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SCAP-18-0000732

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,
Complainant-Appellee-Appellant,

and

CHRISTINA M. KISHIMOTO, Superintendent,
Department of Education, State of Hawai'i; and
CONNECTIONS, A New Century Public Charter School,
Appellants-Appellees,

and

HAWAI'I LABOR RELATIONS BOARD;
SESNITA A.D. MOEPONO and J.N. MUSTO (2003-027),
Agency Appellees-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CAAP-18-0000732; CIV. NO. 07-1-314)

DISSENTING OPINION BY NAKAYAMA, J.
IN WHICH RECKTENWALD, C.J., JOINS

Summary judgment is proper only when the movant demonstrates that no genuine issue of material fact exists, such that the movant is entitled to judgment as a matter of law. Bhakta v. County of Maui, 109 Hawai'i 198, 207, 124 P.3d 943, 952 (2005), as amended (Dec. 30, 2005). We have noted in the past that summary judgment should be cautiously invoked in order to avoid improperly depriving a party of a trial on disputed factual issues. Id. at 207-08, 124 P.3d at 952-53.

In this case, the Hawai'i Labor Relations Board (the HLRB) granted summary judgment in favor of Appellee-Appellant United Public Workers, AFSCME, Local 646, AFL-CIO (collectively "UPW") on its prohibited practices action challenging the non-renewal of an employee's position at Connections Public Charter School (Connections). The HLRB ordered Appellants-Appellees Department of Education (DOE) and Connections (collectively "Employer") to reinstate the employee, James Ah Sing (Ah Sing), to his position. The HLRB ruled in favor of UPW because it concluded that Ah Sing "in all probability" fell within the terms of a March 15, 2004 stipulation entered into by UPW and DOE (UPW/DOE stipulation) in another HLRB case concerning the civil service status of public charter school employees.

Employer appealed the HLRB's decision to the Circuit Court of the Third Circuit (circuit court).¹ The circuit court vacated the HLRB's order because it found disputed issues of material fact as to, inter alia, whether Ah Sing was intended to be in the class of employees covered by the UPW/DOE stipulation.

Because Employer presented evidence to the HLRB showing that Ah Sing's position was eliminated for reasons unrelated to those which gave rise to the UPW/DOE stipulation, Employer demonstrated a genuine issue of material fact as to whether Ah Sing was intended to be in the class of employees covered by the UPW/DOE stipulation. On these facts, the circuit court correctly concluded that the HLRB improperly resolved genuine issues of material fact and denied Employer a contested case hearing on the issues. Respectfully, the majority overlooks the factual dispute in this case and the rule that "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion[,]" in order to reach the outcome that it desires. See Jou v. Dai-Tokyo Royal State Ins. Co., 116 Hawai'i 159, 164, 172 P.3d 471, 476 (2007) (internal citations and quotation marks omitted).

Accordingly, I dissent.

¹ The Honorable Glenn S. Hara presided.

I. DISCUSSION

The majority concludes that there was no genuine issue of material fact as to whether Ah Sing was intended to be in the class of employees covered by the UPW/DOE stipulation and that the circuit court erred in vacating the HLRB's June 8, 2007 order granting summary judgment in favor of UPW. Majority at 20-21. The majority reaches this conclusion despite the fact that Employer presented evidence that Ah Sing's position was eliminated due to budget constraints, rather than as a result of any confusion regarding the civil service status of public charter school employees. Employer presented evidence to demonstrate a genuine issue of material fact regarding the elimination of Ah Sing's position and was entitled to a contested case hearing on the issues.

Summary judgment is a drastic remedy and should be cautiously invoked in order to avoid improperly depriving a party of a trial on disputed factual issues. Bhakta, 109 Hawai'i at 207-08, 124 P.3d at 952-53; Pioneer Mill Co., Ltd. v. Dow, 90 Hawai'i 289, 295, 978 P.2d 727, 733 (1999), as amended on denial of reconsideration (May 11, 1999), as corrected (June 13, 2006). We have often stated

[s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Jou, 116 Hawai'i at 164, 172 P.3d at 476. "[A] 'genuine issue as to any material fact' . . . under a conflict in the affidavits as to a particular matter must be of such a nature that it would affect the result." Richards v. Midkiff, 48 Haw. 32, 39, 396 P.2d 49, 54 (1964).

Here, the evidence presented by the parties established a genuine issue of material fact which precluded summary judgment. The record before the HLRB demonstrated a factual dispute as to why Ah Sing's position was eliminated. This dispute was material, because if Ah Sing's position was eliminated for any reason other than the Department of Human Resources Development's (DHRD) policy that public charter school employees were not part of the civil service, then Ah Sing would not be included in the class of employees covered by the UPW/DOE stipulation. Thus, the reason for Ah Sing's termination and the timing of Connections' decision bears directly on whether Ah Sing was intended to be in the class of employees covered by the UPW/DOE stipulation.

Starting with the plain language of the UPW/DOE stipulation, it specifically defines the class of employees that are included: employees who were "adversely" affected by the DHRD's policy that public charter school employees did not have civil service status. The UPW/DOE stipulation also specifies the manner in which adversely affected employees were impacted. Either the affected employees initiated transfers to preserve their civil service status, or, they remained at public charter schools and DOE failed to process them for hiring into classified positions. According to the terms of the settlement, DOE agreed to stop implementing the DHRD's policy and to "make whole all adversely [affected] employees." Therefore, the UPW/DOE stipulation does not apply to all public charter school employees, but only to those who meet the criteria that the UPW/DOE stipulation sets forth.

Employer presented evidence to the HLRB sufficient to raise a genuine issue of material fact regarding whether Ah Sing was within the class of employees covered by the UPW/DOE stipulation. This evidence included: (1) Connections School Board meeting minutes establishing that Connections decided to not renew Ah Sing's appointment on May 5, 2003; (2) a letter from Connections dated May 6, 2003, informing Ah Sing of the

Connections School Board's decision;² and (3) an affidavit from a DOE employee attesting that Ah Sing's termination was "not related to the DHRD position regarding civil service status."

The UPW/DOE stipulation also specified when adversely affected employees were impacted by the DHRD's policy.³ According to the UPW/DOE stipulation, on June 9, 2003, the DHRD communicated to DOE that public charter school employees "do not have civil service status." On June 12, 2003, the DHRD asked DOE to "convert all public charter school positions to reflect the fact that these positions do not have civil service

² The letter stated, in relevant part:

On Monday, May 5, 2003, the Connections PCS School Board took action to decline to renew your 89 day contract as of June 30, 2003.

³ The majority misapprehends the timeline provided by the UPW/DOE stipulation, stating that

the UPW/DOE stipulation states it applied to "approximately 150 classified positions of DOE [] in public charter schools [] covered by [the] civil service system" (paragraph 5), which included bargaining Unit 1 employees (paragraphs 1 and 4), for whom DOE was informed that "[o]n or about June 9, 2003 . . . that employees of public charter schools in the DOE 'do not have civil service status'" (paragraph 7).

Majority at 22. Despite the fact that DOE was notified of the DHRD's policy on June 9, 2003, public charter school administrators and employees did not actually learn about the DHRD's policy until July 8, 2003. Consequently, any adverse effects of the DHRD's policy could not have occurred at public charter schools before July 8, 2003.

status[.]”⁴ Thus, the DHRD did not announce its policy or communicate it to DOE until more than a month after Connections decided not to renew Ah Sing’s appointment. Moreover, DOE did not even communicate the DHRD’s policy to public charter schools until July 8, 2003 – more than two months after Connections had already decided to eliminate Ah Sing’s appointment, and more than ten days after Ah Sing signed his separation papers.⁵ The fact that Connections was unaware of the DHRD’s policy when it decided to eliminate Ah Sing’s appointment is sufficient to dispute UPW’s claim that Ah Sing was adversely impacted by the DHRD’s policy. Thus, viewing the “evidence and the inferences drawn therefrom” in favor of Employer, a genuine issue of material fact existed that precluded summary judgment. See Jou, 116 Hawai‘i at 164, 172 P.3d at 476.

⁴ The DHRD initially asked that DOE convert all public charter school positions to non-civil service by June 30, 2003, but this deadline was later extended to September 30, 2004.

⁵ UPW’s own evidence also supports the existence of a genuine issue of material fact. UPW attached to its motion for summary judgment (1) a signed declaration from Ah Sing attesting that on June 27, 2003, he was notified that his position was not being renewed, which was the same day that he signed his separation papers; and (2) a letter from Connections dated July 17, 2003, informing Ah Sing that his position was being eliminated due to limited funding. Thus, even UPW’s own evidence demonstrates a genuine issue of material fact as to whether Ah Sing was intended to be covered by the UPW/DOE stipulation because Ah Sing admits that his position was eliminated due to limited funding and before Connections could have learned of the DHRD’s policy.

The majority concludes that Ah Sing was intended to be in the class of employees covered by the UPW/DOE stipulation based solely on the fact that Ah Sing was hired into a civil service position with a not-to-exceed date of June 30, 2003, and that Ah Sing's name was on the list of public charter school employees who would be adversely affected by the DHRD's policy. Majority at 22. However, the fact that Ah Sing's name was on a list of public charter school employees on the island of Hawai'i establishes only that he was in a civil service position and a member of UPW's bargaining Unit 1. Indeed, the cover letter from DOE with the list refers to it simply as "Listing of Public Charter School Civil Service employees."

The majority characterizes the contradictory evidence that Ah Sing's position was eliminated due to limited funding at Connections as "not a genuine issue of material fact[,]" because Ah Sing was still employed on June 9, 2003, when the DHRD announced its policy that public school charter employees were not part of the civil service. Majority at 23 (emphasis in original). This is flawed reasoning. Whether Ah Sing's position was eliminated as a result of the DHRD's policy is the dispositive issue, and thus material. By the UPW/DOE stipulation's own terms, if Ah Sing's position was eliminated

prior to the DHRD's policy and for reasons unrelated to the DHRD's policy, then Ah Sing would not be included in the UPW/DOE stipulation and UPW would not be entitled to judgment as a matter of law. See Richards, 48 Haw. at 39, 396 P.2d at 54 ("[A] 'genuine issue as to any material fact' . . . under a conflict in the affidavits as to a particular matter must be of such a nature that it would affect the result.").

The fact that Ah Sing might have been "denied rights as a civil service employee, which existed whether or not Connections had reduced funding[,]" Majority at 24, does not mean that Ah Sing was necessarily included in the UPW/DOE stipulation. Not every public charter school employee who was ever denied rights as a civil servant is within the class of employees covered by the stipulation. As previously stated, the UPW/DOE stipulation, by its own terms, only applies to public charter school employees who were adversely affected by the DHRD's policy — specifically, those employees who either transferred to other positions to preserve their civil service status, or, remained at public charter schools and lost their civil service status. These adverse effects on public charter school employees could not have begun until after DOE

communicated the DHRD's policy to public charter schools on July 8, 2003.

The HLRB decision granting summary judgment in favor of UPW acknowledged that the record "reflects at least six alternative representations of [Ah Sing's] employment status and consequent reasons for termination." Despite the majority's contrary assertions, the HLRB's own observation that the record supported various factual scenarios implies that the HLRB recognized that a genuine issue of material fact existed and chose to resolve the issue of Ah Sing's "hopelessly muddled" employment status itself. In its decision, the HLRB waxed poetic about the circumstances of Ah Sing's termination:

Sometimes regular human beings are caught in the vortex created when bureaucratic zeal collides with legislative ambiguity. The Board concludes that it is far more likely than not that this is what happened to Ah Sing.

In deciding that Ah Sing "more likely than not" was the victim of the confusion surrounding the civil service status of public charter school employees, the HLRB improperly granted summary judgment in favor of UPW, even though a genuine issue of material fact existed.

I am not unsympathetic to the fact that Ah Sing lost his position at a time when there was confusion regarding the civil service status of public charter school employees.

However, if Ah Sing was denied his rights as a civil service employee, his remedy was to file a grievance before filing a prohibited practices complaint with the HLRB.⁶ While it is unfortunate that neither UPW nor Ah Sing chose to file a grievance, the law does not permit Ah Sing to be shoehorned into the class of employees covered by the UPW/DOE stipulation, when that was not the intent of the parties to the settlement.

Accordingly, I would hold that the circuit court correctly concluded that the HLRB improperly resolved genuine issues of material fact and denied Employer a contested case hearing on the issues.

⁶ Based on a declaration that UPW provided to the HLRB, it appears that Ah Sing might have been denied rights as a civil service employee. The declaration, written by a UPW Division Director on the island of Hawai'i, explained how he obtained the list of public charter school employees who might be impacted by the DHRD's policy from DOE on July 3, 2003, and that Ah Sing's name was on the list. After seeing Ah Sing's name on the list, the UPW Division Director obtained and reviewed a copy of Ah Sing's personnel file on or about July 28, 2003. The UPW Division Director attested that his review indicated that Connections "made an error by treating [Ah Sing] as an 89 day hire in a letter dated May 6, 2003."

After the UPW Division Director realized that Connections mistakenly treated Ah Sing as an 89-day, or temporary hire, it is unclear from the record why UPW did not file a grievance to challenge the non-renewal of Ah Sing's appointment, as required by UPW's collective bargaining agreement with DOE. Because the deadline to file a grievance was within eighteen calendar days of the alleged violation, it appears that by the time the UPW Division Director reviewed Ah Sing's personnel file on July 28, 2003, UPW had already missed the deadline.

II. CONCLUSION

For the reasons stated above, I respectfully dissent. Employer presented evidence to the HLRB which demonstrated a genuine issue of material fact as to whether UPW was entitled to judgment as a matter of law. Consequently, I would affirm the circuit court's decision and order.

DATED: Honolulu, Hawai'i, June 9, 2020.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

