventing reemployment in the collective bargaining agreement or if employee secures employment elsewhere. 70 H. 1, 757 P.2d 641 (1988).

Where public policy against terminating employee solely because employee suffered a compensable work injury is evidenced in this section and remedy is available under §378-35, judicially created claim of wrongful discharge in violation of public policy could not be maintained. 87 H. 57 (App.), 951 P.2d 507 (1998).

Discussed: 945 F. Supp. 2d 1133 (2013).

" **§378-33 Complaint against unlawful suspension, discharge, or discrimination.** (a) Any employee aggrieved by an alleged unlawful suspension, discharge, or discrimination may file with the department of labor and industrial relations a complaint in writing, stating the name and address of the employer alleged to have committed the unlawful suspension, discharge, or discrimination, and shall set forth the particulars thereof and other information as may be required by the department.

(b) No complaint shall be filed after the expiration of thirty days after the alleged act of unlawful suspension, discharge, or discrimination, or after the employee learns of the suspension or discharge, except that a complaint for an alleged act of unlawful discharge under section [378-32(a)(2)] occurring while the aggrieved employee is still physically or mentally incapacitated and unable to work also may be filed before the expiration of thirty days after the date the aggrieved employee is able to return to work. [L 1967, c 22, pt of §1; HRS §378-33; am L 1974, c 150, §1; am L 1981, c 10, §2; am L 1984, c 196, §1]

" **§378-34 Proceeding and hearing on complaint.** (a) After the filing of any complaint, the department of labor and industrial relations shall serve a copy of the complaint upon the employer charged. Service may be by delivery to the employer or by mail. The employer may file an answer to the complaint.

(b) A hearing on the complaint shall be held by the department in conformance with chapter 91. [L 1967, c 22, pt of §1; HRS §378-34]

" **§378-35 Findings and order.** If the department of labor and industrial relations finds, after a hearing, that an employer has unlawfully suspended, discharged or discriminated against an employee in violation of section 378-32, the department may order the reinstatement, or reinstatement to the prior position, as the case may be, of the employee with or without backpay or may order the payment of backpay without any such reinstatement. [L 1967, c 22, pt of §2; HRS §378-35; am L 1981, c 10, §3]

Case Notes

Where public policy against terminating employee solely because employee suffered a compensable work injury is evidenced in §378-32 and remedy is available under this section, judicially created claim of wrongful discharge in violation of public policy could not be maintained. 87 H. 57 (App.), 951 P.2d 507 (1998).

Discussed: 945 F. Supp. 2d 1133 (2013).

" **§378-36 Judicial review.** Any person aggrieved by the order of the department of labor and industrial relations shall be entitled to judicial review as provided by section 91-14. [L 1967, c 22, pt of §1; HRS §378-36]

" **§378-37 Enforcement of order; judgment rendered thereon.** If an employer fails or neglects to comply with the final order of the department of labor and industrial relations from which no appeal has been taken as provided by this part, the department or the employee affected may apply to the circuit court of the judicial circuit in which the employer resides or transacts business for a judgment to enforce the provisions of the final order and for any other appropriate relief. In any proceeding to enforce the provisions of the final order, the department or the employee affected need only file with the court proof that notice of the hearing was given, a certified copy of the final order, and proof that the final order was served. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though the judgment had been rendered in an action duly heard and determined by the court. [L 1967, c 22, pt of §1; HRS §378-37; am L 1986, c 21, §1]

" **§378-38 Rules and regulations.** The director of labor and industrial relations shall adopt rules and regulations as the director deems necessary for the purpose of carrying out this part. [L 1967, c 22, pt of §1; HRS §378-38; gen ch 1985]

Cross References

Rulemaking, see chapter 91.

"[PART IV. FAIR REPRESENTATION]

[§378-51] Action against labor organization, limitation. Any complaint, whether founded upon any contract obligation or for the recovery of damage or injury to persons or property, by an employee against a labor organization for its alleged failure to fairly represent the employee in an action against an employer shall be filed within ninety days after the cause of action accrues, and not thereafter.

Where the alleged failure to fairly represent an employee arises from a grievance, the cause of action shall be deemed to accrue when an employee receives actual notice that a labor organization either refuses or has ceased to represent the employee in a grievance against an employer. Where the alleged failure is related to negotiations or collective bargaining, the cause of action shall be deemed to accrue when the applicable collective bargaining agreement or amendment thereto is executed. [L 1980, c 35, §1]

Case Notes

Employee's claim that union failed to provide fair and adequate representation was time-barred. 779 F. Supp. 1265 (1991).

"[PART V.] WHISTLEBLOWERS' PROTECTION ACT

Revision Note

In this part, "part" substituted for "chapter" pursuant to §23G-15.

Law Journals and Reviews

Wrongful Termination Law in Hawaii. V HBJ, no. 13, at 71 (2001).

Employee Rights Under Judicial Scrutiny: Prevalent Policy Discourse and the Hawai'i Supreme Court. 14 UH L. Rev. 189 (1992).

Confidentiality Breeds Contempt: A First Amendment Challenge to Confidential Ethics Commission Proceedings of the City & County of Honolulu. 18 UH L. Rev. 797 (1996).

Case Notes

Respondent's claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower [sic] Protection Act were not preempted by the Railway Labor Act. 512 U.S. 246 (1994).

Plaintiff's Hawaii Whistleblowers' Protection Act and Parnar v. Americana Hotels, Inc. claims were preempted by §1305(a)(1) of Airline Deregulation Act of 1978. 870 F. Supp. 295 (1994).

The Act does not provide employees with a protected property interest, as it does not create an enforceable expectation of continued public employment. 120 F. Supp. 2d 1244 (2000).

Plaintiff could not maintain the present action where plaintiff had agreed to "forever release, acquit, and discharge" the claims in the mutual release and settlement agreement in plaintiff's first action. 686 F. Supp. 2d 1079 (2010).

Portions of plaintiff's Whistleblowers' Protection Act claims based on the alleged sexual orientation statements and the complaint and investigation regarding plaintiff's alleged discrimination against two individuals were time-barred. 892 F. Supp. 2d 1245 (2012).

Protection afforded under this Act not restricted to at-will employees. 74 H. 235, 842 P.2d 634 (1992).

Where plaintiff was removed from project, State did not violate the Act or the First Amendment to the U.S. Constitution when it reassigned the project to someone else. 76 H. 332, 876 P.2d 1300 (1994).

A. General Provisions

Note

Sections 378-61 to 378-69 designated as Subpart A by L 2011, c 166, §3.

§378-61 Definitions. As used in this part:

"Employee" means a person who performs a service for wages or other remuneration under a contract for hire, written or oral, express or implied. Employee includes a person employed by the State or a political subdivision of the State.

"Employer" means a person who has one or more employees. Employer includes an agent of an employer or of the State or a political subdivision of the State.

"Person" means an individual, sole proprietorship, partnership, corporation, association, or any other legal entity.

"Public body" means:

- (1) A state officer, employee, agency, department, division, bureau, board, commission, committee, council, authority, or other body in the executive branch of state government;
- (2) An agency, board, commission, committee, council, member, or employee of the legislative branch of the state government;
- (3) A county, city, intercounty, intercity, or regional governing body, a council, special district, or municipal corporation, or a board, department, commission, committee, council, agency, or any member or employee thereof;
- (4) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body;
- (5) A law enforcement agency or any member or employee of a law enforcement agency; or
- (6) The judiciary and any member or employee of the judiciary.

"Public employee" means any employee of the State or any county, or the political subdivision and agencies of the State or any county, any employee under contract with the State or any county, any civil service employee, any probationary or provisional employee of the State or county, and any employee of any general contractor or subcontractor undertaking the execution of a contract with a governmental contracting agency, as defined in section 104-1.

"Public employer" means the State and any county, the political subdivisions and agencies of the State and any county, and any general contractor or subcontractor undertaking the execution of a contract with a governmental contracting agency, as defined in section 104-1, and includes any agent thereof. [L 1987, c 267, pt of §1; am L 2011, c 166, §5]

" **§378-62 Discharge of, threats to, or discrimination against employee for reporting violations of law.** An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

- (1) The employee, or a person acting on behalf of the employee, reports or is about to report to the employer, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of:
 - (A) A law, rule, ordinance, or regulation, adopted pursuant to law of this State, a political subdivision of this State, or the United States; or
 - (B) A contract executed by the State, a political subdivision of the State, or the United States, unless the employee knows that the report is false; or
- (2) An employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [L 1987, c 267, pt of §1; am L 2002, c 56, §2]

Case Notes

Employee's wrongful termination action under Hawaii whistleblower's act preempted by ERISA whistleblower provision. 999 F.2d 408 (1993).

Because plaintiff did not have full and fair opportunity to litigate claims sounding in wrongful discharge in plaintiff's unemployment compensation benefits proceeding, the court refused to apply either issue preclusion or claim preclusion. 866 F. Supp. 459 (1994).

Because §378-2 and this section did not contain limitation periods, court invoked State's general personal injury statute of limitations, §657-7; plaintiff's state law claims barred where neither the collective bargaining proceedings nor the equal employment opportunity commission proceedings tolled the statute of limitations. 874 F. Supp. 1095 (1994).

Plaintiff's state whistleblower claim under this section barred, where plaintiff did not file complaint until well after the ninety-day period after the most recent alleged violation of the whistleblowers' protection act. 75 F. Supp. 2d 1113 (1999).

Count of complaint alleging that plaintiff was wrongfully discharged in violation of 31 U.S.C. §3730(h) of the False Claims Act was time-barred, where the court found that the Hawaii Whistleblowers' Protection Act provided the state cause of action most closely analogous to a 31 U.S.C. §3730(h) claim for retaliatory discharge, and thus applied a ninety-day statute of limitations to plaintiff's claim for retaliatory discharge. 362 F. Supp. 2d 1203 (2005).

Questions of material fact existed as to plaintiff's claim of retaliation in violation of the Hawaii Whistleblowers'

Protection Act; the court found the fact that the adverse actions described occurred during the ongoing resolution of plaintiff's complaint sufficient to infer a causal connection between the two activities. 410 F. Supp. 2d 939 (2005).

Plaintiff failed to establish any issue of material fact as to whether plaintiff engaged in protected conduct by requesting compensation documentation or whether the conduct was a substantial motivating factor in defendants' retaliatory actions. 490 F. Supp. 2d 1062 (2007).

Defendant's motion for summary judgment as to plaintiffs' claim for violation of the Hawaii Whistleblowers' Protection Act denied, where issues of material fact existed as to defendant's motivation for removing and terminating plaintiffs; the government contractor defense did not apply in the case. 654 F. Supp. 2d 1122 (2008).

Regardless of whether plaintiff did or did not need to exhaust plaintiff's Whistleblowers' Protection Act claim, plaintiff's claim failed on the merits; plaintiff failed to demonstrate any causal connection between any action plaintiff took that plaintiff said was protected, and any conduct by plaintiff's employer that plaintiff might identify as retaliatory. 937 F. Supp. 2d 1237 (2013).

Whether exhaustion of administrative remedies was required for a Whistleblowers' Protection Act claim, discussed. Plaintiff's claim failed without regard to any exhaustion requirement, where plaintiff took more than two years after the date of the last adverse action that plaintiff identified as relevant to the lawsuit to file suit. 938 F. Supp. 2d 1000 (2013).

Plaintiff failed to identify an adverse employment action, where plaintiff's employment was not terminated so it could not be construed as an adverse employment action and a notation in plaintiff's file was not an adverse employment action. 945 F. Supp. 2d 1133 (2013).

Plaintiff's actions, which allegedly caused defendant's retaliation, were attenuated from the claimed retaliation in the amended complaint; among other things, no causal connection existed between plaintiff's April 2007 threat to report defendant's use of false promotional material and plaintiff's 2009 claims. 945 F. Supp. 2d 1133 (2013).

" **§378-63 Civil actions for injunctive relief or damages.**

(a) A person who alleges a violation of this part may bring a civil action for appropriate injunctive relief, or actual damages, or both within two years after the occurrence of the alleged violation of this part.

(b) An action commenced pursuant to subsection (a) may be brought in the circuit court for the circuit where the alleged

violation occurred, where the complainant resides, or where the person against whom the civil complaint is filed resides or has a principal place of business.

(c) As used in subsection (a), "damages" means damages for injury or loss caused by each violation of this part, including reasonable attorney fees. [L 1987, c 267, pt of §1; am L 2002, c 56, §3]

Case Notes

Plaintiff's state whistleblower claim under §378-62 barred, where plaintiff did not file complaint until well after the ninety-day period after the most recent alleged violation of the whistleblowers' protection act. 75 F. Supp. 2d 1113 (1999).

Count of complaint alleging that plaintiff was wrongfully discharged in violation of 31 U.S.C. §3730(h) of the False Claims Act was time-barred, where the court found that the Hawaii Whistleblowers' Protection Act provided the state cause of action most closely analogous to a 31 U.S.C. §3730(h) claim for retaliatory discharge, and thus applied a ninety-day statute of limitations to plaintiff's claim for retaliatory discharge. 362 F. Supp. 2d 1203 (2005).

Plaintiff's Whistleblowers' Protection Act claim was time-barred, where plaintiff took more than two years after the date of the last adverse action that plaintiff identified as relevant to the lawsuit to file suit. 938 F. Supp. 2d 1000 (2013).

" **§378-64 Remedies ordered by court.** A court, in rendering a judgment in an action brought pursuant to this part, shall order, as the court considers appropriate, reinstatement of the employee or public employee, payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney's fees and witness fees, if the court determines that the award is appropriate. [L 1987, c 267, pt of §1; am L 2011, c 166, §6]

" **§378-65 Penalties for violations.** (a) A person or public employer who violates this part shall be fined not less than \$500 nor more than \$5,000 for each violation.

(b) A civil fine which is ordered pursuant to this part shall be deposited with the director of finance to the credit of the general fund of the State. [L 1987, c 267, pt of §1; am L 2002, c 56, §4; am L 2011, c 166, §7]

" **§378-66 Collective bargaining and confidentiality rights, takes precedence.** (a) This subpart shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement, nor to permit disclosures which would diminish or impair the rights of any person to the continued protection of confidentiality of communications where statute or common law provides such protection.

(b) Where a collective bargaining agreement provides an employee rights and remedies superior to the rights and remedies provided herein, contractual rights shall supersede and take precedence over the rights, remedies, and procedures provided in this subpart. Where a collective bargaining agreement provides inferior rights and remedies to those provided in this subpart, the provisions of this subpart shall supersede and take precedence over the rights, remedies, and procedures provided in collective bargaining agreements. [L 1987, c 267, pt of §1; am L 2011, c 166, §8]

" **§378-67 Compensation for employee participation in investigation, hearing, or inquiry.** This subpart shall not be construed to require an employer to compensate an employee for participation in an investigation, hearing, or inquiry held by a public body in accordance with section 378-62 of this subpart. [L 1987, c 267, pt of §1; am L 2011, c 166, §9]

" **§378-68 Notices of employee protections and obligations.** An employer shall post notices and use other appropriate means to keep the employer's employees informed of their protections and obligations under this subpart. [L 1987, c 267, pt of §1; am L 2011, c 166, §10]

Cross References

Employee protection, see §128D-15.

" **[§378-69] Conflict with common law, precedence.** The rights created herein shall not be construed to limit the development of the common law nor to preempt the common law rights and remedies on the subject matter of discharges which are contrary to public policy. In the event of a conflict between the terms and provisions of this part and any other law on the subject the more beneficial provisions favoring the employee shall prevail. [L 1987, c 267, pt of §1]

Case Notes

Mentioned: 654 F. Supp. 2d 1122 (2008).

"B. Public Employees

[\$378-70] Protected disclosure by a public employee. (a)

In addition to any other protections under this part, a public employer shall not discharge, threaten, or otherwise discriminate against a public employee regarding the public employee's compensation, terms, conditions, location, or privileges of employment because the public employee, or a person acting on behalf of the public employee, reports or is about to report to the public employer or a public body, verbally or in writing:

- (1) Any violation or suspected violation of a federal, state, or county law, rule, ordinance, or regulation; or
- (2) Any violation or suspected violation of a contract executed by the State, a political subdivision of the State, or the United States,

unless the employee knows that the report is false.

(b) Every public employer shall post notices pertaining to the application of sections 378-70 and 396-8(e), as shall be prescribed by the department of labor and industrial relations, in conspicuous places in every workplace. [L 2011, c 166, §4]

"PART VI. VICTIMS PROTECTIONS

Note

Part heading amended by L 2011, c 206, §3(1).

[A.] General Provisions

Note

Section 378-71 designated as Subpart A by L 2011, c 206, §3(2).

[\$378-71] Definitions. As used in this part:

"Child" means an individual who is a biological, adopted, or foster son or daughter; a stepchild; or a legal ward of an employee.

"Course of conduct" means acts over any period of time of repeatedly maintaining a visual or physical proximity to a person or conveying verbal or written threats, including threats conveyed through electronic communications or threats implied by conduct.

"Domestic abuse" means conduct defined in section 586-1.

"Domestic or sexual violence" means domestic abuse, sexual assault, or stalking.

"Electronic communications" includes communications via telephone, mobile phone, computer, e-mail, video recorder, fax machine, telex, or pager.

"Employee" means a person who performs services for hire for not fewer than six consecutive months for the employer from whom benefits are sought under this chapter.

"Health care provider" means a physician as defined under section 386-1.

"Sexual assault" means any conduct proscribed by chapter 707, part V.

"Stalking" means engaging in a course of conduct directed at a specifically targeted person that would cause a reasonable person to suffer substantial emotional distress or to fear bodily injury, sexual assault, or death to the person or to the person's spouse, parent, child, or any other person who regularly resides in the person's household, and where the conduct does cause the targeted person to have such distress or fear.

"Victim services organization" includes:

- (1) A nonprofit, nongovernmental organization that provides assistance to victims of domestic or sexual violence or to advocates for such victims, including a rape crisis center;
- (2) An organization operating a shelter or providing professional counseling services; or
- (3) An organization providing assistance through the legal process. [L 2003, c 60, pt of §2]

"[B.] Victims Leave

Note

Sections 378-72 to 378-74 designated as Subpart B by L 2011, c 206, §3(3).

[§378-72] Leave of absence for domestic or sexual violence. (a) An employer employing fifty or more employees shall allow an employee to take up to thirty days of unpaid victim leave from work per calendar year, or an employer employing not more than forty-nine employees shall allow an employee to take up to five days of unpaid leave from work per calendar year, if the employee or the employee's minor child is a victim of domestic or sexual violence; provided the leave is to either:

- (1) Seek medical attention for the employee or employee's minor child to recover from physical or psychological injury or disability caused by domestic or sexual violence;
- (2) Obtain services from a victim services organization;
- (3) Obtain psychological or other counseling;
- (4) Temporarily or permanently relocate; or
- (5) Take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic or sexual violence, or other actions to enhance the physical, psychological, or economic health or safety of the employee or the employee's minor child or to enhance the safety of those who associate with or work with the employee.

(b) An employee's absence from work that is due to or resulting from domestic abuse or sexual violence against the employee or the employee's minor child as provided in this section shall be considered by an employer to be a justification for leave for a reasonable period of time, not to exceed the total number of days allocable for each category of employer under subsection (a).

"Reasonable period of time" as used in this section means:

- (1) Where due to physical or psychological injury to or disability to the employee or employee's minor child, the period of time determined to be necessary by the attending health care provider, considering the condition of the employee or employee's minor child, and the job requirements; and
- (2) Where due to an employee's need to take legal or other actions, including preparing for or participating in any civil or criminal legal proceeding, obtaining services from a victim services organization, or permanently or temporarily relocating, the period of time necessary to complete the activity as determined by the employee's or employee's minor child's attorney or advocate, court, or personnel of the relevant victim services organization.

(c) Where an employee is a victim of domestic or sexual violence and seeks leave for medical attention to recover from physical or psychological injury or disability caused by domestic or sexual violence, the employer may request that the employee provide:

- (1) A certificate from a health care provider estimating the number of leave days necessary and the estimated commencement and termination dates of leave required by the employee; and

(2) Prior to the employee's return, a medical certificate from the employee's attending health care provider attesting to the employee's condition and approving the employee's return to work.

(d) Where an employee has taken not more than five calendar days of leave for non-medical reasons, the employee shall provide certification to the employer in the form of a signed statement within a reasonable period after the employer's request, that the employee or the employee's minor child is a victim of domestic or sexual violence and the leave is for one of the purposes enumerated in subsection (a). If the leave exceeds five days per calendar year, then the certification shall be provided by one of the following methods:

(1) A signed written statement from an employee, agent, or volunteer of a victim services organization, from the employee's attorney or advocate, from a minor child's attorney or advocate, or a medical or other professional from whom the employee or the employee's minor child has sought assistance related to the domestic or sexual violence; or

(2) A police or court record related to the domestic or sexual violence.

(e) If certification is required, no leave shall be protected until a certification, as provided in this section, is provided to the employer.

(f) The employee shall provide the employer with reasonable notice of the employee's intention to take the leave, unless providing that notice is not practicable due to imminent danger to the employee or the employee's minor child.

(g) Nothing in this section shall be construed to prohibit an employer from requiring an employee on victim leave to report not less than once a week to the employer on the status of the employee and intention of the employee to return to work.

(h) Upon return from leave under this section, the employee shall return to the employee's original job or to a position of comparable status and pay, without loss of accumulated service credits and privileges, except that nothing in this subsection shall be construed to entitle any restored employee to the accrual of:

(1) Any seniority or employment benefits during any period of leave, unless the seniority or benefits would be provided to a similarly situated employee who was on leave due to a reason other than domestic or sexual violence; or

(2) Any right, benefit, or position of employment to which the employee would not have otherwise been entitled.

(i) All information provided to the employer under this section, including statements of the employee, or any other documentation, record, or corroborating evidence, and the fact that the employee or employee's minor child has been a victim of domestic or sexual violence or the employee has requested leave pursuant to this section, shall be maintained in the strictest confidence by the employer, and shall not be disclosed, except to the extent that disclosure is:

- (1) Requested or consented to by the employee;
- (2) Ordered by a court or administrative agency; or
- (3) Otherwise required by applicable federal or state law.

(j) Any employee denied leave by an employer in wilful violation of this section may file a civil action against the employer to enforce this section and recover costs, including reasonable attorney's fees, incurred in the civil action. [L 2003, c 60, pt of §2]

" **[§378-73] Relationship to other leaves.** If an employee is entitled to take paid or unpaid leave pursuant to other federal, state, or county law, or pursuant to an employment agreement, a collective bargaining agreement, or an employment benefits program or plan, which may be used for the purposes listed under section 378-72(a), the employee shall exhaust such other paid and unpaid leave benefits before victim leave benefits under this chapter may be applied. The combination of such other paid or unpaid leave benefits that may be applied and victim leave benefits shall not exceed the maximum number of days specified under section 378-72(a). [L 2003, c 60, pt of §2]

" **[§378-74] Effect on employment and collective bargaining agreements; benefits.** Nothing in this part shall be construed to supersede any provision of any employment agreement, collective bargaining agreement, or employment benefits program or plan that provides greater benefits or rights than those benefits or rights established under section 378-72. [L 2003, c 60, pt of §2]

"[C.] Reasonable Accommodations in the Workplace

[§378-81] Reasonable accommodations. [(a)] An employer shall make reasonable accommodations in the workplace for an employee who is a victim of domestic or sexual violence, including:

- (1) Changing the contact information, such as telephone numbers, fax numbers, or electronic-mail addresses, of the employee;
- (2) Screening the telephone calls of the employee;

- (3) Restructuring the job functions of the employee;
- (4) Changing the work location of the employee;
- (5) Installing locks and other security devices; and
- (6) Allowing the employee to work flexible hours;

provided that an employer shall not be required to make the reasonable accommodations if they cause undue hardship on the work operations of the employer.

(b) Prior to making the reasonable accommodations under this section, an employer may verify that an employee is a victim of domestic or sexual violence as provided in section 378-2(b).

(c) As used in this section, "undue hardship" means an action requiring significant difficulty or expense on the operation of an employer, when considered in light of the following factors:

- (1) The nature and cost of the reasonable accommodation needed under this section;
- (2) The overall financial resources of the employer; the number of employees of the employer; and the number, type, and placement of the work locations of an employer; and
- (3) The type of operation of the employer, including the composition, structure, and functions of the workforce of the employer, the geographic separateness of the victim's work location from the employer, and the administrative or fiscal relationship of the work location to the employer. [L 2011, c 206, pt of §3(4)]

" **[§378-82] Civil actions.** Any employee denied reasonable accommodations by an employer in violation of this subpart may file a civil action against the employer to enforce this subpart and recover costs, including reasonable attorney's fees, incurred in the civil action. [L 2011, c 206, pt of §3(4)]

"[PART VII.] OPPORTUNITY TO EXPRESS MILK

Cross References

Breastfeeding in public accommodations, see §§489-21 to 489-23.

[§378-91] Definitions. As used in this part:

"Employee" means an individual who performs a service for wages or other remuneration under a contract for hire, written or oral, or expressed or implied. "Employee" includes an individual employed by the State or a political subdivision of the State.

"Employer" means a person who has one or more employees. "Employer" includes an agent of an employer or of the State or a political subdivision thereof, but does not include the United States. [L 2013, c 249, pt of §2]

" **[§378-92] Opportunity to express milk.** (a) An employer shall provide:

- (1) Reasonable break time for an employee to express milk for the employee's nursing child for one year after the child's birth each time the employee has a need to express breast milk; and
- (2) A location, other than the restroom, that is shielded from view and free from intrusion from coworkers and the public that may be used by an employee to express breast milk.

(b) Every employer covered by this section shall post a notice in a conspicuous place accessible to employees and use other appropriate means to keep the employer's employees informed of the protections and obligations under this part.

(c) Subsection (a) shall not apply to any employer who has fewer than twenty employees if the employer can show that the requirements under subsection (a) would impose an undue hardship by causing the employer significant difficulty or expense in relation to the size, financial resources, nature, or structure of the employer's business. [L 2013, c 249, pt of §2]

" **[§378-93] Civil actions for injunctive relief or damages.**

(a) An employee who alleges a violation of this part may bring a civil action for appropriate injunctive relief, actual damages, or both within two years after the occurrence of the alleged violation.

(b) A cause of action pursuant to subsection (a) may be brought in the appropriate court in the circuit where the alleged violation occurred, where the plaintiff resides, or where the defendant resides or has a [principal] place of business.

(c) A defendant who violates this part shall be fined \$500 for each violation. A civil fine that is ordered pursuant to this section shall be deposited with the director of finance to the credit of the state general fund.

(d) For purposes of this section, "damages" means damages for injury or loss caused by each violation of this part, including reasonable attorney's fees. [L 2013, c 249, pt of §2]