

# LEGAL ISSUES TERMINATING “AT WILL” EMPLOYEES

Avoiding Liability at the End of the  
Employment Relationship

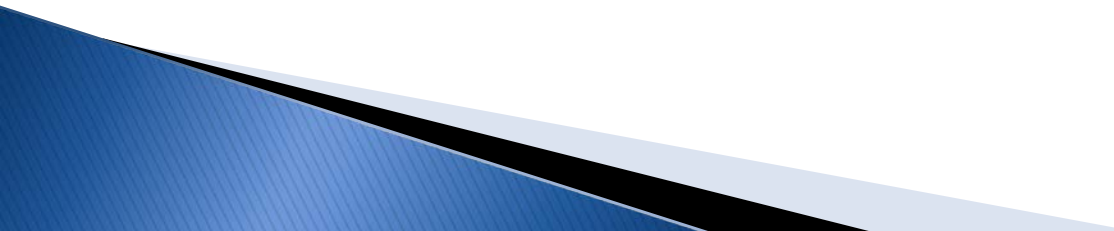
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# Retaliation Claims at Termination

- » Parnar, Hawaii Whistleblower Protection Act, Discrimination Laws, Statutory Specific Retaliation Claims

# RETALIATION IS A BROAD CLAIM

- ▶ The law says you shouldn't be punished for doing the right thing or refusing to do something you think is wrong.
  - ▶ PARNAR claims are based on terminations contrary to a "clear public policy".
  - ▶ HWPA claims are based on any adverse action for reporting violations of law or breach of a state contract.
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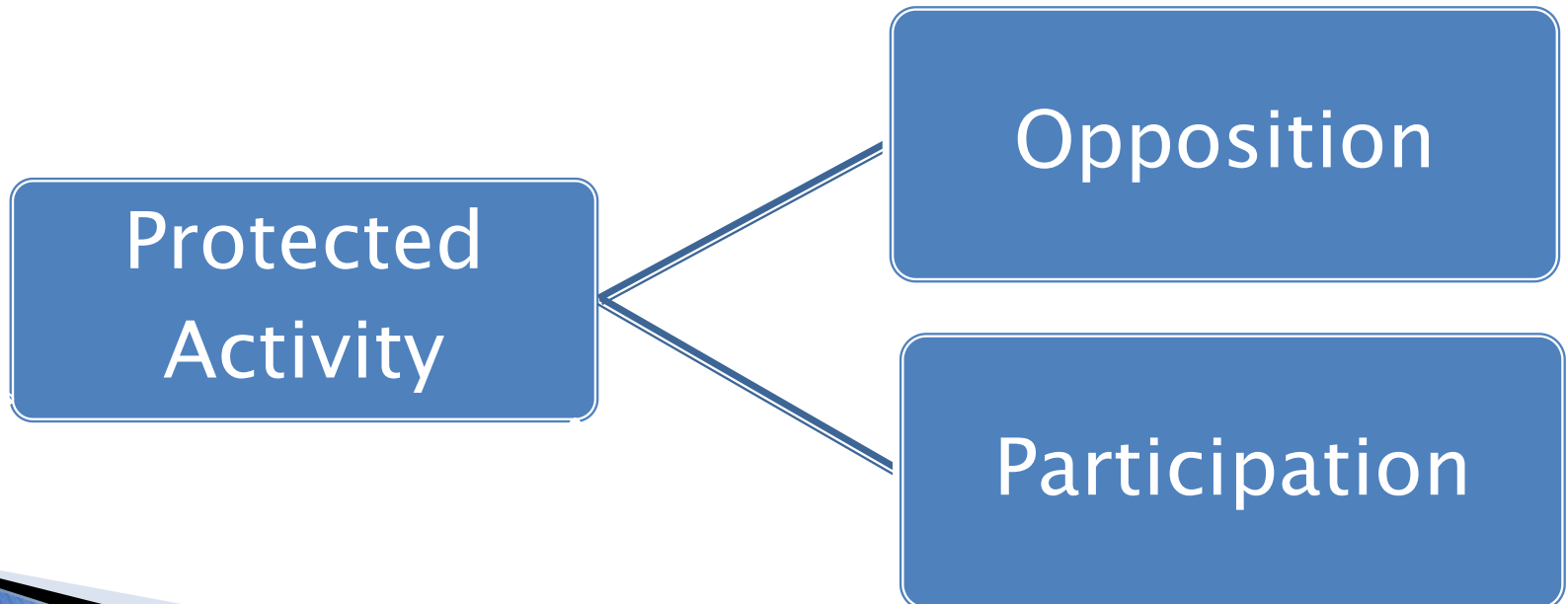
# Hawai'i Whistleblower Protection Act (“HWPA”), HRS §378–62

- ▶ No individual liability
- ▶ *Onodera v. Kuhio Motors Inc.*, 122 FEP Cases 328 (D. Haw. 2014)
- ▶ An employee's complaint regarding an allegedly unlawful employment practice is a “protected activity” for purposes of retaliation— regardless of whether the practice was *actually* unlawful—so long as the employee's belief that an unlawful practice occurred was reasonable.

- ▶ An employee has the burden of showing that his or her protected conduct was a **substantial or motivating factor** in the decision to take an adverse action against an employee.
- ▶ The employer can defend affirmatively by showing that the termination would have occurred regardless of the protected activity.
  - [Mock v. Castro, \(Haw. 2004\);](#)  
[Crosby v. State Dep't of Budget & Fin., \(Haw. 1994\)](#)

# DISCRIMINATION LAW

- ▶ Retaliation Claims under Title VII, ADEA, ADA and Hawaii discrimination law are based on
- ▶ 1) reporting discrimination or harassment or
- ▶ 2) participating in an investigation or proceeding by the EEOC/HCRC.



# Examples of Opposition

- ▶ Informal protests – letters to customers, Congressmen, or picketing
- ▶ Refusal to follow her supervisor's order to terminate female cosmetic sales associate, which was based on supervisor's opinion that associate was sexually unattractive, constitutes protected activity
  - *Yanowitz v. L'Oreal USA* , 96 FEP Cases 601 (Cal. 2005)
- ▶ Threat to file a charge
- ▶ Internal complaints must be specific enough to put employer on notice that issue is protected

# Opposition must be reasonable and in good faith

- ▶ Punching a customer in response to alleged touching lost statutory protection
  - *Folkerson v. Circus Circus Enters.*, 107 F.3d 754 (9th Cir. 1997)
- ▶ Reasonable good faith subjective belief conduct was harassment although it was not legally sexual harassment is protected.
- ▶ If objectively not reasonable, not protected:
  - *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508 (2001).



# Adverse Employment Action

- Would a reasonable person be dissuaded from engaging in protected activity?
- *Burlington Northern v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006)
- *Blackburn v. Wash. Dept. of Soc. Health Servs.* (W.D. Wash 2013)
- “This is going to look really bad in your file” is not likely to dissuade reasonable employee from reporting perceived discrimination.



# What is not an Adverse Employment Action?

- ▶ Alleged failure to move black employee from temporary office space or to provide him with desk or chair that he was promised was not adverse employment action, where he failed to show material disadvantage.
  - *McAllister v. U.S. Veterans Initiative*, 2015 U.S. Dist. LEXIS 63526 (D. Haw. May 14, 2015)

# \$325,000 Punitive Damages for Retaliation

- ▶ 64 year old employee submitted a written complaint asserting age discrimination. He was briefly called back to work for about a week, but after that assignment ended, he was never recalled to work again, even though there was work available that he could perform.
- ▶ *Ramento v. M&M Tanks, Inc.*, 134 Hawai'i 179 (App. 2014)

# Protected Activity

- *Thompson v. North American Stainless* (US 2011): “close relationship” is enough to make retaliation claim
- *Univ. of Texas SW Med Ctr v. Nassar* (US 2013): Title VII anti-retaliation provision requires proof of but-for causation, and does not permit retaliation claims to be proven under lesser motivating-factor standard



# *Westendorf v. West Coast Contractors of Nevada, Inc.*, (9th Cir. 2013).

- ▶ What happened?
- ▶ **9<sup>th</sup> Circuit:** If conduct insufficient to establish harassment claim, BUT an employee could have *reasonably believed* the conduct constituted unlawful harassment, the employee's complaints were a **protected activity**. If the employee was subjected to an adverse action because of his or her complaints about said conduct, the employee could proceed with a retaliation claim.

# *Leggins v. Rite Aid Corp.*, Cal Super. Ct. (7/16/15)

- ▶ Former Rite Aid Store Manager who was fired after 27 years with the company was awarded almost \$9 million (\$5 million in punitive damages)
- ▶ Jury found disability discrimination and harassment, but no race discrimination and harassment
- ▶ Jury found retaliation for complaining about race- and disability-based harassment and discrimination



# *Onodera v. Kuhio Motors, Inc.* (D. Haw. 2014)

- ▶ "It is obviously neither typical, nor generally appropriate, for a person to enter the restroom of the opposite gender and see other employees partially exposed, relieving themselves."

# Other Laws Too

## ▶ OSHA/HIOSH

- *Washington River Protection Solutions, Inc., OSHA, No. 1-1960-12-002 (2014)*
- *Perez v. McKees Rocks Indus. Enters. Inc.* (W.D.Pa. 2013)

## ▶ ERISA

- *McCarthy v. Hawaiian Parasail, Inc.*, 2014 U.S. Dist. LEXIS 167740 (D. Haw. 2014)

## ▶ WC



# Proof is Easier than Discrimination

- »» What leads to liability, motive, and circumstantial evidence

# Proof Is Easier Than Discrimination or Harassment

Protected Activity

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graph TD; A[Protected Activity] --> B[Causal Link]; B --> C[Adverse Action];
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Causal Link

Adverse Action

# Circumstantial evidence of illegal motive comes in many forms.

- ▶ three employees, two men and a woman, frequently show up late. The woman is fired for excessive tardiness but the men are not even reprimanded.
- ▶ a manager fires an employee because she saw the employee yelling at a customer, but the customer and employee both testify that the employee never yelled and was polite.
- ▶ employer claimed it fired the employee for harassing co-workers. Company policy required the employer to conduct an investigation, including interviewing all witnesses, but it never did conduct any such investigation.

# Timing

- ▶ five-month delay between filing discrimination charge with EEOC and his discharge, alone, is insufficient for causation inference, there is no evidence that employer knew that he did not withdraw charge after rehire, and he failed to rebut employer's contention that he was asked to resign due to pattern of insubordinate behavior and violating company policies by disrupting office and not properly maintaining use of union hall by attending wedding. [Mahoe v. Operating Engineers Local 3, 125 FEP Cases 697 \(D. Haw. 2014\)](#)

# Defenses

- ▶ Legitimate, non-retaliatory reason
  - *Lewis v. Ameron Int'l, 123 FEP Cases 944 (D. Haw. 2014)*
- ▶ Decision maker unaware of protected conduct

# Pretext

- ▶ If the Employer establishes a legitimate reason for the adverse action to overcome a prima facie case of retaliation, the employee can offer evidence that the reason advanced is unworthy of belief.
  - *Lales v. Wholesale Motors Co.*, 121 FEP Cases 1225 (Haw. 2014)
- ▶ “(1) Marxen's allegedly hostile reaction to Lales's oral complaint, (2) the temporal proximity (amount one month) between the complaint and the termination, and (3) the aborted attempt to fire him on the previous day, which, given the surrounding circumstances suggested by Lales's declaration, raises an inference of retaliatory intent.”

# Common Law Tort Claims at Termination

- » Intentional Infliction of Emotional Distress, False Imprisonment/False Arrest, *Iddings v. Me Li*

# Intentional Infliction of Emotional Distress (IIED)

- ▶ Elements of an IIED claim:
  - 1) That the act allegedly causing the harm was intentional or reckless,
  - 2) That the act was outrageous, and
  - 3) That the act caused
  - 4) Extreme emotional distress to another.
- ▶ Hawai'i Supreme Court: IIED claims against employers barred unless they arise out of sexual harassment, assault, or discrimination



# Intentional Infliction of Emotional Distress (IIED)

- ▶ **Termination alone**, even if motivated by discriminatory animus, is **not sufficient** to support an IIED claim *unless* the manner or method of termination was **outrageous**.
- ▶ Liability has been found when:
  - Supervisor yelled and cursed at the employee, made at trigger-pulling gesture to indicate that the employee was about to be fired, reprimanded and docked employee's pay
- ▶ Liability has not been found when:
  - Supervisor yelled, "You have to start doing your job!" and slammed down phone, singled out employee 3-4 times and told her to wear more makeup, and chastised employee in front of other employees about her attire and hair style
  - Employer accused employee of being "racist"

# Intentional Infliction of Emotional Distress (IIED)

- ▶ In general, public humiliation, intentionally cruel timing, yelling, and name calling may all give rise to an IIED claim
- ▶ If found liable, may owe compensatory and punitive damages

# False Imprisonment/False Arrest

- ▶ Elements (*Reed v. City & County of Honolulu*, 76 Hawai'i 219 (Haw. 1994):
  1. The detention and restraint of one against his or her will, and
  2. The unlawfulness of such detention or restraint
- ▶ Bringing an employee into a room, standing in front of the door or otherwise indicating that the employee cannot leave, such that the employee believes he or she cannot leave the room, could give rise to a false imprisonment claim
  - *E.g. Lopez v. Wigman Dep't Stores* 39 Hawai'i 416 (Haw. 1966)



# False Imprisonment/False Arrest

- ▶ Not necessary that the employer/supervisor use actual physical force or verbally threaten physical force to restrain the employee, just that the acts and language of the employer/supervisor would induce a reasonable apprehension of use of force
  - *Jacobson v. Yoon*, 41 Hawai'i 181 (Haw. Terr. 1955).

# Iddings v. Mee-Lee

- ▶ Under **Iddings**, Hawai'i's workers' compensation law, HRS Chapter 386, bars suits by an injured worker against co-employees on a theory of negligence.
- ▶ However, [HRS §§ 386-5](#) (1993) and [386-8](#) do not bar suit and establishment of liability on a theory of wilful and wanton misconduct.

# wilful and wanton misconduct

"the wilful and wanton misconduct" exception is limited to "conduct that is either: (1) motivated by an actual intent to cause injury; or (2) committed in circumstances indicating that the injuring employee (a) has knowledge of the peril to be apprehended, (b) has knowledge that the injury is a probable, as opposed to a possible, result of the danger, and (c) consciously fails to avoid the peril."

# Claims After Termination

- »» Defamation, Retaliatory Referral, COBRA, TDI, WC, Statutory Payment of Wages, Non-Compete and Non-Solicitation Agreements

# Defamation

- ▶ Elements to sustain claim for defamation:
  - (1) A false and defamatory statement concerning another;
  - (2) an unprivileged publication to a third party
  - (3) fault amounting at least to negligence on the part of the publisher; and
  - (4) either action ability of the statement irrespective of special harm or existence of special harm caused by the publication.
- ▶ Even if defamatory, author of the statement may be protected by a ***qualified privilege***.
  - *Farmer v. Hickam Federal Credit Union*, 2010 Haw. App. LEXIS 39 (App. 2010)





# Employers' Job Reference Immunity

## HRS § 663-1.95

- ▶ An employer that provides to a prospective employer “information or opinion about a current or former employee’s job performance is presumed to be acting in good faith and shall have a qualified immunity from civil liability....”
- ▶ “Good faith presumption” is rebuttable by showing information or opinion is “knowingly false” or “knowingly misleading”



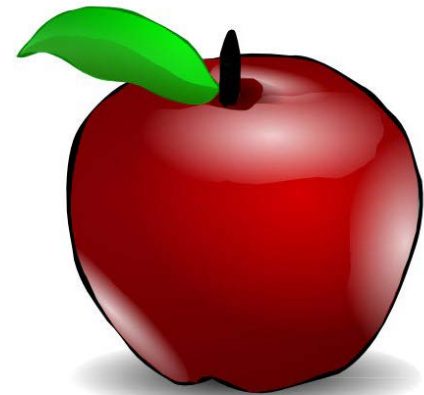
# Employers Beware of... Retaliatory Reference Claims

- ▶ *Boone v. Cementation USA Inc.* (D. Nev. Dec. 9, 2014)
- ▶ *Male v. Tops Mkts. LLC* (W.D.N.Y. 2011)
- ▶ *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004)



# Cobra and Gross Misconduct

- ▶ Termination is a “qualifying event” *unless* the employee is terminated by reason of **GROSS MISCONDUCT**. 29 U.S.C. § 1163(2).
- ▶ What is gross misconduct? 9<sup>th</sup> Circuit:
  - Driving drunk and crashing an employer–provided car
  - Calling a co–worker a racial slur and throwing an apple at her
  - Battering a co–worker
  - Stealing from the employer
  - Repeatedly and persistently refusing to follow the instructions of a supervisor



# COBRA and Gross Misconduct

- ▶ What is gross misconduct? State unemployment insurance law:
  - Placing hands around co-worker's neck and shaking
  - Driving company bus without no-fault insurance, when job requires employees to have valid driver's license



# COBRA and Gross Misconduct

- ▶ Potential Liability for Improper Denial
  - May owe penalties of up to \$100 per day, or up to \$200 per day if more than one qualified beneficiary from same family affected

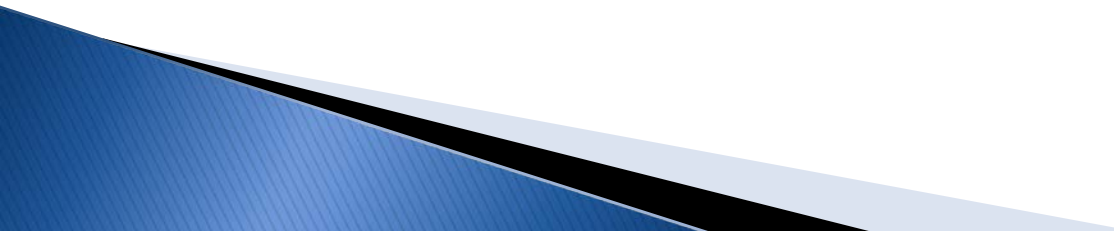
# Temporary Disability Insurance (TDI)

- ▶ TDI provides for weekly payments up to a max. of 26 weeks for an employee who experiences a non-work related disability
- ▶ If the employee receives unemployment benefits, federal disability benefits, workers compensation benefits, or any indemnity payments for wage loss, the employee is NOT entitled to TDI

# Temporary Disability Insurance (TDI)

- ▶ Employee must be in status of “current employment”
  - Includes employees who performed regular service in employment not longer than two weeks prior to the onset of disability
  - Terminated employees may be eligible for TDI benefits
- ▶ Terminating an employee who requested or who is receiving TDI?

# Worker's Compensation

- ▶ Employers with one or more employees generally required to provide worker's compensation
  - ▶ Employees eligible if they suffer from an injury or illness which results from work or working conditions
  - ▶ Employers could be obligated to pay (through insurance), among other things, permanent total disability benefits to employees who cannot return to work because of an injury they sustained
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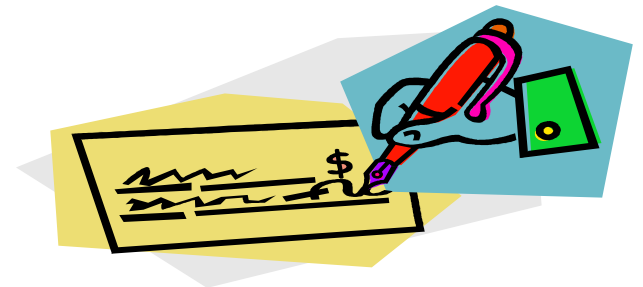
# Worker's Compensation

- ▶ An employer may not suspend, discharge, or discriminate against an employee solely because the employee has suffered a work injury, compensable under Worker's Compensation, **unless** the employee is **no longer capable of performing the work** and the employer has **no other available work** which the employee is capable of performing.  
HRS § 378-32(a)(2)
- ▶ An employee's claim may be valid even if filed after he or she was fired or laid off

# Final Paycheck HRS 388

- ▶ If employee is fired then issue check at the time of last day of work or if conditions prevent immediate payment, next working day.
- ▶ If an employee resigns, pay with the next regularly scheduled pay date unless notice was more than 1 pay period.
- ▶ If required to give advance notice of termination and the employee gives such notice, employer is liable for the wages which the employee would have earned during the period in such notice, providing that the employee does not voluntarily quit or the employment is not terminated **for cause** prior to the last day of such period.

◦ HRS 388-41



# Deductions

- ▶ OK to deduct when required by law or authorized in writing.
- ▶ Adjustments for advances or corrections are NOT deductions.
- ▶ Cannot Deduct:
  - Fines, penalties
  - Cash shortages
  - Replacement costs for breakage
  - Losses due to bad checks
  - Losses due to defective or faulty workmanship, lost or stolen property, damage to property, default of customer credit, or nonpayment for goods or services
  - EXCEPTION: employee's willful or intentional disregard of employer's interest;
  - Medical or physical examinations requested by employer



# Prepaid Health Care

- ▶ Deduct Half of the premium without regard to the 1.5% of monthly wages limitation.

# Non-Compete/Non-Solicitation Agreements

- ▶ Act 158 (July 1, 2015)
- ▶ Bars high-tech companies from requiring their employees to enter into “non-competete” and “non-solicit” agreements as a condition of employment.
- ▶ Applies to Hawaii businesses “that derive[] a majority of [their] gross sales from the sale or license of products or services resulting from its software development or information technology development, or both.”