IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,
Petitioner/Plaintiff-Appellant,

vs.

NEIL ABERCROMBIE,[1] Governor, State of Hawaiʻi; Kalbert K. Young, Director, Department of Budget and Finance, State of Hawaiʻi; Barbara A. Krieg, Director, Department of Human Resources Development, State of Hawaiʻi; Ted Sakai, Director, Department of Public Safety, State of Hawaiʻi,[2]
Respondents/Defendants-Appellees.

SCWC-12-0000505

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000505; CIV. NO. 09-1-2145-09 PWB)

February 28, 2014

[1] During the pendency of this appeal, Neil Abercrombie, Governor of the State of Hawaiʻi, succeeded Linda Lingle. Thus, pursuant to Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 43(c), Abercrombie has been substituted automatically for Lingle in this case.

[2] Kalbert K. Young, Director, Department of Budget and Finance, State of Hawaiʻi; Barbara A. Krieg, Director, Department of Human Resources Development, State of Hawaiʻi; and Ted Sakai, Director, Department of Public Safety, State of Hawaiʻi have been substituted as parties to this appeal pursuant to HRAP Rule 43(c). UPW also listed Linda Lingle's Chief Policy Advisor, Linda Smith, as a Defendant. This title does not exist in Governor Abercrombie's current cabinet.

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
IN WHICH POLLACK, J., JOINS

In my view, respectfully, (1) the majority's formulation and application of the doctrine of primary jurisdiction is incorrect in view of Hawaiʻi Revised Statutes (HRS) § 89-14 (1993) and precedent, (2) jurisdiction on the constitutional claims rests with the circuit court, (3) jurisdiction of the Hawaiʻi Whistleblower's Protection Act (HWPA), HRS Chapter 378, lies with the circuit court, and (4) collateral estoppel would apply to limit litigation and avoid conflicts where jurisdiction may be asserted on the underlying conduct of a claim filed in both the circuit court and with an agency.

I.

A.

On August 27, 2009, Petitioner/Plaintiff-Appellant the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW) filed a "First Amended Prohibited Practice Complaint" with the Hawaiʻi Labor Relations Board (HLRB) (HLRB Complaint) alleging a number of violations of HRS § 89-13(a) (Supp. 2003). Specifically, UPW stated that then-Governor Linda Lingle (Governor Lingle), Marie Laderta, Director of the Department of Human Resources Development, and Clayton Frank, Director of the Department of Public Safety (collectively, "Defendants") willfully:

a. Interfered, restrained, and coerced employees in the exercise of rights guaranteed under chapter 89 in violation of Section 89-13(a)(1)[3], HRS;

b. Discriminated regarding terms and conditions of employment to discourage membership in an employee organization through threats to job security, implementation of reduction in force, layoffs and discharges in violation of Section 89-13(a)(3)[4], HRS, . . . ;

c. Refused to bargain collectively in good faith over furloughs as an alternative to layoffs, and for unilaterally implementing procedures and criteria for reduction in force, displacements, and discharges of bargaining unit employees in violation of Section 89-13(a)(5)[5], HRS, . . .;

d. Refused to comply with provisions of chapter 89, including Sections 89-3, 89-9(a), (c) and (d), HRS, in violation of Section 89-13(a)(7)[6], HRS; and

e. Violated the terms of the unit 1 and 10

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[3] HRS § 89-13(a)(1) provides that:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter[.]

[4] HRS § 89-13(a)(3) provides that it shall be a prohibited practice to:

> (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization[.]

[5] HRS § 89-13(a)(5) provides that it shall be a prohibited practice to:

> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9[.]

[6] HRS § 89-13(a)(7) provides that it shall be a prohibited practice to:

> (7) Refuse or fail to comply with any provision of [HRS Chapter 89.]

> collective bargaining agreements . . . in violation of Section 89-13(a)(8)[7], HRS.

On September 16, 2009, UPW filed a complaint in the circuit court of the first circuit (the court)[8], alleging the following four counts against Defendants, as well as Linda Smith, chief policy advisor to Governor Lingle, and Georgina Kawamura, director of the Department of Budget and Finance:

> COUNT I - VIOLATIONS OF THE HAWAIʻI WHISTLEBLOWERS' PROTECTION ACT
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> . . . .
>
> 75. Defendants' conduct alleged herein constitutes acts of retaliation, reprisal, and intimidation in violation of Hawaii's Whistleblowers' Protection Act and was undertaken knowingly, intentionally, maliciously, wantonly and oppressively.
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> 76. By the aforementioned conduct and other acts and deeds to be established during the proceedings herein Defendants have violated the rights of employees under Section 378-62[9], HRS, for

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[7] HRS § 89-13(a)(8) provides that it shall be a prohibited practice to:

> (8) Violate the terms of a collective bargaining agreement[.]

[8] The Honorable Derrick H.M. Chan presided.

[9] HRS § 378-62 (Supp. 2002) provides, in relevant part, as follows:

> **§ 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

(continued...)

retaliatory threats, reductions in force, discrimination, discharge, and other unlawful adverse actions.
. . . .

COUNT II - VIOLATIONS OF ARTICLE I, SECTION 4 OF THE HAWAII CONSTITUTION

81. The Hawaiʻi State Constitution, in Article I, Section 4, guarantees "the freedom of speech" and "the right of the people . . . to petition the government for a redress of grievances."[10] Included within the rights protected by Article I, Section 4 are the rights to object to and challenge illegal government action in a court action.

82. Plaintiff UPW and the employees UPW represents exercised their rights protected by Article I, Section 4 by seeking relief in the circuit court against illegal government action that would unilaterally implement mandatory unpaid furloughs of three days per month for all state employees for a two-year period.

83. Plaintiff UPW and the employees UPW represents exercised their rights protected by Article I, Section 4 in their capacity as citizens, rather than in the course of their official duties as public employees.

. . . .

86. By retaliating against UPW and its members for objecting to and reporting illegal government action, Defendants deprived UPW and its members of rights guaranteed by Article I, Section 4 of the Hawaiʻi Constitution.

COUNT III - VIOLATIONS OF MERIT PRINCIPLES

. . . .

89. In Konno v. County of Hawaiʻi, 85 Hawaiʻi 61, 937 P.2d 397 (1997), the Hawaii Supreme Court held that the contracting out or privatization of services which have historically and customarily been performed by civil

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[9](...continued)

(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[.]

[10] The full text of Haw. Const. art. I, § 4 states:

No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

servants represented by UPW violates the merit principle.

. . . .

93. On and after June 30, 2009 Defendants have refused to terminate contracts which are contrary to public policy in contravention of Article XVI, Section 1 of the Hawaii State Constitution.[11]

94. Defendants, by the foregoing acts, and other acts to be established during the course of the proceeding herein have violated the merit principle mandated by Article XVI, Section 1 of the Hawaii State Constitution.

. . . .

COUNT IV -- VIOLATIONS OF CIVIL SERVICE LAWS

. . . .

96. HRS Chapters 76 and 77 require that all blue collar, non-supervisory positions and institutional, health and correctional positions within the State of Hawaiʻi, to be governed by the merit principles and that employees be hired and retained in accordance with the provisions thereof[.]

97. It is a fundamental requirement of the merit principle under Section 76-1[12], HRS, that civil servants be afforded reasonable job security.

. . . .

100. The contracting out and privatization of corrections work by Defendants is not justified under Section 76-16, HRS

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11 The Haw. Const. art. XVI, § 1 provides that:

The employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle.

12 HRS § 76-1 (Supp. 2000) provides, in part, that:

It is the purpose of this chapter to require each jurisdiction to establish and maintain a separately administered civil service system based on the merit principle. The merit principle is the selection of persons based on their fitness and ability for public employment and the retention of employees based on their demonstrated appropriate conduct and productive performance. It is also the purpose of this chapter to build a career service in government, free from coercive political influences, to render impartial service to the public at all times, according to dictates of ethics and morality and in compliance with all laws.

> 102. Defendants violated the rights of employees under Section 76-43, HRS, by refusing to negotiate the criteria, procedures, timing, and manner of handling mass layoffs for reasons other than "lack of work" or lack of "funds" with UPW prior to unilateral implementation of the layoffs, reductions in force, and discharges of unit 1 and 10 employees.
> . . . .

B.

The relevant question is whether the court[13] properly granted Defendants' September 14, 2011 Motion to Dismiss. In granting the Motion to Dismiss, the court had determined that the facts in UPW's complaint were essentially the same as those alleged by the UPW in its "prohibited practice" claims brought before the HLRB. It stated that "it would be wholly inconsistent with HLRB's exclusive, original jurisdiction for the [court] to hear the same underlying factual disputes and allegations and create the possibility of inconsistent judgments." The court further concluded that "the statutory scheme mandates that those facts, allegations and claims raised by UPW in its prohibited practice complaint be heard to conclusion by the HLRB first and subject to judicial review by a court of competent jurisdiction operating in its appellate capacity[,]" and that it "lack[ed] primary subject matter jurisdiction[14] over [claims concerning

[13] The Honorable Patrick W. Border presided over the September 14, 2011 Motion to Dismiss.

[14] It is noted that "primary subject matter jurisdiction" is dissimilar from the "primary jurisdiction doctrine", which does not involve subject matter jurisdiction.

potential prohibited practices], since exclusive, original jurisdiction over such controversies rests with the HLRB."

Finally, the court found that "to the extent that the instant complaint raise[d] constitutional or statutory claims over which the HLRB lacks subject matter jurisdiction to address, such claims may be rendered moot in the event that the HLRB issues a ruling against UPW on the key factual and legal questions . . . ." On May 15, 2012, the court filed an order dismissing all of UPW's claims.

C.

UPW subsequently appealed the circuit court's order to the Intermediate Court of Appeals (ICA). United Public Workers, AFSCME, Local 646, AFL-CIO v. Lingle, No. CAAP-12-0000505, 2013 WL 3063803, at *1 (App. June 18, 2013). The ICA first concluded that "this case raises issues within the HLRB's exclusive jurisdiction over prohibited practices controversies." Id. at *2. It also stated that "UPW correctly asserts its statutory claims could be raised directly in the circuit court." Id. at *5 (citing Konno v. Cnty. of Hawaiʻi, 85 Hawaiʻi 61, 937 P.2d 397 (1997)). The ICA then noted that "[w]hen a court and an agency have concurrent original jurisdiction to decide issues that have been placed within the competence of an administrative agency, the primary jurisdiction doctrine applies and a court should refer the issues to the agency before proceeding." Id. (citing

Fratinardo v. Employees' Ret. Sys., 121 Hawaiʻi 462, 468, 220 P.3d 1043, 1049 (App. 2009)). Finally, the ICA concluded that primary jurisdiction applies, and that the court erred in dismissing the case rather than staying the claims pending the outcome of the HLRB proceedings. Id.

II.

Contrary to the ICA and majority's holding, primary jurisdiction is not applicable to this case. Respectfully, the majority's formulation of the primary jurisdiction doctrine will enable courts to perfunctorily stay or dismiss claims for "primary jurisdiction" any time a particular claim or the "issues" underlying that claim are directly or tangentially related to an administrative agency.[15] Rather than serving as a "catch-all," the primary jurisdiction doctrine should be reserved for the more limited cases where an agency, rather than a court, should determine "reasonableness" or other policy considerations, and where inconsistent judgments may result in policy conflicts.[16]

[15] It is noted that the ICA has been applying the primary jurisdiction doctrine with some frequency. See, e.g., UPW, 2013 WL 3063803, at *5; Hawaiʻi State Teachers Ass'n v. University Laboratory School, No. CAAP-12-0000295, 2013 WL 1578338 (App. April 15, 2013); Pacific Lightnet, Inc. v. Time Warner, Inc., No. 28948, 2013 WL 310149 (App. Jan. 25, 2013); Dancil v. Arakawa, No. CAAP-11-0001020, 2012 WL 6003715 (App. Nov. 16, 2012); Pavsek v. Sandvold, 127 Hawaiʻi 390, 279 P.3d 55 (App. 2012).

[16] Overuse of primary jurisdiction may result in undue delay to litigants because claims will be more frequently stayed pending administrative resolution. See e.g., Pacific Lightnet, 2013 WL 6669334, at *19 (noting that (continued...)

Our law is well-established that "primary jurisdiction presumes that the claim at issue is originally cognizable by both the court and the agency." Pacific Lightnet, Inc. v. Time Warner Telecom, Inc., 2013 WL 6669334, at *10 (Dec. 18, 2013) (emphasis in original) (citing Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Hawaiʻi 192, 202, 891 P.2d 279, 289 (1995)). In determining what course to follow in that event, "the court must first determine whether the agency has exclusive original jurisdiction[.]" Id. "If not, and the court finds that it does possess jurisdiction over the matter, the court can then decide if it is appropriate to apply the doctrine of primary jurisdiction." Id. (citing Aaron J. Lockwood, Note, The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review, 64 Wash. & Lee L. Rev. 707, 750-55 (2007)).

In deciding on whether to refer the case to the agency, the court must first decide whether the case "'rais[es] issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion[.]'" Id. (quoting Kona Old Hawaiian Trails Grp. v. Lyman, 69 Haw. 81, 93, 734 P.2d 161, 169 (1987)). The question is "whether the claim presented 'falls squarely within the experience and expertise of

[16](...continued)
"'wise use of the [primary jurisdiction] doctrine necessitates a careful balance of the benefits to be derived from utilization of agency processes as against the costs in complication and delay.'" (quoting Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 321 (1973)).

courts generally[,]'" id. at *16 (internal quotation marks and citation omitted), or if, "instead, the claims are premised on 'technical matters calling for the special competence of the administrative expert[.]'" Id. (quoting Aged Hawaiians, 78 Hawaiʻi at 202, 891 P.2d at 289). Special competence relates "to the rationales behind the doctrine, to promote uniformity and to prevent courts from engaging in the types of policy-making decisions that administrative agencies must make."[17] Id. at *17.

The second question for the court "is whether applying the primary jurisdiction doctrine will 'promote uniformity and consistency in the regulatory process.'" Id. at *19 (quoting Aged Hawaiians, 89 Hawaiʻi at 202, 891 P.2d at 289). For example, in the context of public utility rate-making or interstate transportation carrier regulation, a decision by the court as to "reasonableness" could conflict with a particular policy of an administrative agency. See, e.g., United States v. W. Pac. R.R. Co., 352 U.S. 59, 63 (1956) (stating that "because we regard the maintenance of a proper relationship between the courts and the [Interstate Commerce Commission] in matters

[17] The majority's test for when to apply primary jurisdiction seems to be, "'whenever enforcement of the claim requires the resolution of issues, which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" Majority opinion at 23 (quoting Kona Old, 69 Hawaiʻi at 93, 734 P.2d at 168). This diminishes the doctrine, inasmuch as the agency's "special competence" has its own set of considerations, and other factors come into play as well. See generally, Pacific Lightnet, 2013 WL 6669334, at *16-20.

affecting transportation policy to be of continuing public concern, we have been constrained to inquire [as to the reasonableness of rates]"). Consequently, "[t]he court's decision to invoke primary jurisdiction is reviewed on the basis of the[se] dual rationales underlying the primary jurisdiction doctrine." Pacific Lightnet, 2013 WL 6669334, at *16.

Once a court has determined that the primary jurisdiction doctrine should be applied, a referral to the agency does not deprive the court of jurisdiction. Reiter v. Cooper, 507 U.S. 258, 268 (1993). Instead, the court has discretion to retain jurisdiction, or dismiss without prejudice, so long as the parties would not be unfairly disadvantaged.[18] Pacific Lightnet, 2010 WL 6669334, at *13 (citing Fratinardo, 121 Hawaiʻi at 469, 220 P.3d at 1050); Reiter, 507 U.S. at 268.

III.

The majority is concerned with the potential to subvert the statutory scheme of HRS Chapter 89, and hence the jurisdiction of the HLRB, through artful pleading. See Hawaiʻi State Teachers Ass'n v. Abercrombie, 126 Hawaiʻi 318, 322, 271

[18] As explained infra, the majority's application of the doctrine concludes that UPW's claims raise policy issues that the HLRB should consider "in the interest of a uniform and expert administration of the regulatory scheme laid down by HRS Chapter 89." Majority's opinion at 30 (emphases added). Respectfully, it is not at all clear how resolution of these specific claims either requires agency expertise, or will lead to a uniform regulatory scheme, and thus it is not evident why they "ought to be considered by the HLRB". Id.

P.3d 613, 618 (2012) ("HSTA") ("[T]he legislative purpose of providing the HLRB with exclusive original jurisdiction over chapter 89 complaints is frustrated if plaintiffs can recast their statutory claims as constitutional claims and proceed directly to circuit court.").

A.

HRS § 89-14 provides:

> Any controversy concerning prohibited practices may be submitted to the [HLRB] in the same manner and with the same effect as provided in section 377-9 [(Supp. 2004)]; provided that the [HLRB] shall have exclusive original jurisdiction over such a controversy, except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section [89-12(c)] or (2) the judicial review of decisions or orders of the [HLRB] in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

(Emphases added.) The plain language gives "exclusive original jurisdiction" to the HLRB over prohibited practices "controversies", HRS § 89-14. Yet, despite HRS § 89-14, as will be discussed infra, the majority deems that some of UPW's allegations "present[] a prohibited practices controversy", majority's opinion at 34, but concludes that the court also has jurisdiction over these claims.[19] Majority's opinion at 27. This determination is directly contrary to the HLRB's "exclusive"

[19] It is assumed that the majority's use of "first pass" means that the court stays the proceedings to allow the HLRB to resolve the underlying factual issues relating to prohibited practices controversies, rather than exclusive jurisdiction. But under such an approach, HLRB would have non-exclusive jurisdiction over prohibited practices controversies, rather than exclusive jurisdiction, in contravention of HRS § 89-14. As noted, HRS § 89-14 requires exclusive jurisdiction, to the exclusion of any other body exercising jurisdiction.

jurisdiction over such controversies mandated by statute.

B.

In Hawaiʻi Government Employees Association v. Lingle, 124 Hawaiʻi 197, 239 P.3d 1 (2010) (HGEA), a majority of this court engaged in an extensive discussion of the legislative history of HRS § 89-14. See 124 Hawaiʻi at 203, 239 P.3d at 7. HGEA related the following relevant legislative history:

> At the time Winslow [v. State, 2 Haw. App. 50, 625 P.2d 1046 (1981)] was decided, HRS § 89-14 provided: "Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9. All references in section 377-9 to 'board' shall include the Hawaii public employment relations board and 'labor organization' shall include employee organization." 2 Haw. App. at 56-57, 625 P.2d at 1051 (quoting HRS § 89-14).[]
>
> However, in 1982, Hawaii's legislature amended HRS § 89-14 to "legislatively . . . overrule[ ]" Winslow because it disagreed with the ICA's interpretation of HRS § 89-14 and HRS § 377-9. A standing committee report was issued by the Committee on Public Employment and Government Operations that stated, in pertinent part, as follows:
>
> > The purpose of this bill is to make the jurisdiction of the [HPERB] in controversies relating to prohibited practices exclusive except as otherwise provided in Chapter 89, [HRS].
> > ....
> >
> > Recently, the [ICA], in [Winslow], construed sections 89-14 and 377-9, HRS, and concluded that the jurisdiction of the [HPERB[20]] over controversies concerning prohibited (unfair labor) practices in the public sector is not exclusive, and that a prohibited practice complaint or action may be brought either before HPERB or in circuit court. In other words, the [ICA] concluded that under these two statutory sections, HPERB and the circuit courts have concurrent jurisdiction over prohibited practice complaints in the public sector.
> >
> > By making the jurisdiction of HPERB exclusive in

[20] The HPERB became the HLRB in 1985. See 1985 Haw. Sess. Laws Act 251, § 6 at 479-80.

> controversies concerning prohibited practices, this bill legislatively rectifies or overrules the judicial conclusion or statutory construction enunciated in [Winslow].

H. Stand. Comm. Rep. No. 134-82, in 1982 House Journal, at 943 (emphases in original, brackets added).

A separate standing committee report was issued by the Committee on Judiciary, which stated:

> The purpose of this bill is to clarify that the [HPERB], rather than the courts, has primary jurisdiction over prohibited practice complaints filed under Chapter 89, Hawaii Revised Statutes.
>
> A recent Hawaii Court of Appeals decision interprets Section 89-14 and 377-9, Hawaii Revised Statutes, to give HPERB and the circuit courts concurrent jurisdiction over prohibited practice complaints. This bill will make it clear that HPERB has exclusive original jurisdiction over prohibited practice complaints. Appeals from HPERB will continue to be filed in Circuit Court.

H. Stand. Comm. Rep. No. 589-82, in 1982 House Journal, at 1164 (brackets added).

As further explained by the Committee on Human Resources:

> In 1970, the Legislature created the [HPERB] to administer the provisions of Chapter 89 in an effort to promote cooperative relations between the government and its employees and to protect the public by ensuring orderly government operations. Thus, the board was given jurisdiction of prohibited practice cases. Your Committee believes the original intent of this provision was to allow the board, who is the administrative agency with the expertise in public employment relations, to have primary jurisdiction of prohibited practice complaints. However, a recent Hawaii Court of Appeals decision interprets Section 89-14 and 377-9, Hawaii Revised Statutes, to give HPERB and the circuit court concurrent jurisdiction over prohibited practice complaints.
>
> This bill will make it clear that HPERB has exclusive original jurisdiction over prohibited practice complaints. Appeals from HPERB will continue to be filed in Circuit Court.

S. Stand. Comm. Rep. No. 597-82, in 1982 Senate Journal, at 1202 (brackets added).

As enacted, the pertinent portions of HRS § 89-14 were amended to read as it does today.[] See 1982 Haw. Sess. Laws Act 27, § 1 at 38.

> In light of the foregoing, the legislature clearly intended for the HLRB to have exclusive original jurisdiction over prohibited practice complaints, and the ICA's contrary interpretation in Winslow was incorrect. See, e.g., H. Stand. Comm. Rep. No. 134-82, in 1982 House Journal, at 943.

Id. at 203-204, 239 P.3d at 7-8 (emphases added). Based on the above, it is abundantly clear that the majority in HGEA held that the legislature, in legislatively overruling Winslow,[21] intended that the HLRB have exclusive original jurisdiction, and that court involvement would be by way of appeal from the HLRB, filed in circuit court under HRS Chapter 91, or HRS § 377-9[22]. See id. (citing S. Stand. Comm. Rep. No. 597-82, in 1982 Senate Journal, at 1202).

The majority states that "HRS Chapter 89 must be examined to determine whether it requires the HLRB to first pass on the controversy, which in turn depends on whether the controversy raises policy issues concerning matters that ought to be considered by the HLRB in the interests of a uniform and expert administration of the regulatory scheme laid down by HRS

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[21] It is also noted that "by legislatively overruling Winslow, the legislature did not divest the courts of the power to address constitutional issues unless and until the statutory issues are decided by the HLRB." HGEA, 124 Hawaiʻi at 33, 239 P.3d at 33 (Acoba, J., dissenting).

[22] HRS § 377-9(f) provides, in relevant part, that:

> (f) Any person aggrieved by the decision or order of the [HLRB] may obtain a review thereof as provided in chapter 91 by instituting proceedings in the circuit court of the judicial circuit in which the person or any party resides or transacts business, subject, however, to the general provisions of law for a change of the place of trial or the calling in of another judge.

Chapter 89." Majority opinion at 30. Respectfully, this analysis undermines the legislature's intention.

The question is simply whether the claim presented is a "controversy concerning prohibited practices." HRS § 89-14 (emphasis added). Plainly disputed issues would constitute a "controversy." Hence, a so-called "issue" is subsumed within a "controversy."[23] If a particular claim does present such a controversy, then the HLRB has exclusive, original jurisdiction to decide the controversy, and the circuit court has no original jurisdiction. However, once the HLRB has rendered a determination, a party may appeal to the circuit court pursuant to the procedures of HRS Chapter 91 and HRS § 377-9. Id. If the claim is not a "controversy concerning prohibited practices," then HRS § 89-14 will not provide the HLRB with jurisdiction. Pursuant to the language of the statute, the inquiry is straightforward and either the HLRB has exclusive original jurisdiction, or it does not. In light of HRS § 89-14, respectfully, the majority cannot have it both ways.

The majority concludes that "HRS § 89-14 expressly requires that the HLRB first pass on prohibited practice controversies." Majority opinion at 35. However, the majority's interpretation effectively reads the word "exclusive" out of the

[23] "Controversy" is defined as "[a] disagreement or dispute[,]" or "[a] justiciable dispute." Black's Law Dictionary 379 (9th ed. 2009).

statute, a word that was explicitly added by the legislature in 1985. See H. Stand. Comm. Rep. No. 134-82, in 1982 House Journal, at 943. Despite acknowledging that the legislature amended HRS § 89-14 in 1985, in order to invalidate Winslow's conclusion that the HLRB had concurrent jurisdiction with the circuit court, majority's opinion at 30, the majority goes on to find concurrent jurisdiction in the HLRB and the court over the claims in this case, in derogation of HRS § 89-14 and the legislative history overruling Winslow and establishing exclusive jurisdiction only in the HLRB.

It must be noted that every time the term "primary" is used in connection with the term "jurisdiction", it is not necessarily referencing the primary jurisdiction doctrine. See, e.g., Nicholas A. Lucchetti, One Hundred Years of the Doctrine of Primary Jurisdiction: But What Standard of Review is Appropriate for It?, 59 Admin. L. Rev. 849, 853 (2007) (noting that "primary jurisdiction" is "neither primary nor jurisdictional"). The Reports cited to by the majority stating that "exclusive original jurisdiction" may also be referred to as "exclusive primary or initial jurisdiction[,]" see H. Stand. Comm. Rep. No. 134-87, in 1982 House Journal, at 944, stand for the proposition that the agency must first, i.e. "primari[ly]", or "initial[ly]", decide prohibited practices controversies, and that the circuit court

may only decide such controversies on appeal via HRS Chapter 91 or HRS § 377-9, i.e., secondarily.[24]

IV.

A.

Respectfully, the majority relies on an issue/claim distinction that is not relevant for purposes of determining whether concurrent jurisdiction exists. See majority opinion at 36-37. In the context of primary jurisdiction, a court may consider whether issues require resolution by an agency. Kona Old, 69 Hawaiʻi at 93, 734 P.2d at 168-69. However, this does not negate the initial requirement that a court have jurisdiction over such claims or issues. And, respectfully, it is unclear how the majority can conclude that the court and the HLRB share jurisdiction over the prohibited practices controversies in this case, where HRS § 89-14 gives HLRB exclusive original jurisdiction over "[a]ny controversy [presumably including, arguendo, an "issue"] concerning prohibited practices." (Emphasis added.)

For example, Kona Old considered whether a county planning director properly issued a special management permit, in accordance with the Costal Zone Management Act (CZMA). 69 Haw.

[24] As noted supra, however, HLRB's determination over controversies involving prohibited practices is more than a "first pass", it is the exclusive, original forum for jurisdiction over those controversies. See HRS § 89-14.

at 84, 734 P.2d at 163. One of the questions addressed by this court was whether a statute allowing "any person or agency [to] commence a civil action alleging that any agency" breached the CZMA vested the circuit court with jurisdiction over the dispute. Id. at 92, 734 P.2d at 168. Importantly, Kona Old first noted that the cause of action, pursuant to the statute, "seemingly describes a claim 'originally cognizable in the courts.'" Id. at 93, 734 P.2d at 169 (quoting W. Pac. R.R., 352 U.S. at 64). It explained that this was different from a situation where a claim is cognizable in the first instance by an administrative agency alone. Id. It was only then that Kona Old considered whether the issues needed to be resolved by the agency under the doctrine of primary jurisdiction. Id. Thus, under Kona Old, concurrent jurisdiction is a prerequisite to an application of primary jurisdiction.

Contrary to Kona Old, the majority concludes, referencing Kona Old, that "the agency and the court need not have concurrent jurisdiction over the claims, as long as the agency and the court have concurrent jurisdiction over the issues presented in the claims." Majority's opinion at 34 (emphasis added). However, first, Kona Old held that there was concurrent jurisdiction over the claims, when it established that the cause of action presented a claim that was "cognizable in the courts." Id. at 93, 734 P.2d at 169 (citation omitted). Kona Old then

considered whether certain "issues" should be resolved by the agency, but only after it established that there was concurrent jurisdiction over the claims.

The majority also cites to Aged Hawaiians in support of its issue/claim distinction. Majority opinion at 37. However, no such distinction was made in Aged Hawaiians either. Instead, this court explained that the relevant claim was originally cognizable in the court. Aged Hawaiians, 78 Hawaiʻi at 202, 891 P.2d at 289 (stating that "the exhaustion of administrative remedies is not required as a prerequisite to bringing an action [in the court] pursuant to [42 U.S.C.] § 1983." (citation and internal quotation marks omitted)). Then, it considered whether the questions and issues presented should be referred to the agency, concluding briefly that "[d]eference to the agency is particularly inappropriate in cases like this one, in which the constitutionality of the agency's rules and procedures is challenged and questions are raised as to whether the agency has acted within the scope of its authority." Id. Thus, Aged Hawaiians first established original jurisdiction in the court, then considered whether it was appropriate to apply the primary jurisdiction doctrine. See id.

In sum, Kona Old and Aged Hawaiians obviously assumed that the court had jurisdiction and then went on to decide whether the primary jurisdiction doctrine was applicable. The

operative question in this case, in contrast, is whether the court had jurisdiction in the first place. Respectfully, the majority does not first establish that the court had jurisdiction over the issues or claims. If such claims do in fact allege prohibited practices "issues", as the majority contends, the legislature has already deemed in HRS § 89-14, that HLRB's jurisdiction over these "issues" is exclusive of the court.

Second, even assuming, arguendo that there is some distinction between "issues" and "claims" with respect to deciding whether concurrent jurisdiction exists between the court and the agency, it is clear in this case that the agency and the court do not have concurrent jurisdiction over the "issues" presented. If the "issues" in this case are "subsumed" within HLRB's claims as prohibited practices controversies, as the majority avers, majority opinion at 40, then the HLRB alone would have jurisdiction over those "issues" subsumed within the "controversies" under HRS § 89-14, and the court could not retain concurrent jurisdiction.

B.

Although characterized as "primary jurisdiction", the majority is essentially requiring that UPW exhaust its administrative remedies, by mandating that the HLRB decide certain issues as a "first pass", and only then allowing the court to render its decision. The concept of a "first pass", as

used by the majority, is inimical to primary jurisdiction, and instead suggests that the UPW must submit issues to the agency for a decision before the court may consider any issues presented by UPW's complaint. There is no support for requiring a "first pass", as it is characterized.

Respectfully, such a position is detrimental to the parties and the public, and improper, inasmuch as "[t]he requirement that a party exhaust [its] administrative remedies comes into play where a claim is cognizable in the first instance by an administrative agency alone[.]" Hawaiʻi Insurers Council v. Lingle, 120 Hawaiʻi 51, 71-72, 201 P.3d 564, 584-85 (2008) (internal quotation marks and citation omitted); Kona Old, 69 Haw. at 93, 734 P.2d at 169; see also, HSTA, 126 Hawaiʻi at 325, 217 P.3d at 620 (Acoba, J., dissenting). Here, under the majority opinions in HSTA, HGEA, and HRS § 89-14, the "issues" are cognizable in the administrative agency alone, and thus the majority appears to be applying a primary jurisdiction/exhaustion hybrid, which, respectfully, mixes the two distinct doctrines.

As discussed, it is well-established that the agency and the court have concurrent jurisdiction in order for the primary jurisdiction doctrine to apply. At the very least, the court must have subject matter jurisdiction, because it is the court that decides whether to stay or dismiss the action before it. And, the court must have concurrent jurisdiction in order to

effectuate a stay of the proceedings. Therefore, the majority's holding that the court should stay the claims, pending a "first pass" by the HLRB, majority opinion at 38, conflicts with its determination that the issues asserted in the Complaint were essentially prohibited practices issues, see majority opinion at 40. For, the court could not retain jurisdiction to stay the action unless it had concurrent jurisdiction with HLRB, but conversely, in considering prohibited practices issues, the HLRB has exclusive jurisdiction. Clearly, then, where the agency, such as the HLRB, is said to have exclusive original jurisdiction over particular controversies, the primary jurisdiction doctrine is not applied.[25]

The majority's citation to Reiter in support of its assertion that the court had discretion to either retain jurisdiction or dismiss the case without prejudice, majority opinion at 39-40, is, respectfully, incorrect. The majority refers aspects of the claims to the HLRB as prohibited practices

[25] Although at one point, primary jurisdiction did apply where there was exclusive agency jurisdiction, that is no longer the case. Commentators have described a shift from the original conception of "primary jurisdiction" to the modern primary jurisdiction doctrine. Compare Far E. Conference v. United States, 342 U.S. 570, 573-74 (1952) with W. Pac. R.R. Co., 352 U.S. at 62. "After Far East Conference, applying the primary jurisdiction doctrine is no longer equivalent to a finding of exclusive agency jurisdiction[.]" Lockwood, The Primary Jurisdiction Doctrine, 64 Wash. & Lee L. Rev. at 713. Moreover, the U.S. Supreme Court, "provided lower courts the option of either to stay the proceedings while the agency action is pending, or to dismiss the proceedings entirely[,]" and thus, "presumes that the claim is originally cognizable by both the court and agency[,] because otherwise, "dismissal would have been mandatory." Id. at 714 (emphasis added) (citing Far E. Conference, 342 U.S. at 576-77).

"issues," and yet, holds that the court still has jurisdiction to stay the claims. As explained, this is contrary to HRS § 89-14, which gives the HLRB exclusive original jurisdiction over prohibited practices "controver[sies]," thereby divesting the court of jurisdiction.

Reiter is distinguishable. In Reiter, the agency did not have exclusive original jurisdiction over the relevant policy issues on which the court could apply primary jurisdiction. 507 U.S. at 269. It was also clear that the court in Reiter did have jurisdiction, so there was no difficulty presented by the court choosing whether to stay or to dismiss the case inasmuch as the court had jurisdiction to do so. Id. Hence, Reiter's holding that the "[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction," id. at 268, followed from its conclusion that the court had jurisdiction over the claims presented. Here, by contrast, the referral of any prohibited practices "controversies" to the HLRB would deprive the court of jurisdiction, because of the exclusive, original jurisdiction granted to the HLRB pursuant to HRS § 89-14. Thus, Reiter would hold, contrary to the majority's position, that the court in this case would have no jurisdiction to decide whether to effectuate a stay or dismiss the claims.

V.

Moreover, the precedent of this court is plainly

contrary to the application of primary jurisdiction in this case. First, the majority opinions in HGEA and HSTA were consistent in holding that only HLRB had jurisdiction, because it had exclusive, original jurisdiction, i.e., that there was not concurrent jurisdiction with the court. Hence, logically, primary jurisdiction did not apply in either HGEA or HSTA. The majority in HGEA held that the HLRB had "exclusive original jurisdiction," 124 Hawaiʻi at 204, 239 P.3d at 8, over the statutory issues raised by the plaintiffs under HRS Chapter 89-9(a) and (d), id. at 206, 239 P.3d at 10, but that the HLRB lacked jurisdiction to decide the constitutional issues presented. Id. at 207, 239 P.3d at 12.

The majority in HSTA held that "[t]he plaintiffs' complaint states claims relating to 'prohibited practices' because it ultimately challenges [the governor's] ability to unilaterally impose furloughs without collectively bargaining." 126 Hawaiʻi at 322, 271 P.3d at 617 (citation omitted). HSTA explained that "[d]eleting references to chapter 89 does not change the fact that the dispute ultimately relates to a prohibited practice[,]" and "[t]herefore, the plain language of HRS § 89-14 indicates that the HLRB has exclusive original jurisdiction over the plaintiffs' claims." Id. (emphasis added).

Second, the majority's conclusion that the privatization claims alleged in UPW's circuit court complaint are

cognizable in the circuit court, majority's opinion at 37, clashes with its determination that the primary jurisdiction doctrine applies to the retaliation claims.[26] The majority concludes that based on Konno, the HLRB "only has jurisdiction over issues related to chapter 89, such as collective bargaining and prohibited practices controversies, to the extent they do not violate merit principles." Majority opinion at 47.

Respectfully, it is not clear how the majority's analysis is a determination that UPW's privatization claims "do not contain issues within the specialized expertise of HLRB." Id. at 43. Instead, in Konno, this court decided whether the privatization efforts at issue violated civil services laws and merit principles. 85 Hawaiʻi at 78, 937 P.2d at 414. Having determined that there was a violation, Konno held that there was no need to reach the HRS Chapter 89 arguments, because "our collective bargaining statutes expressly state that parties are barred from negotiating upon and agreeing to proposals that violate merit principles." Id. The court had jurisdiction first to determine whether the privatization effort was contrary to law, because "collective bargaining statutes do not require negotiation over topics that are contrary to duly enacted laws." Id. Thus, Konno clearly holds that the circuit court had

[26] Accordingly, in connection with the privatization claims presented in this case, I concur with the majority as to the result, but not as to the rationale.

jurisdiction to determine the validity of privatization efforts under civil service laws and merit principles, without consideration of whether such issues were within the "specialized expertise" of the HLRB.

Accordingly, the majority's application of the primary jurisdiction doctrine is not supported in this case. The discussion does not take into account the fundamental jurisdictional prerequisites that must be established before the doctrine can be considered as a possibility in any given case.

VI.

As noted, UPW alleges two claims in its complaint with respect to retaliation; first, that the Defendants' actions violated the employees' rights as guaranteed by the Free Speech Clause, Haw. Const. art. I, § 4, and second, that the Defendants' actions constituted acts of retaliation, reprisal, and intimidation in violation of the HWPA. Both of these claims are unquestionably cognizable before the court alone, and thus there is no need to turn to primary jurisdiction.

A.

1.

As to constitutional claims, it is axiomatic that administrative agencies do not have jurisdiction to decide constitutional claims. Count II of UPW's complaint specifically alleged a constitutional violation of article I, section 4 of the

Hawaiʻi constitution, specifically that, "[b]y retaliating against UPW and its members for objecting to and reporting illegal government action, Defendants deprived UPW and its members of rights guaranteed by Article I, Section 4 of the Hawaiʻi Constitution."[27] As in HGEA and HSTA, UPW's allegations manifestly challenged the constitutionality of actions taken by Defendants. See HGEA, 124 Hawaiʻi at 218, 239 P.3d at 22 (Acoba, J., dissenting); HSTA, 126 Hawaiʻi at 323, 271 P.3d at 618 (Acoba, J., dissenting).

Just as in those two cases, the court here had jurisdiction over the constitutional question presented by UPW. This court has held that "[a]lthough an administrative agency may always determine questions about its own jurisdiction it generally lacks power to pass upon the constitutionality of a statute." HOH Corp. v. Motor Vehicle Indus. Licensing Bd., 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (internal brackets, quotation marks, and citations omitted); Morgan v. Planning Dep't., Cnty. of Kauai, 104 Hawaiʻi 173, 184, 86 P.3d 982, 993 (2004) ("[a]n administrative agency can only wield powers expressly or implicitly granted to it by statute." (internal quotation marks and citation omitted).

[27] It may become appropriate to resolve UPW's claim under art. 1, § 4 on a motion for summary judgment. However, this has no bearing on the court's original jurisdiction to hear the constitutional claim.

In HGEA, the union alleged a constitutional claim in a complaint to the circuit court. 124 Hawaiʻi at 212, 239 P.3d at 16. As noted, the majority in HGEA characterized the complaint as alleging a prohibited practice, and held that HLRB had exclusive original jurisdiction. Id. at 205, 239 P.3d at 9. However, it did not explain how HLRB could have jurisdiction over the union's complaint, because HLRB has no jurisdiction over constitutional issues. See id. at 225, 239 P.3d at 29 (Acoba, J., dissenting). The dissent noted that "[g]iven that [the union's] complaint plainly alleged that the [provision at issue] was unconstitutional and the HLRB lacks any jurisdiction over constitutional matters, the HLRB could not have original exclusive jurisdiction over [the union's] complaint." Id. at 225-26, 239 P.3d at 29-30. Similarly, here, UPW's Complaint plainly alleges that Defendants' actions were unconstitutional, and thus the HLRB lacks jurisdiction, because there is no way in which HLRB could have original exclusive jurisdiction over UPW's constitutional claim. See id.

Moreover, "the determination of the [constitutional] issue is not only of primary, but of paramount importance, inasmuch as any supposed separate HLRB prohibited practice decision would always be subject [to] and inferior to the resolution by the court and this court of the constitutional question." Id. at 229, 239 P.3d at 33. While this court has

noted that "'deference will be given to decision of administrative agencies acting within the realm of their expertise[,]'" id. (quoting Mahaʻulepu v. Land Use Comm'n, 71 Haw. 332, 335, 790 P.2d 906, 908 (1990)), "such deference does not extend to matters over which the agencies do not have jurisdiction[,]" including constitutional claims. Id. (emphasis added).

In the event that UPW had alleged its Free Speech claim before the HLRB, the agency would have been powerless to declare Defendants' actions "unconstitutional" or "constitutional", and thus, inasmuch as HLRB could not have provided a remedy, the court had jurisdiction over the constitutional Free Speech claim as alleged in UPW's complaint. Thus, the majority's characterization of UPW's complaint as alleging "prohibited practices" is incorrect. See HSTA, 126 Hawaiʻi at 324, 217 P.3d at 619 (Acoba, J., dissenting) (noting that the court had sole and exclusive jurisdiction over the constitutional claims presented, despite the majority's recharacterization of those claims as an HRS Chapter 89 action). UPW properly pled a claim under article 1, section 4 of the Hawaiʻi Constitution, and accordingly, should be able to seek the remedies available under the Hawaiʻi Constitution in a timely manner.[28]

[28] This court has taken jurisdiction over alleged constitutional violations in other cases, without requiring that the parties first submit (continued...)

2.

This case poses the problem of delay when a claim that only the circuit court can remedy is incorrectly referred to an administrative agency before the circuit court is permitted to exercise its original exclusive jurisdiction. See, e.g., HGEA, 124 Hawaiʻi at 223, 239 P.3d at 28 (Acoba, J., dissenting) (noting that "requiring HGEA to seek a determination from the HLRB on whether the Governor's actions were a prohibited practice before it could seek injunctive relief from the court would result in unjustifiable delay," where the court was the only entity that could have granted such relief "in conjunction with the constitutional question"); HSTA, 126 Hawaiʻi at 323, 271 P.3d at 618 (Acoba, J., dissenting) (explaining that requiring the parties to engage in proceedings before the HLRB before the constitutionality of the Governor's actions could be considered "invites the possibility of unnecessary delay and a waste of judicial and party resources"). Moreover, unlike in HSTA and in

[28](...continued)
those claims as prohibited practices to the HLRB. For example, in United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawaiʻi 46, 62 P.3d 189 (2002), the question was whether employment terms affecting wages, hours, and other conditions should have been subject to collective bargaining as required by the constitution. 101 Hawaiʻi at 48, 62 P.3d at 191. This court did not first require a ruling from the HLRB before deciding the constitutional issue. See id. at 54, 62 P.3d at 197. Similarly, in Malahoff v. Saito, 111 Hawaiʻi 168, 140 P.3d 401 (2006), the plaintiffs challenged the implementation of an "after-the-fact" payroll plan that had the effect of delaying the dates on which certain public employees were paid. 111 Hawaiʻi at 171, 140 P.3d 404. On appeal, Malahoff determined whether the measure violated the employees' constitutional right to collective bargaining, without first requiring that the HLRB decide an alleged prohibited practice issue. Id. at 181, 140 P.3d at 414.

HGEA, a prohibited practices action has already been filed before the HLRB in the instant case and was pending for two years before UPW filed its Complaint with the court, and no final decision to date has been made by the HLRB. Therefore, there is no final agency action from which UPW could appeal pursuant to HRS Chapter 91. Respectfully, this case exemplifies why the approach chosen by the majority will only promote more cost and delay, to the parties' and the public's detriment.

3.

UPW did not raise any statutory claims under HRS Chapter 89, and thus under the majority's holding, there are no clear parameters as to what the HLRB must decide with respect to "prohibited practices." Is the majority suggesting that the court wait until UPW's HLRB Complaint is addressed in full, or should it simply wait until the agency has made a separate determination on the factual issues that it states are implicated? Regardless, HLRB's Complaint does not present "prohibited practices", and while this court may "decide the legal limits within which the parties may act," the "choices they should make within those limits and what would be in their best interest to effectuate once the law is applied, is prudently and lawfully committed to them." County of Kauai ex. rel Nakazawa v. Baptiste, 115 Hawaiʻi 15, 60, 165 P.3d 916, 927 (2007) (Acoba, J., dissenting, joined by Duffy, J.). As in other cases, the

claim should be allowed to be decided in court, rather than being pre-characterized by this court, thus giving due consideration to the good faith requirement binding on every pleader.

B.

1.

As to the HWPA violation alleged, the court also clearly had sole original jurisdiction over UPW's claim. The HWPA, at HRS § 378-63, states as follows:

> (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.

(Emphases added.)

The legislature manifestly intended for plaintiffs to bring actions enforcing the HWPA, HRS §§ 378-61 to 378-69, in court. Under the plain language of HRS § 378-62, the Act protects all "employees" against changes in the "employee's compensation, terms, conditions, location, or privileges of employment" in retaliation for reporting a violation of law. To enforce such violations, "a person who alleges a violation" "may [bring an action] in the circuit court 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." HRS § 378-63. Finally, under HRS § 378-64, "[a] court, in rendering a judgment in an action brought pursuant to this part, shall order" remedies "as the court considers appropriate[.]" (Emphases added.)

Thus, the plain language of the HWPA provides that any "person" alleging a violation of the Act "may" sue in either the circuit court where the alleged violation occurred, or the circuit court where the complaint resides, or the circuit court where the defendant resides, but the complainant must sue in one of these courts. Moreover, the subsequent section plainly contemplates that a court will issue remedies for violations of the Act. Thus, the plain language of the statutes mandates that plaintiffs enforcing violations would sue in court.

Additionally, the language used by the legislature in broad and all-inclusive, indicating that all persons, including employees, were entitled to sue in court for violations of the HWPA. Had the legislature intended to allow such actions to also be enforced in the HLRB with respect to employees, it would have said so, but did not. Thus, HWPA manifestly applies even in those situations in which employee grievances would be governed by collective bargaining agreements ostensibly within the jurisdiction of the HLRB.

2.

This conclusion is reinforced by the Act's legislative history, which explained that Act "provides an employee with a basis for going to court to seek an injunction or other redress for unfair retaliation." S. Stand. Comm. Rep. No. 711, in 1987 Senate Journal, at 1442 (emphases added). Moreover, the legislative history indicates that the HWPA was intended to govern a wide spectrum of conduct inclusive of matters otherwise related to collective bargaining in public employment under HRS Chapter 89.

In HRS § 89-1, the legislature "declare[d] that it is the public policy of the State to promote harmonious and cooperative relations between the government and employees and to protect the public by assuring effective and orderly operations of government." These polices were "best effectuated" by, inter alia, "[r]ecognizing the right of public employees to organize for the purpose of collective bargaining." HRS § 89-1(b)(1). Thus, HRS Chapter 89 generally governs disputes between the government and its employees related to collective bargaining.

In contrast, the legislative history of the HWPA indicates that "the purpose of the [HWPA] is to prohibit retaliatory employment actions against employees in the private and public sectors who either report suspected violations of law or rule to government authorities or who are asked to participate

in investigative efforts of our government." H. Stand. Comm. Rep. No. 25, in 1987 House Journal, at 1090; accord S. Stand. Comm. Rep. No. 711, in 1987 Senate Journal, at 1442. Plainly, government employees may "report suspected violations of law or rule" that are related to the collective bargaining process or to "harmonious and cooperative relations between the government and employees." Thus, it is apparent that the scope of conduct the legislature intended to prohibit under the HWPA includes conduct covered by HRS § 89-1, and that actions for violation of such conduct under the HWPA must be brought in court. Hence, the Act's legislative history confirms that the legislature intended that actions under the Act would be brought in court despite the existing governance procedures under collective bargaining agreements that would be within the ostensible jurisdiction of the HLRB.

3.

As demonstrated above, the language and legislative history of the HWPA do not admit of extracting the prohibited practices "issue" for the so-called "first pass" by the HLRB. To reiterate, the language of the Act states that actions must be brought in court, and the legislative history confirms that such actions were intended to be heard by the courts. To permit the HLRB to make a so-called "first pass" on some of the issues

pivotal to resolve the HWPA claim would frustrate the legislative intent that such claims would be resolved in court.

Additionally, HRS § 378-62 provides that "[a]n employer shall not discharge, threaten, or otherwise discriminate against an employee." (Emphases added.) Similarly, the legislature noted that the HWPA covers "retaliatory employment actions against employees in the private and public sectors[.]" see H. Stand. Comm. Rep. No. 25, in 1987 House Journal, at 1090 (emphasis added). Thus, it was apparent to the legislature that the issues raised in HWPA claims could relate to disputes between employees and the government regarding collective bargaining, i.e., those issues covered by HRS Chapter 89. The legislature nevertheless determined that such issues should be heard by the courts. To require that the HLRB resolve issues central to the HWPA claim would therefore undermine the legislature's rejection of this option. In fact, the statute refers to conflict between employers and employees without ever mentioning the HLRB, and the legislative history indicates the legislature specifically intended that the HWPA cover retaliatory employment actions against employees in the "public sectors". Id. Thus, it is apparent that the legislature considered the scenario wherein employees would bring a HWPA claim based on conflicts with the government but nevertheless determined that such claims should be brought in court.

Consequently, the crux of the HWPA claim may not be decided outside of the court. The statute provides for the circuit court resolution without reference to HLRB, and an HWPA claim is not the type of claim over which the HLRB would have any specialized expertise on predicate factual issues. Instead, the legislature required that actions brought under the HWPA be filed, and thus plainly be tried, in the circuit court.

In sum, the majority incorrectly characterizes UPW's HWPA claim as a "prohibited practices" issue, where the jurisdiction over HWPA claims is firmly committed to the court. In mandating that such a claim be referred to the HLRB, the majority abrogates the express statutory right to file a claim under the HWPA in court, a right given to plaintiffs by the legislature in its enactment of the HWPA.

VII.

Respectfully, similar to HSTA, here, there is a fundamental defect in allowing the court to stay its proceeding, pending an HLRB determination, where, on the other hand, the majority has determined that HLRB has exclusive original jurisdiction over the dispute. See id. at 323, 271 P.3d at 618. As noted supra, a court cannot stay a claim unless it has concurrent jurisdiction over that claim. Further, a court may not "refer" a claim to an agency if that agency has no

jurisdiction over the claim, such as in this case, where HLRB can have no jurisdiction over constitutional claims or the HWPA. Instead, as discussed, concurrent jurisdiction should be a prerequisite to the application of the primary jurisdiction doctrine.

VIII.

There are two systems of decision-making implicated by this case. The first is the court, which, as explained, has exclusive original jurisdiction over the claims presented in UPW's Complaint. The second is the HLRB, which has exclusive original jurisdiction over the claims presented by UPW's HLRB Complaint, pursuant to HRS § 89-14.

Inamsuch as there were parallel proceedings in this case, or where there might be in other cases in the future, the doctrine of collateral estoppel would apply to prevent re-litigation of issues decided by the agency and the court, and vice versa. "Res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, are doctrines that limit a litigant to one opportunity to litigate aspects fo the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy." Eastern Savings Bank, FSB v. Esteban, 129 Hawaiʻi 154, 158, 296 P.3d 1062, 1066 (2013) (citation omitted). "[I]ssue preclusion . . . prevents the

parties or their privies from relitigating any issue that was actually litigated and finally decided in the earlier action." Id. (citation omitted).

If HLRB decides facts pertaining to the subject matter before the court, then the only question is whether collateral estoppel would apply. If either forum rendered a judgment as to the merits, then that judgment would prevent the parties from relitigating particular issues in the other forum. Of course, should the HLRB render a judgment first, UPW could appeal to the circuit court as provided in HRS Chapter 91. Although, in effect, the decision would be rendered by the forum which first decides the case, that is the risk that UPW assumed when it decided to file both an HLRB Complaint and a Complaint in the circuit court. The doctrine of collateral estoppel would therefore prevent relitigation of issues in this case, and accordingly, would act as a barrier to inconsistent judgments as between the court and agency.[29]

IX.

In accordance with the above, I would hold that all of UPW's claims as alleged in its Complaint are originally,

[29] As such, the majority's concern with inconsistent decisions is not valid on this basis as well. See majority's opinion at 34 (noting that part of its decision was based on "avoiding the risk of divergent decision between an administrative agency and a court").

exclusively cognizable in the court. I therefore concur in part and dissent in part.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack