IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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GERARD R. LALES, Respondent/Plaintiff-Appellant,

vs.

WHOLESALE MOTORS COMPANY, dba JN AUTOMOTIVE GROUP, JOHNNY MARTINEZ, and GARY MARXEN, SR., Petitioners/Defendants-Appellees.

SCWC-28516

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 28516; CIV. NO. 03-1-2415)

February 13, 2014

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I would hold first, that Petitioner/Defendant-Appellee Gary Marxen, Sr. (Marxen), a supervisory employee of Petitioner/Defendant-Appellee Wholesale Motors Company (JN) was not entitled to summary judgment regarding the Hawaiʻi Revised Statutes (HRS) Chapter 378 claims of Respondent/Plaintiff-Appellant Gerard R. Lales (Lales), a former employee of JN, inasmuch as genuine issues of material fact existed as to whether

Marxen, as Lales' supervisor, aided, abetted, incited, compelled, or coerced the doing of a discriminatory practice in violation of HRS § 378-2(a)(3).[1]

In my view, Marxen may be subject to individual liability under HRS § 378-2(a)(3). I would therefore vacate the entry of summary judgment of the Circuit Court of the First Circuit (the court)[2] in favor of Marxen as to Lales' state ancestral harassment claim (harassment claim) and retaliatory discharge claim and remand to the court for application of HRS § 378-2(a)(3). However, Marxen may not be individually liable to

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[1] HRS § 378-2 (Supp. 2002) provided in relevant part as follows:

> **§ 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:
>
> (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;
> . . .
> (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[.]

(Emphases added.)

[2] The Honorable Randall K.O. Lee presided.

Lales under HRS § 378-2(a)(1). Rather, HRS § 378-1[3] and HRS § 378-2(a)(1) do not support holding supervisory employees or "agents" such as Marxen individually liable for alleged discriminatory conduct (employee liability) under HRS § 378-2(a)(1).

Further, I believe the adoption of Hawaiʻi Administrative Rule (HAR) § 12-46-175(d),[4] which in effect imposes absolute liability on employers for ancestral harassment[5] by their supervisory employees (employer strict liability)

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[3] HRS § 378-1 (1993) provides in relevant part as follows:

> "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.

(Emphases added.)

[4] HAR § 12-46-175(d) (1990) provides in relevant part as follows:

> (d) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of ancestry regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in a supervisory or agency capacity.

(Emphasis added.)

[5] HAR 12-46-175(b) (1990) provides in relevant part as follows

> (b) Ethnic slurs and other verbal or physical conduct relating to an individual's ancestry constitute harassment when this conduct:
> (1) Has the purpose or effect of creating an intimidating, hostile, or offensive working environment;
> (2) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
> (3) Otherwise adversely affects an individual's employment opportunity.

exceeded the statutory authority granted the Hawaiʻi Civil Rights Commission (HCRC) under HRS §§ 368-3[6] and 378-2.[7] Instead, under HRS Chapter 378, a proper balance between the interests of employers and employees is struck by applying the principles of liability enumerated in the Restatement (Second) of Agency (Second Restatement) § 219.[8]

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[6] HRS § 368-3 (Supp. 2004) provides in relevant part as follows:

§ 368-3 Powers and functions of commission.

The commission shall have the following powers and functions:

. . .
(9) To adopt rules under [HRS] chapter 91.

Pursuant to HRS Chapter 91, an agency may adopt rules following a public hearing and an opportunity for interested persons to submit data, views, or arguments. HRS § 91-3.

[7] HAR § 12-46-175 lists HRS § 378-2 as "implied authority" for the Rule. The majority appears to assume that HAR § 12-46-175(d) is based on HRS § 378-2. See majority opinion at 54. The authority for HAR § 12-46-175(d) appears to be HRS § 378-2(a)(1)(A), which makes it an unlawful discriminatory practice for "any employer" to "discriminate against any individual in compensation or in the terms, conditions, or privileges of employment." (Emphasis added.)

[8] Second Restatement § 219 provides as follows:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

(Emphases added.)

Finally, Marxen's employer, JN, should not be able to avail itself of the so called "Faragher [affirmative] defense"[9] to an employer's vicarious liability applicable in Title VII federal harassment actions in state suits under HRS Chapter 378.[10] The Supreme Court adopted the Faragher defense on the basis of Congressional legislative history unique to Title VII. The defense is not compatible with a state claim brought under HRS § 378-2(a)(1) and thus JN may not avoid vicarious liability under section 219 of the Second Restatement.[11] Therefore, I

[9] In Faragher v. City of Boca Raton, 524 U.S. 775 (1998), the United States Supreme Court held that an affirmative defense was available in Title VII cases as follows:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 807-08 (emphases added). The Supreme Court reached the same conclusion in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), a companion case to Faragher. This defense is referred to herein as the "Faragher defense."

[10] "Title VII" refers to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. Title VII prohibits employers, employment agencies, and labor organizations from discriminating against any individual in the employment context based on the individual's race, color, religion, sex, or national origin. Schefke v. Reliable Collection Agency, Ltd., 96 Hawaiʻi 408, 425, 32 P.2d 52, 69 (2001).

[11] The majority also holds that the court improperly allowed JN to invoke Faragher as a defense to Lales' Title VII claims. I agree with the majority as to Title VII claims inasmuch as the Faragher defense does not apply to Title VII claims when a genuine issue of material fact exists as to

(continued...)

would remand Lales' harassment claim against JN under HRS § 378-2(a)(1) to the court with instructions to apply the principles in section 219 of the Second Restatement.[12]

I.

A.

1.

Lales filed an amended complaint on February 20, 2004, asserting, inter alia, that Marxen and JN[13] had engaged in "discriminatory acts" and retaliatory discharge as set forth in HRS chapter 378. The Complaint further alleged that Marxen was Lales' supervisor and that Lales had been harassed by both Marxen and Johnny Martinez (Martinez), who had been both Lales' co-employee and supervisor. The complaint asserted six causes of action, including, inter alia, (1) discriminatory acts in violation of Chapter 378[14] of the HRS and (2) retaliatory

[11](...continued)
whether a supervisor's harassment culminated in a tangible employment action.

[12] I agree with the majority that there were genuine issues of material fact regarding whether JN's proffered reasons for Lales' termination were pretextual, that Lales' produced sufficient evidence to raise genuine issues of material fact as to his state and federal harassment claims against JN. I also agree that the basis for Lales' public policy claim is not clear from the record. Cf. Takaki v. Allied Machinery Corporation, 87 Hawaiʻi 57, 64 951, P.2d 507, 514 (App. 1998). I therefore concur in affirming the ICA's decision vacating the court's entry of summary judgment in favor of JN with respect to Lales' first, second, fourth, fifth, and sixth causes of action.

[13] The amended complaint also named Johnny Martinez (Martinez) as a defendant. The court granted summary judgment in favor of Martinez, and this ruling was not challenged on appeal.

[14] The amended complaint did not specify which sections of HRS
(continued...)

discharge in violation of Chapter 378 of the HRS.[15] Inasmuch as Lales cited HRS Chapter 378 in the Complaint, his Complaint could subject Marxen to liability under either HRS § 378-2(a)(1) or HRS § 378-2(a)(3). See In re Genesys Data Technologies, Inc., 95 Hawaiʻi 33, 41, 18 P.3d 895, 903 (2001) ("Pleadings must be construed liberally.").

Pertinent to the question of employee liability, on May 3, 2006, Marxen filed a motion for summary judgment, arguing, inter alia, that individual employees cannot be sued under HRS § 378-2(a)(1) and therefore he was entitled to summary judgment on Lales' first and second causes of action. Marxen attached a copy of his deposition to his motion for summary judgment. In the deposition, Marxen related that he was the "general sales manager" at JN and that Lales was a "car salesman" at JN. Marxen explained that he "was not the one who made the decision to fire [Lales]" but that he "did the paperwork."

Marxen recounted that Lales was initially terminated for "missing a sales meeting" and "lack of production."

[14](...continued)
Chapter 378 Marxen or JN violated.

[15] The complaint also asserted causes of action for (3) breach of the employment contract, (4) unlawful termination as against public policy, (5) discriminatory acts in violation of section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, and (6) retaliatory discharge for Lales' opposition to the harassment he suffered in violation of section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a). The first four claims asserted violations of state law, whereas the final two claims asserted violations of federal law.

However, Marxen suspended the original termination because Lales had asked for an opportunity to improve his sales during that weekend. Nevertheless, Lales was terminated the next day after Joey Dempsey, Lales' immediate supervisor, reported that Lales lied to a customer. Marxen's son, Gary Marxen Jr., the "used car manager" therefore instructed Dempsey to fire Lales. Marxen approved of his son's decision.

Lales filed a memorandum in opposition, arguing that a supervisor, such as Marxen, was an "agent" included in the definition of "employer" in HRS § 378-1 and therefore could be liable under HRS § 378-2(a)(1) for acts committed by an employer. Lales' attached declaration asserted that at one point Marxen told Martinez, who was Lales's co-employee and would later become Lales' supervisor, to "beat his [] French ass[.]" Subsequently, Martinez allegedly "subjected [Lales] to ancestry harassment." This harassment included "derogatory remarks" and "threats." Lales "complained orally to [] Marxen that [he] did not appreciate the remarks made concerning [his] ancestry." Marxen apparently did not take any action in response to these complaints. However, Lales was terminated following his complaints to Marxen, his co-workers, "and others."

Lales' declaration also stated that the reasons given by JN for Lales' firing were false. Lales maintained that he did not have the lowest sales at the time of his termination, that he

missed the sales meeting because he did not receive notice of the meeting, and that he did not "know [of] anybody to be terminated for not attending a sales meeting." Lales denied that he lied to a customer regarding whether a car was equipped with air conditioning. Instead, Lales claimed that he was fired "as retaliation" for his complaint.

On July 14, 2006, the court granted summary judgment in favor of Marxen on all counts. The court did not decide whether Marxen could be individually liable under HRS chapter 378. Instead, the court determined that Lales could not sue Marxen because Marxen was not listed in the Lales' right to sue letter from the HCRC.[16]

2.

Pertinent to the question of employer strict liability, on June 30, 2006, JN also filed a motion for summary judgment. On August 29, 2006, the court issued findings of fact (findings), conclusions of law (conclusions), and an order granting summary judgment in favor of JN on all counts. The court apparently granted summary judgment on Lales' first cause of action, the state harassment claim, and Lales' fifth cause of action, the federal harassment claim, on the basis of the Faragher defense.

[16] The ICA held that the court erred in granting summary judgment based on the failure to name Marxen in the letter. Lales v. Wholesale Motors Co., No. 28516, 2012 WL 1624013, at *9 (App. May 9, 2012). Marxen did not challenge the ICA's determination.

Conclusion 29 stated that "in [Faragher] the U.S. Supreme Court held that if a plaintiff unreasonably fails to avail himself or herself of the employer's preventative or remedial apparatus, he or she should not recover damages that could have been avoided if he or she had done so." Conclusion 31 further stated that Lales "was fully aware [of JN's] procedure for any complaint for discrimination" and failed to follow that procedure. In conclusion 33 the court granted summary judgment "as to any claims relating to hostile work environment harassment," i.e., claims one and five.

B.

On appeal, the ICA determined that Marxen could be held individually liable under both HRS §§ 378-2(a)(1) and 378-2(a)(3). The ICA concluded that "employees are subject to individual liability under HRS § 378-2 when they are agents of an employer or when they aid, abet, incite, compel, or coerce prohibited discriminatory practices." Lales, 2012 WL 1624013, at *10. Therefore, the ICA concluded, Marxen was not entitled to summary judgment on Lales' HRS chapter 378 claims.

Several amicus briefs filed with the ICA also discussed the applicability of the Faragher defense. Briefs by amici curiae the Chamber of Commerce of Hawaiʻi, the Hawaiʻi Employers Council, and the Hawaiʻi Automobile Dealers Association all argued that the court's adoption of Faragher defense should be

affirmed. The HCRC, on the other hand, argued that the Faragher defense was incompatible with HAR § 12-45-175(d). The ICA did not decide whether the Faragher defense should apply or whether HAR § 12-46-175(d) exceeded the scope of the HCRC's statutory authority.

Rather, the ICA held that "as Faragher itself makes clear, the affirmative defense does not apply 'where a supervisor's harassment culminates in tangible employment action, such as a discharge[].' Here, because the alleged harassment by Marxen did culminate in Lales's discharge, the Faragher affirmative defense did not apply." Lales, 2012 WL 1624013, at *15. Hence, the ICA concluded that it "need not address what the result would be in a different case where a supervisor's alleged harassment does not culminate in tangible employment action [i.e., the Faragher defense would apply]." Id.

II.

With respect to employee liability, I would hold that Marxen is subject to liability in his individual capacity on Lales' first and second causes of action pursuant to HRS § 378-2(a)(3). As stated before, HRS § 378-2(a)(3) provides that it is an unlawful discriminatory practice for "any person, whether an employer, employee, or not, to aid,[17] abet,[18] incite,[19]

[17] "Aid" is defined as "to render assistance" or "to provide what is useful in achieving an end." Merriam-Webster's Collegiate Dictionary 25 (9th (continued...)

compel,[20] or coerce[21] the doing of any of the discriminatory practices forbidden by this part." As to HRS § 378-2(a)(3), Lales contends that "Marxen's acts were that of an agent . . . aiding and abetting in ancestry harassment against [] Lales for which he can be individually liable."

In his Reply, Marxen argues that the "theory of aiding and abetting is completely irrelevant to this case," because there is no evidence that Marxen aided, abetted, incited, compelled or coerced other persons in the doing of discriminatory practices. Marxen points out that "[Lales] did not allege that [] Marxen aided and abetted anyone in his Amended Complaint," that Lales did not allege in his opposition to Marxen's motion for summary judgment that "Marxen aided and abetted anyone in violating HRS § 378-2[(a)(3)]," and that "the first time that

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[17](...continued)
ed. 1993); see also Leslie v. Board of Appeals of County of Hawaiʻi, 109 Hawaiʻi 384, 393, 126 P.3d 1071, 1080 (2006) ("This court has said that we may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined." (internal quotation marks and brackets omitted)).

[18] "Abet" is defined as "to actively second and encourage" or "to assist and support in the achievement of a purpose." Merriam-Webster's Collegiate Dictionary 3.

[19] "Incite" is defined as "to move to action," or to "stir up" or "spur on" or "urge on." Merriam-Webster's Collegiate Dictionary 588.

[20] "Compel" is defined as "to drive or urge forcefully or irresistibly" or "to cause to do or occur by overwhelming pressure." Merriam-Webster's Collegiate Dictionary 234.

[21] "Coerce" is defined as "to compel an act or choice" or "to bring about by force or threat." Merriam-Webster's Collegiate Dictionary 222.

[Lales] has made this allegation is in the Response, and [he] has still not identified who [Marxen] is alleged to have aided or abetted."

Contrary to Marxen's position, the evidence submitted by Lales created a genuine issue of material fact as to whether Marxen aided, abetted, incited, compelled, or coerced other persons in the doing of discriminatory practices for both Lales' first and second causes of action.[22] See Ralston v. Yim, 129

[22] The majority contends that Lales waived any argument that Marxen was liable under HRS § 378-2(a)(3) because he did not allege that Marxen was liable on that ground in his Amended Complaint, and did not raise that argument in response to Marxen's motions for summary judgment or before the ICA. Majority opinion at 22 n.9. Respectfully, the majority is incorrect. To reiterate, in his Amended Complaint, Lales stated that Marxen's acts violated "HRS Chapter 378." Lales alleged that Martinez was at times his co-worker, that Marxen was his supervisor, and that both Martinez and Marxen harassed Lales. Thus, it may be construed reasonably that Marxen "aided, abetted, incited, compelled, or coerced" Martinez's harassment of Lales, and therefore was liable under HRS § 378-2(a)(3). See In re Genesys, 95 Hawaiʻi at 41, 18 P.3d at 903.

Further, the ICA held that HRS § 378-2(a)(3) was pertinent to Lales' claim, because "employees are subject to individual liability under HRS § 378-2 when they are agents of an employer or when they aid, abet, incite, compel, or coerce prohibited discriminatory practices," and concluded that "Marxen was not entitled to summary judgment on Lales's HRS Chapter 378 claims." Lales, 2012 WL 1624013, at *10 (emphasis added). Finally, Lales raised this argument before this court both in his Response and at oral argument. Because this issue was included in Lales' Amended Complaint, was decided by the ICA, and raised before this court, it is appropriate to resolve it here.

Of course, plain error also may be noticed regarding HRS § 378-2(a)(3). "[O]ur discretionary power to notice plain error ought to be exercised in civil cases if: (1) [] consideration of the issue not raised at trial requires additional facts, (2) [] its resolution will affect the integrity of the trial court's findings . . . and (3) [] the issue is of great public import." State v. Fox, 70 Haw. 46, 56 n.9, 760 P.2d 670, 676 n.9 (1988); accord Earl M. Jorgensen Co. v. Mark Const. Inc., 56 Haw. 466, 476, 540 P.2d 978, 985 (1975).

No additional facts are required to consider whether Marxen can be held liable under HRS § 378-2(a)(3). Resolution of the issue will not affect any findings of the trial court. Earl M. Jorgensen Co., 56 Haw. at 476, 530 P.2d at 985 ("The consideration of this issue raised for the first time on appeal will not affect the integrity of any findings . . . by the trial court[.]"). Finally, the question is one of great public import inasmuch as

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Hawaiʻi 46, 56, 292 P.3d 1276, 1286 (2013) (holding that summary judgment is appropriate only if "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law") (internal quotation marks omitted); accord French v. Hawaiʻi Pizza Hut, Inc., 105 Hawaiʻi 462, 470-72, 99 P.3d 1046, 1054-56 (2004).

A.

In Lales' first cause of action, he alleges that he was subject to harassment and physical threats by Marxen, Martinez, and other co-workers. Lales asserted in his declaration that Marxen had told Martinez to "beat his [] French ass," and that Martinez subsequently repeatedly harassed Lales. Viewed in the light most favorable to Lales, Marxen's statement could be viewed as "inciting," i.e., "urging on" or "spurring on" or "abetting," i.e., "seconding or encouraging" the discriminatory acts of Martinez, especially in light of Marxen's position of authority as supervisor. See Schefke, 96 Hawaiʻi at 417, 442, 32 P.3d at 61, 86 (holding that a defendant "incited the doing of a discriminatory practice" by telling another defendant that the plaintiff should not receive a Christmas bonus because the

[22](...continued)
it requires interpretation of the applicability of HRS § 378-2(a)(3). Cf. Earl M. Jorgensen Co., 56 Haw. at 476, 530 P.2d at 985 (applying plain error in a civil case because, inter alia, "[t]he matter is one of first impression in this jurisdiction, and calls for the interpretation and elucidation of HRS § 490:2-719(2)").

plaintiff "'stabbed him in the back'" by filing a discrimination complaint).

Furthermore, in his declaration, Lales explained that Marxen took no action in response to his complaints regarding the harassment of Martinez and other employees. Viewed in the light most favorable to Lales, Marxen's refusal to put a stop to Martinez's discriminatory remarks following Lales' complaints could be viewed as "aiding" or "abetting" Martinez's harassment by "rendering assistance" inasmuch as Marxen had the authority to halt Martinez's actions but did not do so.

B.

In his second cause of action, Lales alleges that the defendant's discriminatory acts and his ultimate discharge were in retaliation for his complaints. In Schefke, this court explained that "a retaliation claim under HRS § 378-2(2) is subject to [a] three-part test[.]" 96 Hawaiʻi at 426, 32 P.3d at 70. First, "the plaintiff must establish a prima facie case of such retaliation by demonstrating that" he or she, inter alia, "has opposed any practice forbidden by [HRS Chapter 378]." Second, "if the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for the adverse employment action." Id. Third, "if the defendant articulates such a reason, the burden shifts back to the plaintiff to show evidence

demonstrating that the reason given by the defendant is pretextual." Id.

Here, Lales' declaration established that he "opposed" the harassment prohibited by HRS § 378-2(a)(1) by complaining to Marxen and others. Although Marxen provided non-discriminatory reasons for the termination, Lales presented evidence that the reasons given by Marxen were pretextual inasmuch as Lales asserted that he did not have the lowest sales when he was terminated, did not know of anyone being terminated for missing sales meetings, and did not lie to a customer. Hence, Lales met his burden of establishing a prima facie case of retaliation under HRS § 378-2(a)(2).

In his deposition, Marxen explained that although he did not personally make the decision to fire Lales, he ultimately approved that decision. Based on the foregoing, Marxen's approval of Lales' termination could be construed as "aiding" or "abetting" the discriminatory act of firing Lales in retaliation for Lales' complaints. See Schefke, 96 Hawaiʻi at 442, 32 P.3d at 86 ("[U]nder the broad language of HRS § 378-2[(a)](3), [a defendant] can be liable even if he was 'offering advice, not making any decision.'"). Moreover, the firing of Lales in retaliation for his complaints could be viewed as "aiding" or "abetting" prior discrimination because that action served to protect those who had previously discriminated against Lales.

Marxen acknowledged that he played a role in firing Lales. Marxen, then, could be said to have aided or abetted the discriminatory acts. Lales also stated at oral argument that HCRC § 378-2(a)(3) could apply, because "there were more than two people making the slurs" against Lales.

C.

Viewing the evidence in the light most favorable to Lales, issues of material fact exist on Lales' first and second causes of action regarding whether Marxen is subject to liability based on HRS § 378-2(a)(3). Hence, summary judgment was wrongly granted, and the court's order granting summary judgment as to Lales' first and second causes of action should be vacated.

III.

However, the ICA incorrectly determined that Marxen was individually liable to Lales under HRS § 378-2(a)(1). The definition of "employer" in HRS § 378-1 plainly does not include individual agents or employees, such as Marxen. Marxen, as a supervisory agent or employee, thus cannot be held individually liable under HRS § 378-2(a)(1), which applies only to "employers." This construction is consistent with (1) the ordinary and usual meaning of the words employed, (2) other provisions of Chapter 378, such as HRS § 378-2(a)(3), and the overall scheme of Chapter 378, and (3) federal interpretations of the analogous provision in Title VII.

A.

To reiterate, HRS § 378-1 defines an "employer" as "any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees." (Emphasis added.) HRS § 1-14 commands that "[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." In HRS § 378-1, the terms employer, agent, and employee are all used in the same sentence.

The word "agent" generally means "one who is authorized to act for or in place of another." Merriam-Webster's Collegiate Dictionary at 22 (9th ed. 1993); accord Black's Law Dictionary 72. The plain meaning of the word "agent" is an individual who is not an employer, but instead someone who acts for a principal such as an employer and is therefore subject to the direction of an employer or other principal. Thus, giving the term agent its "usual signification," "without attending so much to the literal and strictly grammatical construction of the words," agent must be interpreted in the HRS § 378-1 to mean an entity other than an "employer."[23] This construction is confirmed in reading the other provisions in HRS Chapter 378, in pari materia, with the

[23] Thus, "employer" cannot be defined to include an employer's agent.

definition in HRS § 378-1. See discussion infra. Agent, then, would not subsumed within the term "employer."[24]

An "employee" is "[a] person who works in the service of another under an express or implied contract of hire, under which the employer has the right to control the details of work performance." Black's Law Dictionary 602 (9th ed. 2009). Obviously, an employee then is not an employer. Under the plain meaning of both terms, and in the context of HRS § 378-1, neither an "agent" nor an "employee" can be an "employer."

If "employee" and "agent" were synonymous there would be no need to use both terms. As used in HRS § 378-1, an agent is not an employee (supervisory or otherwise).[25] When two words are used in "close juxtaposition," it may be "inferred that the legislature realized the difference in meaning[s]." Cf. In re

[24] If the term "agent" were construed as synonymous with employer, "agent" would not be given its "usual signification." As explained by Judge Mollway, the statute interpreted literally would provide that an "agent" would be an "employer" only if the agent "had one or more employees." Lum v. Kauai County Council, 2007 WL 3408003, at *11 (D. Haw. Nov. 9, 2007) (Mollway, J.). Judge Mollway's interpretation was affirmed by the Ninth Circuit. Lum v. Kauai County Council, 358 Fed. Appx. 860, 862 (9th Cir. Dec. 1, 2009) (unpublished) ("We agree with the district court's analysis of the Hawaiʻi statute's language[.]"). The legislative intent is also to be determined from the language used by the legislature. See Hill v. Inouye, 90 Hawaiʻi 76, 976 P.2d 390, 397 (1998) ("The starting point in statutory construction is to determine the legislative intent from the language of the statute itself." (internal quotation marks omitted)). Hence, HRS § 378-1 does not "expressly state" that an agent may be an employer.

[25] The plain language of HAR § 12-46-175(d) provides that an employer is liable for the acts of both its agents and supervisory employees. The HCRC would not have used both terms unless it recognized that the definition of "agent" is different from the definition of "supervisory employee." Additionally, as explained supra, if "agent" and "employee" were synonymous, it would not have been necessary for the legislature to use both terms in HRS § 378-1.

Fasi, 63 Haw. 624, 627, 634 P.2d 98, 101 (1981) (holding that "where 'shall' and 'may' are used in close juxtaposition, we infer that the legislature realized the difference in meaning and intended that the verbs used should carry with them their ordinary meanings").

Thus, in using the term agent in the same sentence as employee, it is manifest that the legislature did not intend for an agent to be construed as synonymous with or inclusive of the term employee (or supervisory employee) in HRS § 378-1. In retaining the independent significance of the terms agent and employee, the legislature indicated that both agents and employees act under the employer's direction. Therefore, the term agent as used in HRS § 378-1 is not intended to be synonymous with the term employee.

Accordingly, the term "employer," which indicates who may be sued in HRS § 378-2 for discriminatory practices, would not include an agent, such as supervisory employees. Agents and supervisory employees therefore would not be subject to personal liability under HRS § 378-2.[26] For similar reasons, it seems indisputable that an employee, supervisory or not, is not an "employer" and therefore would not fall within the term "employer" in HRS § 378-2(a)(1) so as to be subject to individual

[26] Thus, an employer's "agent" may not be held individually liable for his or her sole discriminatory conduct under HRS § 378-2(a)(1).

liability under that section.

B.

This court has also explained that "each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole." Kam v. Noh, 70 Haw. 321, 326, 770 P.2d 414, 418 (1989). Interpreting "agent" as incorporating the principles of respondeat superior is consistent with the overall scheme of HRS Chapter 378. In HRS § 378-2(a)(3), the legislature subjected to liability "any person, whether an employer, employee, or not," who "aid[ed], abet[ted], incite[d], compel[led], or coerce[d] the doing of any of the discriminatory practices forbidden by this part." (Emphasis added.) The other provisions of HRS § 378-2 expressly apply only to employers or entities such as labor organizations. The legislature's specific inclusion of the term "employees" as being subject to liability only under HRS § 378-2(a)(3) confirms that the legislature did not intend to subject employees to liability under the other provisions of HRS § 378-2, including HRS § 378-2(a)(1), that apply to an "employer."

Inasmuch as no other provision in HRS § 378-2 refers to employees, it is evident that under HRS § 378-2 an employee is subject to liability only with respect to the acts described in HRS § 378-2(a)(3). The lack of any other reference to an

employee means that employees, including supervisory employees, are not subject to the other provisions of HRS § 378-2, such as HRS § 378-2(a)(1), which specifically refers only to an employer. The text of HRS § 378-2 indicates that, when the legislature meant to subject individual employees to liability under HRS Chapter 378, it did so explicitly. See also Luzon v. Atlas Ins. Agency, Inc., 284 F. Supp. 2d 1261, 1265 n.1 (D. Haw. 2003) (Mollway, J.)("[T]he legislature clearly knew how to include employees within a statute's scope[.]"); White v. Pacific Media Group, Inc., 322 F. Supp. 2d 1101, 1114 (D. Haw. 2004) (Ezra, J.).

Also, under HRS § 378-6,[27] "every employer" must "make and keep records" that are relevant to unlawful discriminatory practices. It appears unlikely that the legislature intended individual supervisors to be responsible for keeping employment

[27] HRS § 378-6 (1993) provides as follows:

> (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.

(Emphases added).

records, which would be the effect of treating individual "agents" or supervisory employees as "employers." See Chatman v. Gentle Dental Center of Waltham, 973 F. Supp. 228, 238 (D. Mass. 1997) (interpreting similar provisions of Title VII and noting that "[i]f 'employer' were read consistently throughout the statute to include supervisors as agents of the employer, it would lead to the problematic result that individual supervisors would also shoulder these burdens" and that "[i]t is unlikely that Congress intended to impose such administrative duties on individual supervisors").

Furthermore, it is a fundamental principle of statutory construction that "[c]ourts are bound to give effect to all parts of a statute, and . . . no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." Dejetley v. Kahoʻohalahala, 122 Hawaiʻi 251, 264, 226 P.3d 421, 434 (2010). To repeat, HRS § 378-2(a)(3) allows suit against "any person, whether an employer, employee, or not . . . ." (Emphasis added.) Were employees, such as supervisory employees, encompassed in the definition of employer, then the word "employee" in HRS § 378-2(a)(3) would be superfluous inasmuch as an employee would have already been covered by the reference to "employer" in that provision. Hence, construing the term employer as meaning

supervisory employee, would render the term "employee" in HRS § 378-2(a)(3) meaningless.[28]

C.

Finally, this court has held that "the federal courts' interpretation of Title VII [of the Federal Civil Rights Act of 1964] is useful in construing Hawaiʻi's employment discrimination law." Sam Teague, Ltd. v. Hawaiʻi Civil Rights Comm'n, 89 Hawaiʻi 269, 281, 971 P.2d 1104, 1116 (1999). This is because "Hawaiʻi's employment discrimination law was enacted to provide victims of employment discrimination the same remedies, under state law, as those provided by Title VII[.]" Id. (citing H. Stand. Comm. Rep. No. 549, in 1981 House Journal, at 1166; S. Stand. Comm. Rep. No. 1109, in 1981 Senate Journal, at 1363).

Title VII's definition of "employer" is substantially similar to the definition provided in HRS § 378-1. Pursuant to 42 U.S.C. §2000e, an "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." (Emphasis added.) Nearly every federal circuit has concluded that the word "agent" is "an unremarkable expression of respondeat superior -- that discriminatory

[28] Insofar as employer is construed to include "agent," the term "or other" would to that extent also be nullified.

personnel actions taken by an employer's agent may create liability for the employer." Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994); (internal quotation marks omitted)(emphasis added); see also Lissau v. Southern Food Service, Inc, 159 F.3d 177, 181 (4th Cir. 1998) (identifying decisions from the second, third, fifth, seventh, eighth, tenth and eleventh circuits, and the D.C. circuit, which concluded that individual supervisors are not employers under Title VII); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993).[29] Thus, the federal courts' interpretations of "employer" in Title VII also indicate that "agent" in HRS § 378-1 should be read as imposing liability on an employer under the doctrine of respondeat superior, and not as allowing suits against individual employees as agents.

IV.

On the other hand, the ICA concluded that Marxen is subject to liability under HRS § 378-2(a)(1) because, as an

[29] Miller concluded that "it is inconceivable that Congress intended to allow civil liability to run against individual employees" because of "the statutory scheme" of Title VII. 991 F.3d at 587 (emphasis added). Miller cited the inapplicability of Title VII to small businesses as one aspect of the statutory scheme that was inconsistent with including individual agents in the definition of employer. Id.

Similarly, as was explained in greater detail supra, defining "employer" to include "agents" is incongruous with several aspects of HRS Chapter 378. Defining an "employer" as including a supervisory employee would nullify the terms "employee" or "other" in HRS § 378-2(a)(3) and would be inconsistent with the provisions of HRS Chapter 378 subjecting employers to record-keeping requirements.

"agent," he falls within the statutory definition of "employer" in HRS § 378-1.

A.

The ICA first contended that "[a] plain reading of the statutory provisions supports the conclusion that an individual employee, who is an agent of an employer, can be held individually liable as an 'employer.'" Lales, 2012 WL 1624013, at *10. However, in the grammatical structure of HRS § 378-1 an "agent" cannot be reasonably construed as an "employer," applying well recognized canons of statutory construction, see discussion supra, and federal authority in which we generally join. See, e.g., Lissau, 159 F.3d at 181.

B.

Second, the ICA maintained that the extension of "aider and abettor liability" to any person also suggests that agents are subject to liability as employers. Lales, 2012 WL 1624013, at *11. The ICA argued that it would be inconsistent to allow individuals to be sued for aiding and abetting under HRS § 378-2(a)(3), and yet "'immunize[30] the individual agents'" who violate HRS § 328-2(a)(1). Id. (quoting Sherez v. State of

[30] Reading HRS § 378-1 to exclude suits against individual agents "does not actually 'immunize' individual employees," because they "remain liable for wrongdoing under other laws that they may have violated." Maizner v. Hawaiʻi, 405 F. Supp. 2d 1225, 1237 (D. Haw. 2005). Thus, finding that individual agents are not "employers under HRS § 378-1 is no more than a determination that "[HRS Chapter 378] does not extend to them." Id.

Hawaiʻi Dept. of Educ., 396 F. Supp. 2d 1138, 1147 (D. Haw. 2005) (Seabright, J.)).[31] However, the statutory framework plainly confines the liability of individuals to circumstances where those individuals aid or abet discrimination. HRS § 378-2(a)(3). Contrary to the ICA's position, the legislature's intent was clearly to limit individual employee liability exposure to circumstances where an individual engaged in discriminatory acts in concert with others.[32] On its face, HRS 378-2 only imposes liability on individual employees who aid and abet discrimination. As noted before, HRS § 378-2(a)(3) applies to "any person, whether an employer, employee, or not," while the remaining sections of HRS § 378-2 mention only employers or similar entities and not an "employee, or [those] not" an employer or employee.

[31] Sherez was disagreed with by the Ninth Circuit in Lum, 358 Fed. Appx. at 862. The arguments raised in Sherez coincide with those adopted by the ICA herein.

[32] It has been concluded that it is not illogical to impose liability on individuals who aid and abet discrimination, but to refrain from imposing liability under HRS Chapter 378 when those individuals actually perform a discriminatory act. An employee is already subject to the regulation of his employer. Cf. Miller, 991 F.2d at 588 ("An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief.") When an employee "aids or abets" discrimination two or more employees are acting together, reflecting the "systematic imbalance of power" that exists between employer and employee. Maizner, 405 F. Supp. 2d at 1237. Thus, it is apparent that HRS § 378-2(a)(3) is aimed at people acting in concert to perpetuate discrimination, and not ordinary workplace activity requiring focused regulation. See id. Contrastingly, an isolated act of discrimination "does not necessarily call into play the [same] imbalance of power" Id. Hence, it has been held that the legislature may have found it unnecessary to extend the remainder of HRS § 378-2 to single individuals acting independently. Id.

The ICA essentially asserts that all employees who are subject to liability as an "aider and abettor" must also be subject to individual liability.[33] See Lales, 2012 WL 1624013, at *11. Again, in treating supervisory employees as encompassed by the term "employer" under HRS § 378-1, the ICA's reasoning would necessarily invalidate the term "employee" in HRS § 378-2(a)(3) as superfluous. The ICA's construction thus conflicts with well-established canons of statutory construction, by including all employees within the definition of "employer." This would mean that "employee" must be read out of the statute.

C.

Third, the ICA contends that "federal precedents that had construed Title VII as not subjecting employees to individual liability should not be followed in construing HRS Chapter 378," because Title VII imposes liability on employers with fifteen or more employees, but HRS §§ 378-1 and 378-2 impose liability on

[33] The ICA reasons that supervisory employees must be subject to individual liability as "employers" because it would be inconsistent to subject supervisory employees to liability for aiding and abetting discrimination but not for actually committing discriminatory acts. See Lales, 2012 WL 1624013, at *11.

This argument would apply with equal force to non-supervisory employees. Under the ICA's reasoning, it similarly would be inconsistent for a non-supervisory employee to be subject to liability only as an "aider and abettor." Hence, the ICA's analysis would subject all employees, whether supervisory or not, to individual liability as employers. See id. at *10 ("A plain reading of the statutory provisions supports the conclusion that an individual employee, who is an agent of an employer, can be held individually liable as an "employer." (emphases added)). As explained supra, such an interpretation would render the term "employee" in HRS § 378-2(a)(3) superfluous and conflict with the ordinary significance of the term "employer" as not including an "employee."

employers with one or more employees. Lales, 2012 WL 1624013, at *11.

As an initial matter, the legislature's purpose in defining "employer" as including "any person" with "one or more employees" in a state context under HRS § 378-1 is not evident but would not conflict with Congress's decision to exclude employers with less than 15 employees as a matter of national policy. On the face of it, the size of the employer indicates the legislative body's policy decision as to the scope of the law, but nothing about whether the question of individual agents should be held liable as employers was even considered. Nothing in the legislative history evinces the legislature's purpose in defining "employer" more expansively than in Title VII. Thus, the size of the employer provides no basis for subjecting individual agents to liability under HRS Chapter 378.

Moreover, the distinction between the definitions of "employer" in Title VII and HRS Chapter 378 is not a "relevant detail" that renders federal precedent interpreting Title VII unpersuasive.[34] The federal courts point to Title VII's definition of "employer" as "any person with fifteen or more employees as one reason for interpreting the reference to "agent"

[34] Sherez, for example notes that some federal cases "view[] the fifteen or more employee requirement in Title VII critical in determining Congressional intent with respect to individual liability." 396 F. Supp. 2d at 1147-48. The ICA's reliance on this proposition is rebutted supra.

as imposing liability on employers under respondeat superior. The federal courts reason, inter alia, that it would be incongruous to apply Title VII to supervisory employees but not to small businesses, because "[i]f Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees." Miller, 991 F.2d at 587. Therefore "[t]he statutory scheme itself indicates that Congress did not intend to impose individual liability on employees." Id.

Similarly, the statutory scheme of HRS Chapter 378-1 is not consistent with holding individual agents liable as "employers," as the ICA would contend. As explained supra, the canons of statutory construction indicate employer cannot be read reasonably as including an agent or supervisory employee. Moreover, the text of HRS § 378-2(a)(3) demonstrates that the legislature did not understand the definition of "employers" to include individuals inasmuch as when the legislature intended to impose liability on individuals, it did so explicitly by extending liability to "employees." See HRS § 378-2(a)(3). As noted, reading "supervisory employee" as incorporated in the term "employer" would nullify the terms "employee" or "other" in HRS § 378-2(a)(3). See also Chatman, 973 F. Supp. at 238 (holding that imposing individual liability on supervisory agents under Title

VII would be inconsistent with provisions subjecting "employers" to record keeping requirements).

D.

Fourth, the ICA contends that Steinberg v. Hoshijo, 88 Hawaiʻi 10, 960 P.2d 1218 (1998), and Sam Teague support the conclusion that the definition of employer includes supervisory employees so as to subject them individually to the liability imposed on "employers" under HRS § 378-2(a)(1). Lales, 2012 WL 1624013, at *12. Manifestly, neither case supports this conclusion.

In Steinberg, the plaintiff brought suit under HRS § 378-2(a)(1)(A) for "unwelcome sexual conduct [that] created an intimidating, hostile, and offensive work environment." 88 Hawaiʻi at 11, 960 P.2d at 1220. The defendant was "in charge of the Clinic [where the plaintiff worked,] and [the] supervis[or] of the medical assistants and receptionists in treating patients." Id. In a footnote, this court noted that "[t]he parties do not dispute that [the defendant] was an agent of the Clinic and therefore an 'employer' as defined by HRS § 378-1." Id. at 18 n.10, 960 P.2d at 1226 n.10. That footnote did not purport to decide whether HRS § 378-1 could subject individuals to liability as "employers" but merely noted the lack of a dispute on the issue. Cf. Mukaida v. Hawaiʻi, 159 F. Supp. 2d 1211, 1226 (D. Haw. 2001) (Mollway, J.) ("[T]he very reference in

Steinberg to the lack of a dispute raised by the parties might suggest that the court would have analyzed the issue and might have reached a different conclusion had the issue been raised."). Thus, Steinberg does not hold that individual agents or employees are included in the definition of employer under HRS § 378-1.

In Sam Teague, the plaintiff amended her complaint before the HCRC to include the president of her company in his individual capacity. 89 Hawaiʻi at 275, 971 P.2d at 1110. The HCRC approved the amendment, which was subsequently challenged by the defendant. Id. at 276, 971 P.2d at 1111. This court noted that although no reason was necessary, it appeared that the HCRC added the defendant to the complaint once it was discovered that he was the individual responsible for the discriminatory conduct. Id.

It was further stated that "[b]ecause HRS § 378-1 defines 'employer' to include agents of persons having one or more employees, the [HCRC] added [the defendant] when it discovered that [the defendant] was an agent of [the employer]." Id. at 276-77, 971 P.2d at 1111-12. Thus, Sam Teague observed that the HCRC interpreted the definition of employer in HRS § 378-1 as imposing liability on individual agents. However, that is the very issue here. Nothing in Sam Teague indicates the definition of employer in HRS § 378-1 was disputed by the parties. Hence, Sam Teague also did not resolve whether an agent

or employee may be sued as an employer under HRS § 378-2.[35] In sum, neither Steinberg nor Sam Teague expressly or directly decided the question of whether a supervisory employee was an employer under HRS § 378-2.

Relatedly, contrary to the position of Lales, Schefke did not hold that individual employees may be held liable as "employers." In Schefke, the plaintiff argued that the trial court erred in granting directed verdicts on behalf of two individual defendants, the president and co-owner of the company that employed the plaintiff, and another co-owner of the company, on a retaliation claim.[36] 96 Hawaiʻi at 441, 32 P.3d at 85. As to the president, this court explained that the facts "could support a finding of HRS § 378-2[(a)](3) violations[,]" related to aiding, abetting, inciting, compelling, or coercing the doing of prohibited practices. Id. at 442, 32 P.3d at 86 (emphasis added). Similarly, as to the other co-owner of the company, this court explained that he "could be said to have at least incited the doing of the discriminatory practice forbidden by HRS § 378-

[35] Moreover, in Sam Teague the defendant was the "President and sole stockholder" of a two person business. 89 Haw. at 272, 971 P.2d at 1107. Thus, the defendant may have qualified as an "employer" with one employee. See HRS § 378-1.

[36] The plaintiff also apparently maintained that the defendants were individually liable on a compensation discrimination claim. See Schefke, 96 Hawaiʻi at 417, 32 P.2d at 61. However, this court affirmed the trial court's decision granting a directed verdict on the compensation discrimination claim on other grounds. Id. at 85, 32 P.3d at 441. Thus, this court explained that "the [only] issue remaining is [the defendant's] individual liability with respect to the retaliation claim." Id.

2[(a)](2), in violation of HRS § 378-2[a](3)." Id. (emphasis added). Thus, this court's holding in Schefke was premised on the conclusion that, based on the facts, the president and owner could be found to be liable as "aiders and abettors," under HRS § 378-2(a)(3), which, as explained supra, does provide for individual liability.[37] Thus, Schefke does not support Lales' position that Marxen may be individually liable as an "employer."

V.

A.

With all due respect to the HCRC, I believe the imposition of strict liability on an employer for acts of its supervisory employees pursuant to HAR § 12-46-175(d) exceeds the scope of authority given to the HCRC under Chapter 378. This is because strict liability extends beyond the doctrine of respondeat superior inhering in HRS § 378-2 and liability principles in Section 219 of the Second Restatement. Cf. Faragher, 524 U.S. at 791-92; Meritor Sav. Bank, FSB v. Vinson, 447 U.S. 57, 72 (1986). Consequently, HAR § 12-46-175(d) must be deemed invalid.

JN filed a Reply to the HCRC's amicus brief arguing that HAR § 12-46-175(d) exceeds the scope of the HCRC's authority because "it makes employers liable for the conduct of supervisors

[37] In any event, inasmuch as the defendants were both co-owners of the company that employed plaintiff, they may have been "employers" under HRS § 378-1.

regardless of whether the supervisors functioned as agents of the employer, which is an expansion of the statute." Similarly, several amicus briefs filed before the ICA urged that HAR § 12-46-175(d) was void because it exceeded the scope of HCRC's authority. Briefs by amici curiae the Chamber of Commerce of Hawaiʻi, the Hawaiʻi Employers Council, and the Hawaiʻi Automobile Dealers Association all argued that HAR § 12-46-175(d) was inconsistent with the legislature's intent in enacting HRS Chapter 378 and therefore should be overruled.

All three briefs contend (1) that the use of the word "agent" in the definition of employer in HRS § 378-1 only indicates a legislative intent to incorporate agency principles into HRS chapter 378, (2) that under agency law, an employer is vicariously liable for the acts of its employees only if those acts were committed in the scope of their employment, and (3) HAR § 12-46-175(d) imposes strict liability regardless of whether the employee acted within the scope of employment.

In response, the HCRC asserted that HAR § 12-46-175(d) is consistent with the agency principles elucidated in the Second Restatement. The HCRC points out that "[a]fter an extensive discussion of agency law" in Faragher, the Supreme Court "concluded [that] 'in sum, there are good reasons for vicarious

liability for misuse of supervisory authority.'" (Quoting Faragher, 524 U.S. at 803.)

B.

As discussed supra, by employing the terms "agent" and "employees" in the definition of "employer" the legislature signified that both agents and employees act under the employer's direction. Consequently, the terms used in the definition of "employer" implicate the doctrine of respondeat superior.[38] Cf. Meritor, 447 U.S. at 72 ("Congress' decision to define 'employer' to include any 'agent' of an employer, evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.") (internal citations omitted). That doctrine, then, is embedded in the relationship between an employer and its agents and employees as set forth in HRS § 378-1.

As explained supra, by using the word "agent" in the definition of "employer" in HRS § 378-1, the legislature indicated that the doctrine of respondeat superior would determine the scope of an employer's liability for the discriminatory acts of its agents or employees. Under that

[38] In contrast, the language of HRS § 378-1 does suggest that the legislature intended to incorporate the law of agency in HRS Chapter 378. As explained supra, this conclusion is consistent the federal courts' interpretation of Title VII inasmuch as the federal courts conclude that Congress' use of the term "agent" in the definition of "employer" in Title VII is "an unremarkable expression of respondeat superior." Birkbeck, 30 F.3d at 510.

doctrine, an employer may be vicariously liable for the discriminatory acts of both its agents and employees.

VI.

A.

An employer is vicariously liable for the torts of its agents or employees committed in the scope of their employment. State v. Hoshijo ex rel. White (White), 102 Hawaiʻi 307, 319, 76 P.3d 550, 562 (2003) ("'[G]enerally, a principal can only be held vicariously liable for the actions of an agent under the theory of respondeat superior.'"). In White, this court cited the Second Restatement § 219, which indicated that a principal may be subject to liability for the acts of his agents or employees if the agents committed a tort "while acting in the scope of their employment." Second Restatement § 219(1).[39]

As explained in White, conduct is within the scope of employment if "(a) it is of the kind that he [or she] is employed to perform, (b) it occurs substantially within the authorized time and space limits, and (c) it is actuated at least in part, by a purpose to serve the master[.]" White, 102 Hawaiʻi at 319-320, 76 P.3d at 562-63 (quoting Second Restatement § 228). Further, an act may fall within the scope of employment even if it is forbidden by the employer. Id. at 320, 76 P.3d at 563

[39] To reiterate, section 219(1) of the Second Restatement provides that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."

("[A]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment.") (quoting Second Restatement § 230).

Racial or sexual harassment usually does not fall within "the scope of employment" because it is not "actuated, at least in part, by a purpose to serve the master." In Ellerth, the Supreme Court stated that "the harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer." 524 U.S. at 757; see also Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422, abrogated on other grounds by Patterson v. McLean Credit Union, 491 U.S. 164 (1989) ("It would be the rare case where racial harassment against a co-worker could be thought by the author of the harassment to help the employer's business."). However, "[t]here are instances . . . where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer." Ellerth, 524 U.S. at 757.

In White, for example, the defendant, a student manager of the University of Hawaiʻi basketball team shouted racial slurs at a fan who was criticizing the performance of the team. White, 102 Hawaiʻi at 311, 76 P.3d at 554. This court held that "it might be concluded" that the defendant acted with the purpose of benefitting the University of Hawaiʻi because the fan's heckling "might [have been] reasonably perceived as interfering with the

concentration or morale of the coaches or players." Id. at 320, 76 P.3d at 563.

B.

Section 219(2) of the Second Restatement also provides that under certain circumstances an employer may be subject to vicarious liability for the acts of its employees even if such acts fall outside the scope of employment:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> © the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Second Restatement § 219 (emphases added). Consequently, under section 219(2)(d), an employer generally will be found vicariously liable for the racial or sexual harassment of his supervisory employees, even if the harassment is outside the scope of employment. See Faragher, 524 U.S. at 802-803. This is because such harassment will almost always be aided "by the existence of the agency relation." Id. "The agency relationship affords contact with an employee subjected to a supervisor's [] harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior." Id. at 803.

Thus, "[w]hen a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be

difficult to offer such responses to a supervisor[.]" Id. "[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." Meritor, 477 U.S. at 77 (Marshall, J., concurring) (emphasis added). Hence, "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and, in this sense, a supervisor always is aided by the agency relation," although exceptions to this rule exist. Ellerth, 524 U.S. at 763 (emphasis added).[40]

In Ellerth, the Supreme Court explained that the terms "quid pro quo" and "hostile work environment . . . illustrate the distinction between cases involving a threat which was carried out [i.e., a tangible employment action] and offensive conduct in general." Ellerth, 524 U.S. at 742. However, an employer may be aided by the existence of the agency relation regardless of whether harassment culminates in a tangible employment action. As explained by Justice Marshall in his concurrence in Meritor, "[a] supervisor's responsibilities do not begin and end with the power to hire, fire and discipline employees" but instead "a supervisor is charged with the day-to-day supervision of the work

[40] The Supreme Court recently reaffirmed the reasoning of Ellerth on this point in Vance v. Ball State University, 133 S.Ct. 2434, 2442 (2013). Thus Vance supports the conclusion that under the Second Restatement, exceptions exist to an employer's liability for the conduct of its supervisory employees. Vance, 133 S.Ct. at 2442.

environment and with ensuring a safe, productive workplace." Meritor, 477 U.S. at 77 (Marshall, J., concurring).

Accordingly, as indicated by Justice Marshall, "[t]here is no reason why abuse of the latter authority should have different consequences than abuse of the former," because "[i]n both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong." Id. (emphasis added). Hence, it is apparent that under section 219(2)(d) of the Second Restatement, an employer will generally be liable for the harassment by his supervisory employees. See Faragher, 524 U.S. at 804 (noting that there are "good reasons" for imposing vicarious liability on supervisors).

However, an employer is not automatically vicariously liable under section 219(2)(d) of the Second Restatement because "there are acts of harassment a supervisor might commit" where "the supervisor's status makes little difference." Ellerth, 524 U.S. at 763. For example, where "a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find strict liability." Meritor, 477 U.S. at 77 (Marshall, J., concurring).

Under section 219 of Second Restatement, therefore, an employer would not be liable automatically for the racial or sexual harassment of his supervisory employees. Rather, it must be demonstrated that the supervisor was acting within the scope

of his employment or that he was aided in the harassment by his authority. Second Restatement § 219.[41] This can only be decided on a case by case basis.

VII.

A.

HAR § 12-46-175(d), however, disregards agency principles in determining when an employer may be vicariously liable for the harassment of its supervisory employees.[42] Nothing in HAR § 12-46-175(d) references the Second Restatement or the agency principles discussed supra. Instead, as noted, HAR § 12-46-175(d) provides that "[a]n employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of ancestry regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." (Emphases added.)

[41] The HCRC cites the concurring and dissenting opinion in Gonsalves v. Nissan Motor Corp., 100 Hawaiʻi 149, 58 P.3d 1196 (2002), which stated that "[a]s explained by the HCRC, within the context of supervisor harassment, absolute liability on the employer is imposed." Id. at 181, 58 P.3d at 1228 (Acoba, J., concurring and dissenting) (citing HAR § 12-46-109(d)). In Gonsalves, however, liability was not at issue. Instead, the question was whether a related provision, which the HCRC interpreted as requiring an employer to take "immediate and appropriate [corrective] action," rendered a promise not to fire a supervisor who was accused of sexual harassment contrary to public policy. Id. at 181-82, 58 P.3dc at 1228-29. Thus, the cited language repeated a rule as to which there was no disagreement.

[42] Pursuant to HAR § 12-46-175(e), an employer is liable for harassment between fellow employees if "the employer, its agent, or [its] supervisory employee knows or should have known of the conduct."

By generally providing that an employer "is responsible" for the acts of its agents and supervisory employees with respect to harassment without any qualifications, the regulation plainly holds employers strictly liable. Strict liability is defined as "liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe." Black's Law Dictionary 998. Here, the employer is strictly liable for the acts of its employers inasmuch as it is liable for the harm caused irrespective of its own "actual negligence or intent to harm" and "regardless of whether the employer knew or should have known." As explained in greater detail infra, in its amicus briefs the HCRC characterized HAR § 12-46-175(d) as imposing strict liability on employers for the actions of their supervisors.

Moreover, the plain language of the rule disregards the qualification in the Second Restatement that an employer is vicariously liable for the acts of its supervisory employee only if the supervisor's acts occurred in the scope of employment or were aided by the agency relation with the employer. Under the Restatement approach, "[a] supervisor is [recognized as] charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace." Meritor, 477 U.S. at 76 (Marshall, J., concurring). Thus, in "acting with the authority

of the company," the supervisor is "aided in the agency relation" with the employer. Ellerth, 524 U.S. at 762.

In the absence of a tangible employment action, a supervisor's "power and authority invests his or her harassing conduct with a particular threatening character." Ellerth, 524 U.S. at 763; accord Meritor, 477 U.S. at 76-77 (Marshall, J., concurring) ("[I]t is the authority vested in the supervisor by the employer that enables him to commit the wrong[.]"). However, HAR § 12-46-175(d) renders consideration of whether the supervisor was authorized or even forbidden to commit the harassment complained of irrelevant. Hence, the vicarious liability imposed by HAR § 12-46-175(d) on the employer extends even beyond the bounds drawn by Section 219 of the Second Restatement and recognized in Faragher.

B.

It has been argued that the imposition of absolute liability on employers for the acts of their supervisory employees may be unfair, inasmuch as it may be unreasonable or impractical for employers to meet this standard. First, it may be implausible to expect an employer to be aware of all forms of harassment that occur within the workplace. Cf. Jansen v. Packaging Corp. of America, 123 F.3d 490, 511 (7th Cir. 1997) (Posner, J., concurring and dissenting) (noting "the infeasibility of an employer's stamping out this sort of

harassment without going to extreme expense and greatly curtailing the privacy of its employees, as by putting them under continuous video surveillance"). Second, even careful selection and training of employees may not ensure that an employer's supervisors will not commit acts of harassment. Cf. id. at 544 (Coffey, J., concurring and dissenting) (noting that "[o]nly with great difficulty (if at all) can an employer measure and detect . . . the thoughts, feelings, and behavior of its employees or potential employees").

In any event, the legislature clearly intended that the HCRC would follow the law of agency in imposing vicarious liability on employers for the acts of their employees. HAR § 12-46-175(d), however, runs well beyond the boundaries of agency law. This expansion of vicarious liability renders employers liable for the tortious actions of their employees that may not have been aided by the supervisory status of the offending employees. It cannot be concluded that the legislature intended such an extension of liability without a clear and manifest command. In the absence of such a mandate HAR § 12-46-175(d) exceeds the scope of HRS § 378-2, the statutory enactment it was intended to implement. Because "an administrative rule cannot contradict or conflict with the statute it attempts to implement," and a rule conflicts with the statute if it is more expansive than the statute itself, see Agsalud v. Blalack, 67

Haw. 588, 591, 699 P.2d 17, 19 (1985), it must be concluded that HAR § 12-46-175(d) is invalid.

C.

Contrary to the text of HAR § 12-46-175(d) and the construction placed on it by the HCRC, the majority intimates that "HAR § 12-46-175(d) is consistent with the theory of agency set forth in the Second Restatement." Majority opinion at 54 n.19. The majority infers that, based on the last sentence of HAR § 12-46-175(d), that the HCRC will examine the circumstances to determine "whether an individual acts in a supervisory or agency capacity," and "whether the supervisory employee was aided by the existence of the agency relation" before strict liability will be imposed. Majority opinion at 54 n.19 (internal quotation marks and punctuation omitted).

However, on its face, the reference in HAR § 12-46-175(d) to the HCRC examining the circumstances of the alleged offending individual's job pertains only to whether an "individual" was acting as a supervisory employee or agent of the employer, and not to the circumstances surrounding the scope of employment or the effect of the agency relationship. For, under the rule, the fact that the acts were "authorized" or "forbidden" by the employer are expressly irrelevant for purposes of imposing liability. Similarly, that the employer actually knew or should have known makes no difference and is not relevant under the

rule. The employer is considered liable without respect to any act or knowledge. Consequently, the HCRC examines an individual's relationship to his employer only to determine whether the employee is in fact an agent or supervisory employee. However, once an individual is determined to be an agent or supervisor, the employer is liable for the harassment ipso facto. This is because the only specific "circumstances" that are "examined" are the "employment relationships" and the "job functions performed by the individual," HAR § 12-46-175(d) (emphasis added), not the circumstances of whether the agent or supervisor was acting within the scope of employment or aided by the agency relationship with the employer. Given the plain language of the rule, that the individual was a agent or supervisor is enough to impose liability and no proof need be produced with respect or the employer's actions or knowledge or lack thereof.

Additionally, the majority's analysis of HAR § 12-46-175(d) conflicts with the HCRC's interpretation of its own regulation. In its amicus brief before the ICA, the HCRC cited HRS § 12-46-175(d) for the proposition that "in cases of supervisory harassment, the employer is vicariously liable, and there are no defenses." (Emphasis added.) Similarly, in its amicus brief before this court, the HCRC unambiguously declared that "HAR § 12-46-175(d) imposes 'strict' vicariously liability

on employers for supervisor harassment." The HCRC's interpretation of HAR § 12-46-175(d) as providing no defenses to an employer in cases of supervisory harassment could not be clearer. This reading is consistent with the plain language of the regulation: it imposes strict liability on the employer without qualification.

Also, the HCRC's amicus brief before the ICA explained that the HCRC had held hearings on a petition to "eliminate parts of [the] existing rules that established vicarious liability on the part of an employer for . . . harassment by a supervisor" and instead "recognize the affirmative defense created by [Faragher]." At a public hearing, the HCRC rejected the proposed changes but "instructed its staff to draft proposed rules to implement the [Faragher] defense." However, it appears that HAR § 12-46-175(d) has not been amended to date.

This confirms again that the HCRC rule imposes strict liability. If the Faragher defense applied, an employer would be entitled to assert as a defense that the employer exercised reasonable care to prevent and correct harassing behavior, and that Lales failed to take advantage of preventative or corrective opportunities available provided that no tangible employment action was taken. But, inasmuch as the HCRC apparently believed an amendment to HAR § 12-46-175(d) was necessary to recognize the Faragher defense, the HCRC plainly construed HAR § 12-46-175(d)

as consistent with its assertion before the ICA and this court that there are no employer defenses to the rule.

Finally, the majority's construction also clashes with its governing precept that deference must be given to the HCRC's interpretation under Gillan v. Government Employees Ins. Co, 119 Hawaiʻi 109, 194 P.3d 1071 (2008). According to the majority, the HCRC's interpretation of HRS § 378-2 through its promulgation of HAR § 12-46-175(d) "should be given deference." See majority opinion at 54. Thus, under Gillan, the HCRC's interpretation of HAR § 12-46-175(d) that admits of no defenses controls. Hence, respectfully, the HCRC's position under HAR § 12-46-175(d) that employers are strictly liable must given deference under the majority's application of Gillan.

D.

Contrary to the majority's position, then, the plain language of HAR § 12-46-175(d) does not at all consider whether an agent or supervisor was acting within the scope of his authority or was aided in the agency relation, or whether the supervisor "has no authority over an employee, because the two work in wholly different parts of the employer's business." Meritor, 477 U.S. at 77 (Marshall, J., concurring). The rule does not cover such situations, because under HAR § 12-46-175(d) an employer's liability for harassment is based solely on the offending individual's status as an agent or supervisor. Thus,

the majority's citation to Justice Marshall's statement that employers might not be strictly liable if the supervisor is in a "wholly different part[] of the employer's business" clearly has no relationship to the rule but is only relevant if the Second Restatement applied. HAR § 12-46-175(d) does not embody the agency principles set forth in Section 219 of the Second Restatement as written or as applied by the HCRC. HAR § 12-46-175(d) therefore contravenes the principles adopted by the legislature in HRS § 378-1, see discussion supra, and is invalid.

VIII.

All amici agree that it is appropriate to look to agency principles to determine the contours of the employer's liability for the harassment of its supervisors. The HCRC acknowledges that this court has applied a broad construction to an employer's liability inasmuch as "the Hawaiʻi Supreme Court has taken an expansive view of whether discriminatory conduct falls within the scope of an agent's employment." (Citing White, 102 Hawaiʻi at 320, 76 P.3d at 563.) The HCRC suggests that the agency principles discussed in Faragher support finding employers "automatically" liable for the harassment of their supervisors.

On the other hand, the Hawaiʻi Employers Council and the Chamber of Commerce also cite White, but apparently would find that an employer is not usually vicariously liable because "a supervisor ordinarily is not aided by his [or] her position of

authority [i.e., aided by the existence of the agency relation] in perpetrating harassment."

Section 219 of the Second Restatement, discussed supra, strikes the right balance between the positions advanced by the parties and the various amici. On one hand, under the Second Restatement the employer is vicariously liable when a supervisor's position enables the supervisor to perform acts of harassment. Applying section 219 of the Second Restatement would afford plaintiffs in state harassment cases the benefit of an employer's vicarious liability for acts of supervisory employees.

On the other hand, vicarious liability should not be imposed under circumstances where the supervisor's position is not material to an act of harassment, see Ellerth, 524 U.S. at 763 ("[T]here are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit."), such as when the supervisor has authority over a wholly different part of the business from the complaining employee. Meritor, 477 U.S. at 77 (Marshall, J., concurring). By applying section 219 of the Second Restatement, no more burden is imposed on employers than already exists in all areas of entrepreneurial endeavor. Whether a state or private claim is involved, the obligations of the employer would be the same and are well-established under existing law.

IX.

The Faragher defense is irrelevant to actions under Chapter 378 because it was adopted on the basis of legislative history that was unique to Title VII and has no analogue in the legislative history of HRS Chapter 378. As explained supra, a supervisor may be aided by the existence of the agency relation when he harasses other employees even when that harassment does not culminate in a tangible employment action. Meritor, 477 U.S. at 77 (Marshall, J., concurring). Under such circumstances, an employer is vicariously liable for his or her supervisor's harassment. Second Restatement § 219(2)(d). Under Faragher, however, an employer is entitled to an affirmative defense unless harassment culminates in a tangible employment action. Thus, Faragher departs from the Second Restatement because under the Faragher defense an employer is not vicariously liable if no tangible employment action has occurred.

Furthermore, the Faragher defense is immaterial in applying HRS Chapter 378. "[T]he federal courts' interpretation of Title VII is useful in construing Hawaiʻi employment discrimination law" but the federal courts' interpretation of Title VII "is not controlling." Nelson v. Univ. of Hawaiʻi, 97 Hawaiʻi 376, 390, 38 P.2d 95, 109 (2001) (internal citations and quotation marks omitted). Federal law is unpersuasive when relevant differences exist between HRS Chapter 378 and Title VII.

See Furukawa v. Honolulu Zoological Soc., 85 Hawaiʻi 7, 13, 936 P.2d 643, 649 (1997) ("[F]ederal employment discrimination authority is not necessarily persuasive, particularly where a state's statutory provision differs in relevant detail.").

In Faragher, the Supreme Court recognized that the affirmative defense it created departed from the Second Restatement inasmuch as under the section 219 of the Second Restatement, employers are usually liable for the harassment by supervisory employees. See Faragher, 524 U.S. at 804. Nevertheless, the Supreme Court reasoned that it was "not entitled to recognize" the imposition of vicarious liability under the Second Restatement unless the Court could "square it with [its] holding [in Meritor] that an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination." Id.

The Supreme Court observed that the "Congress relied on our statements in Meritor about the limits of employer liability," in enacting the Civil Rights Act of 1991. Id. at 804 n.4. Because that act "modified the statutory grounds of several of [the Supreme Court's] decisions," the decision "to leave Meritor intact [was] conspicuous." Id. Perceiving "some tension" existed between its application of the Second Restatement and Meritor, the Court itself devised "an affirmative defense to liability in some circumstances" to align Faragher

with its decision in Meritor. Id. at 804; cf. Ellerth, 524 U.S. at 772 (Thomas, J., dissenting) (arguing that the Court's "holding is a product of willful policymaking, pure and simple"). The Faragher doctrine thus was not based on agency principles but on the Court's belief that it needed to accommodate what was presumed to be Congressional reliance on Meritor.

There is no comparable legislative history in Hawaiʻi to that described in Faragher. There was no decision of this court like Meritor inasmuch as this court has never stated that an employer is not "automatically" liable for harassment by a supervisor. Thus, the legislature could not have relied on or implicitly approved of any decision of this court purporting to limit the scope of employer's liability under chapter 378. This difference between the history of HRS Chapter 378 and Title VII renders the Supreme Court's adoption of the Faragher defense immaterial to HRS Chapter 378. Cf. Furukawa, 85 Hawaiʻi at 13, 936 P.2d at 649. Hence, the Supreme Court's adoption of the Faragher defense is not persuasive as a reason to qualify an employer's liability under Section 219 of the Second Restatement in actions under HRS § 378-2.

In any event, the Faragher defense is inconsistent with the principles espoused in section 219 of the Second Restatement. Amici assert that the Faragher defense is compatible with the goals embodied in chapter 378 and therefore should be adopted.

However, amici also maintain that "the Hawaiʻi legislature's use of the term "agent" in HRS § 378-[1] should be interpreted as a direction to apply general agency principles." The Second Restatement section 219 does not posit any affirmative defenses to vicarious liability of the employer such as that raised in Faragher. Under section 219, vicarious liability is imposed under general and well-established agency principles. Any limitation on such liability already would be found in situations outside of the parameters drawn by section 219. See Meritor, 477 U.S. at 77 (Marshall, J., concurring) (noting that vicarious liability may not apply if the supervisor has no authority over an employee). As a result, the creation of an affirmative defense based on negligence, such as embodied in Faragher, would conflict with the scope of generally accepted agency principles.[43]

X.

The majority maintains (1) HAR § 12-46-175(d) was "'reasonably necessary' in implementing the statute," majority opinion at 53, and (2) that the legislature implicitly approved of HAR § 12-46-175(d) because a similar provision was in effect

[43] The majority holds that "HAR § 12-46-175(d) imposes strict liability on employers for the discriminatory conduct of their supervisory employees, and thus, the Faragher affirmative defense is not applicable to HRS chapter 378." Id. at 57-58. Based on the preceding discussion herein, it is agreed that the Faragher defense does not apply in HRS Chapter 378 actions, but for different reasons.

when the Hawaiʻi Civil Rights Act was enacted. Majority opinion at 56. I respectfully disagree.

A.

The majority first contends that "the legislature "did not define the extent of an employer's liability or provide any defenses for discriminatory conduct" and so "it was reasonably necessary for the HCRC to clarify these gaps" by adopting HRS § 12-46-175(d). Majority opinion at 53 (internal quotation marks omitted). However, in including "agent" in the definition of "employer" in HRS § 378-1, the legislature intended to place some boundaries on the employer's liability for the acts of their employees, namely, those found in the law of agency. See discussion supra; cf. Meritor, 477 U.S. at 72 (holding that by using "agent" in the definition of "employer," Congress intended the law of agency to limit employer's liability under Title VII); Faragher, 524 U.S. at 791-92 (noting that Meritor "cited the [Second Restatement § 219] with general approval"). These boundaries do not constitute "gaps."

As explained by the Second Restatement, exceptions exist to an employer's vicarious liability for harassment by its supervisory employees. See also Meritor, 477 U.S. at 77 (Marshall, J., concurring). Thus, contrary to the majority's position, HRS § 378-1 does embody "the extent of an employer's liability" under HRS § 378-2. Cf. Meritor, 477 U.S. at 72;

Faragher, 524 U.S. at 791-92. Additionally, as discussed before, HAR § 12-46-175(d) exceeds the scope of HRS § 378-2 inasmuch as under that rule employers are automatically liable for the conduct of their supervisory employees in contradiction to agency principles. See Restatement Second § 219.[44]

B.

Second, the majority contends that "HRS § 368-1[45]

[44] For the same reasons, contrary to the position of the majority, see majority opinion at 54, the HCRC's interpretation of HRS § 378-2 cannot be accorded deference. This court has explained that "[t]he rule of judicial deference does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose," and that "we have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation." In re Water Use Permit Applications, 105 Hawaiʻi 1, 9, 93 P.3d 643, 651 (2004) (emphasis added) (internal quotation marks omitted); cf. Gillan, 119 Hawaiʻi at 127, 194 P.3d at 1089 (Acoba, J., dissenting) ("Assuming, arguendo, the agency's application of a statute is entitled to consideration, the overriding rule is that this court is duty-bound to determine whether such application comports with the language of the statute."). As explained supra, the agency's reading of the statute is "incorrect" inasmuch as it ignores the limits on an employer's liability inhering in HRS Chapter 378 and as imposed by section 219 of the Second Restatement. Cf. Meritor, 477 U.S. at 71-72 (noting that an Equal Employment Opportunity Commission rule imposing absolute liability on an employer for the acts of its supervisory employee is "in some tension" with section 219 of the Second Restatement).

[45] HRS § 368-1 provides as follows:

> **§ 368-1 Purpose and intent**
>
> The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, including gender identity or expression, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy. It is the purpose of this chapter to provide a mechanism that provides for a uniform procedure for the enforcement of the State's discrimination laws. It is the legislature's intent to preserve all existing rights and remedies under such laws.

(Emphasis added.)

(continued...)

provides that the intent of the Hawaiʻi Civil Rights Act, and its creation of the HCRC, was to 'preserve all existing rights and remedies' of the various state anti-discrimination laws.'" Majority opinion at 55 (quoting HRS § 368-1) (emphasis in original). Accordingly, the majority maintains that "the legislature did not expressly foreclose the HCRC from adopting the then existing anti-discrimination rights and remedies," and that "the HCRC did not violate its statutory mandate in adopting HAR § 12-46-175(d)." Majority opinion at 56.

Respectfully, the majority misreads the import of the legislative intent in preserving "existing rights and remedies." HRS § 368-1. In transferring authority to enforce antidiscrimination laws from numerous agencies, including the Department of Labor and Industrial Relations (DLIR), to the HCRC, it is evident that the legislature sought to avoid any disruption in enforcement of the law by the creation of a new agency and hence, to maintain the status quo. See HRS § 368-2. The fact that the DLIR had adopted HAR § 12-23-115(d)[46] prior to the

[45](...continued)

[46] HAR 12-23-115(d) provided as follows:

> An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of ancestry regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The department will
>
> (continued...)

transfer of enforcement to the HCRC did not mean the legislature "did not expressly foreclose the HCRC from adopting" HAR 12-46-175(d), majority opinion at 56, but merely reflected that the regulations previously existing were not affected by the establishment of the new HCRC.

On its face, HRS § 368-1 has nothing to do with authorizing an expansion of rule making power by the HCRC, approving any particular administrative rule, or permitting the imposition of absolute liability on employers. The text and legislative history of the 1988 act do not evince a legislative intent to authorize HAR § 12-46-175(d) or any other administrative rule as coming within the bounds of Chapter 378. The general reference to "existing rights and remedies" in HRS § 368-1 thus does not establish that the legislature found that any specific rule fell within the scope of the statute.[47] Had the legislature intended to validate HRS § 12-46-175(d) by enacting HRS § 368-1, it necessarily would have said so.

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[46](...continued)
examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in a supervisory or agency capacity.

[47] It may be noted that "[t]he function of a legislature is to make laws, not to construe them." Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Hearing, 694 P.2d 697, 700 n.2 (1985). Thus, the legislature cannot "'construe the intent of other legislatures.'" Id. It is a function of the judiciary to interpret statutes passed by previous legislatures. Consequently, a legislative determination that an administrative rule did not exceed the scope of a prior statute would pose "[s]eparation of powers problems." See id.

In deciding whether an administrative rule is valid, this court determines whether the rule "exceed[s] the scope of the statutory enactment." See, e.g., Stop H-3 Ass'n v. State Dept. of Transp. 68 Haw. 154, 161, 706 P.2d 446, 451 (1985); Haole v. State, 111 Hawaiʻi 144, 152, 140 P.3d 377, 385 (2006); Blalack, 67 Haw. at 591, 699 P.2d at 19. HRS § 378-2(a)(1) does not provide for the imposition of absolute liability. HAR § 12-46-175(d) would, in effect, impose "automatic" and absolute liability on employers even where the supervisor was not aided by his supervisory position in harassing another employee. As noted before, such a provision would extend employer liability beyond that imposed under the common law and section 219 of the Second Restatement and as recognized under Title VII. Because nothing in Chapter 378 expressly or impliedly imposes absolute liability on an employer, HAR § 12-46-175(d) must be deemed to have exceeded the scope of HRS § 378-2(a)(1).

XI.

Based on the foregoing, I respectfully concur in part and dissent in part.

/s/ Simeon R. Acoba, Jr.