DISSENTING OPINION BY RAMIL, J.

I write to state my position regarding the elements of a sexual harassment claim. Because I believe the trial court correctly stated the elements of a sexual harassment claim, I would hold that the jury instruction -- consistent with the "totality of the circumstances" analysis -- was a proper statement of the law. Accordingly, I respectfully dissent.

I.

The majority proposes, in my view, an additional separate element to a hostile environment sexual harassment (HESH) claim by requiring a plaintiff to show that the alleged sexual conduct either (a) unreasonably interfered with work performance or (b) created an intimidating, hostile, or offensive work environment. Majority at 32. In doing so, it rejects -- as do I -- the requirement that a plaintiff prove both (a) and (b). But the majority overlooks another, more reasonable alternative: courts should examine the totality of the circumstances, using (a) and (b) as factors, to determine whether the conduct is sufficiently "severe or pervasive" to qualify as a HESH claim. In other words, (a) or (b) are not additional separate alternative elements of a HESH claim. In my view, (a) and (b) are merely two of the many circumstances within "the totality of the circumstances" that may be considered in evaluating the "severe or pervasive" element of a HESH claim. Accordingly, I respectfully dissent from the majority's "separate element/

alternative means" approach in favor of the "totality of the circumstances" approach.

II.

The "totality of the circumstances" analysis follows the administrative rules and both Hawai'i and federal case law. First, the Hawai'i Civil Rights Commission (HCRC), after outlining the required showing for sexual harassment, which admittedly appears to support the "alternative means" analysis ("[t]hat conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"), immediately clarifies in the following subsection that the conduct must be examined in the context of the "record as a whole" and the "totality of the circumstances":

> In determining whether alleged conduct constitutes sexual harassment, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

Hawai'i Administrative Rules (HAR) § 12-46-109(b). Such language is identical to its federal regulatory counterpart, as promulgated by the Equal Employment Opportunity Commission (EEOC). See 29 C.F.R. § 1604.11(b). To comply with our well-established rule of statutory construction -- that where an administrative agency is charged with overseeing and implementing a particular statutory scheme, courts generally accord persuasive

weight to such administrative construction, see Sam Teague, Ltd. v. Hawai'i Civil Rights Comm'n, 89 Hawai'i 269, 276 n.2, 971 P.2d 1104, 1111 n.2 (1999) (citation omitted) -- this court must read the HCRC's rules as a whole, not selectively. Thus, the appropriate framework for establishing a HESH claim is determined by examining all relevant subsections of the statute, not merely one subsection. Indeed, the HCRC, in a case quoted by the majority, confirms the use of the "totality of the circumstances," rather than the "separate element/alternative means," approach: "The conduct was sufficiently severe or pervasive to alter the conditions of employment, such as having the purpose or effect of unreasonably interfering with an individual's work performance or by creating an intimidating, hostile or offensive working environment." Majority at 24-25 (quoting Santos v. Niimi, No. 91-001-E-SH at 2 (HCRC Final Decision Jan. 25, 1993) (citations omitted)) (emphasis added). In this way, the HCRC noted that many factors should be considered -- not merely (a) or (b) in isolation -- to determine whether the conduct element was sufficiently severe or pervasive.

Second, in Steinberg v. Hoshijo, 88 Hawai'i 10, 18, 960 P.2d 1218, 1226 (1998), this court detailed the elements required in establishing a HESH claim by citing to HAR § 12-46-109. In doing so, this court properly parsed all relevant subsections of the statute and expressly pointed out that "[i]n determining whether alleged conduct constitutes sexual harassment, HAR § 12-46-109(b) instructs the HCRC to 'look at the record as a whole

and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" Steinberg, 88 Hawai'i at 18, 960 P.2d at 1226.

Moreover, Steinberg relies on federal case law, specifically Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), which, as described infra, also supports the "totality of the circumstances" approach with respect to the severe or pervasive conduct element.

The majority here found this additional and separate element to a HESH claim in Steinberg:

> 3. that the conduct had the purpose or effect of either:
> a. unreasonably interfering with an individual's work performance or
> b. creating an intimidating, hostile, or offensive work environment.

Majority at 23 (quoting Steinberg, 88 Hawai'i at 18, 960 P.2d at 1226 (citing Ellison, 924 F.2d at 879)) (emphases added). But Steinberg misconstrues Ellison. In truth, Ellison actually states quite differently:

> [W]e hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

Ellison, 924 F.2d at 879 (emphasis added). In other words, Steinberg adopted the "separate element/alternative means" method based exclusively on a misapprehended case. As a result, this court should rectify such error or, at least, fully explain its divergence from federal case law. To neglect such a glaring

error would be to compound mistakes and muddle the jurisprudence in this complex area of law.

Indeed, it appears odd that this court would diverge from federal case law without explanation, especially given that we have long declared that federal case law is highly instructive in the area of employment discrimination. Only recently, this court noted that "Hawai'i employment discrimination law was enacted to provide victims of employment discrimination the same remedies, under state law, as those provided by Title VII of the Federal Civil Rights Act of 1964." Sam Teague, Ltd., 89 Hawai'i at 281, 971 P.2d at 1116 (citing Hse Stand. Comm. Rep. No. 549, in 1981 House Journal, at 1166; Sen. Stand. Comm. Rep. No. 1109, in 1981 Senate Journal, at 1363). Thus, "the federal courts' interpretation of Title VII is useful in construing Hawai'i's employment discrimination law." Id. (citing Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 13, 936 P.2d 643, 649 (1997)); see also Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 377, 14 P.3d 1049, 1058 (2000). Especially where the state and federal statutory provisions are similar, this court explained, "The federal courts have considerable experience in analyzing these cases, and we look to their decisions for guidance." Shoppe, 94 Hawai'i at 377, 14 P.3d at 1058 (quoting Furukawa, 85 Hawai'i at 13, 936 P.2d at 649). In fact, as far as I can tell, this court has followed federal case law in the employment discrimination area -- particularly where Hawai'i and federal statutory provisions are similar -- in almost all cases. See, e.g.,

Shoppe, 94 Hawai‘i at 368, 14 P.3d at 1049 (prima facie claim and burden-shifting in age discrimination context); Sam Teague, Ltd., 89 Hawai‘i at 269, 971 P.2d at 1104 (unemployment benefits as collateral source payments); Furukawa, 85 Hawai‘i at 7, 936 P.2d at 643 (similarly situated employees); Puchert v. Agsalud, 67 Haw. 25, 677 P.2d 449 (1984) (unlawful retaliatory discharge). In this case, not only are the relevant federal and state statutory provisions similar, compare 42 U.S.C. § 2000e-2(a)(1); with HRS § 378-2(1)(a) (1993), but the applicable EEOC guideline and the HCRC's rule are identical, compare 29 C.F.R. § 1604.11(a)(3); with HAR § 12-46-109. Yet the majority insists that this court diverged from federal case law in Steinberg without explanation.

Relatedly, given our traditional consideration of federal case law, it seems unusual to trailblaze a new path -- especially one contrary to federal law -- with no more than one mis-cited citation to a federal case. To worsen matters, the majority discounts the vast body of established federal case law as "confusing." Majority at 34. But these cases are confusing and inconsistent only when applying the "separate element/ alternative means" analysis.

Third, federal case law not only rejects the "separate element/alternative means" approach, but also supports the "totality of the circumstances" approach. In Ellison, which this court relied heavily on in Steinberg, the Ninth Circuit directly addressed the variation between the United States Supreme Court's

language in Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (conduct must "alter the conditions of [the victim's] employment and create an abusive working environment"), and the EEOC guideline language (conduct "creates an intimidating, hostile, or offensive environment or where it unreasonably interferes with work performance"). The Ellison court reconciled the supposed difference by pointing out that the EEOC guideline language is actually "encompassed" within the Meritor language:

> We do not think that these standards are inconsistent. The Supreme Court used the words "abusive" and "hostile" synonymously in Meritor. The Meritor Court also approved of and paid detailed attention to the EEOC's guidelines, and it implicitly adopted the EEOC's position that sexual harassment which unreasonably interferes with work performance violates Title VII. Similarly, although we only expressly incorporated [the language from Meritor], that part also encompasses the EEOC's [guideline language]. Conduct which unreasonably interferes with work performance **can** alter a condition of employment and create an abusive working environment.

924 F.2d at 877 (emphases added). It is significant that the Ninth Circuit specified "can," rather than "can, by itself." In this way, rather than declaring, as does the majority, that conduct which unreasonably interferes with work performance, by itself, is sufficient to establish a prima facie case, the Ninth Circuit actually noted only the possibility that it may. Such distinction centers on whether the "totality of the circumstances" is to be considered. Thus, the Ellison court explained that "conduct which unreasonably interferes with work performance" is included as a factor that "alter[s] a condition

of employment and create[s] an abusive working environment."[1] Depending on the totality of the circumstances and consideration of the record as a whole, which would include "whether such conduct created an intimidating, hostile, or offensive work environment," the fact that the "conduct unreasonably interfered with work performance" may or may not present a prima facie case for sexual harassment.

Most recently in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), the United States Supreme Court observed, "[I]n Meritor, we held that sexual harassment so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment violates Title VII." Id. at 786 (quotation and internal quotation marks omitted) (brackets in original). The Court then clarified that courts should "determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Id. at 787-88 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)) (emphases added).

[1] In fact, an analysis of the phrase "unreasonably interferes with work performance" reveals that it is properly characterized as a factor in deciding whether conduct "alters the conditions of employment and creates an abusive working environment." To determine what is "unreasonable," the court must examine the interference in conjunction with the severity and frequency of the conduct--the same examination in deciding whether the conduct "alters the conditions of employment and creates an abusive working environment." See Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998).

To reiterate "what was plain from [its] previous decisions," the United States Supreme Court in its most recent decision again stated that

> [w]orkplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"

Clark County School Dist. v. Breeden, 562 U.S. 268 (2001) (quoting Faragher, 524 U.S. at 786-88 (citations omitted)). Therefore, the Court expressly noted that whether conduct "unreasonably interferes with an employee's work performance" is not an "alternative means" of establishing a HESH claim, but rather a factor to be considered in examining the "totality of the circumstances" regarding such claim.

Similarly, the Ninth Circuit in Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000), examined whether the plaintiff, for purposes of summary judgment, had presented evidence sufficient to raise a genuine issue of fact as to his being subjected to a hostile work environment after he complained about the treatment of women in his workplace. The Ninth Circuit first stated that, "[t]o determine whether an environment is sufficiently hostile, we look to the totality of the circumstances, including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Id. at 1245 (quoting Faragher,

524 U.S. at 787 (citations omitted)) (emphases added). Then, the Ninth Circuit evaluated the totality of the circumstances in that case, including (a) whether the conduct unreasonably interfered with work performance and (b) whether the conduct created an intimidating, hostile, or offensive work environment:

> Here, after [Plaintiff] made his complaint about the treatment of women at the Willits Post Office, he was targeted for verbal abuse related to those complaints for a period lasting over one and [a] half years. His supervisors regularly yelled at him during staff meetings; they called him a "liar," a "troublemaker," and a "rabble rouser," and told him to "shut up." Additionally, [Plaintiff] was subjected to a number of pranks, and was falsely accused of misconduct.
>
> Not only did his supervisors make it harder for [Plaintiff] to complete his own tasks, they made [Plaintiff] an object lesson about the perils of complaining about sexual harassment in the workplace. [Plaintiff's supervisors] made it clear to the other staff that disadvantageous changes in management style were due to [Plaintiff's] complaints. . . . [Plaintiff's supervisors] also fostered animus in other employees whose working conditions were affected. Other employees began to distance themselves from [Plaintiff], and some stopped talking to him. In November of 1995, the difficulties at work rose to such a level that [Plaintiff] took stress leave from his job.
>
> We conclude that [Plaintiff] has presented evidence that is, for purposes of summary judgment, sufficient to raise a genuine issue of facts as to whether he was subjected to a hostile work environment.

Id. at 1245-46. Thus, the Ninth Circuit assessed the totality of the circumstances by analyzing both factor (a) ("his supervisors ma[de] it harder for [plaintiff] to complete his own tasks") and factor (b) (verbal abuse, pranks, making plaintiff an "object lesson"). Moreover, such analysis indicates that both factors are often difficult to separate and evaluate in isolation.

Such dictates by Hawai‘i and federal case law, in addition to the established practice of the HCRC, require the "totality of the circumstances" approach. Even the majority

concedes as much. In conclusion, after justifying its proposed "separate element/alternative means" approach, the majority surprisingly embraces the "totality of the circumstances" approach. Majority at 33 ("[W]e also emphasize that . . . courts must 'look at the record as a whole and at the totality of the circumstances . . . .'").

III.

Indeed, the overly mechanistic and formulaic approach adopted by the majority would exclude potentially meritorious plaintiffs. First, suppose a plaintiff fell just short of establishing (a) (alleged conduct "unreasonably interfered with work performance"). In addition, this same plaintiff fell just short of establishing (b) (alleged conduct "created an intimidating, hostile, or offensive work environment"). The application of the rigid "separate element/alternative means" method would absolutely bar this plaintiff from her day in court. On the other hand, under the flexible "totality of the circumstances" analysis, which examines the record as a whole, including both (a) and (b) as factors, this plaintiff would likely have demonstrated conduct that is sufficiently "severe or pervasive" to qualify as a HESH claim.

Second, as the majority explains, the conduct must be evaluated both from the subjective standpoint of the claimant and from an objective standpoint of a reasonable person of the claimant's gender in the claimant's position. Majority at 32

(holding that the claimant must show, inter alia, "(5) the claimant actually perceived the conduct as having such purpose or effect; and (6) the claimant's perception was objectively reasonable to a person of the claimant's gender in the same position as the claimant."). Assume, for example, that a trial court found that the alleged conduct did not unreasonably interfere with the plaintiff's work performance (subjective aspect of (a)), although a reasonable woman would have found that such conduct unreasonably interfered with her work performance (objective aspect of (a)). On the other hand, the trial court also found that the plaintiff believed the conduct created an offensive work environment (subjective aspect of (b)), but that a reasonable woman would not have found such conduct created an offensive work environment (objective aspect of (b)). In other words:

	Subjective Standpoint ("plaintiff")	**Objective Standpoint ("reasonable woman")**
(a) Conduct "unreasonably interfering with an individual's work performance"	No	Yes
(b) Conduct "creating an intimidating, hostile, or offensive work environment"	Yes	No

Under the "separate element/alternative means" approach, such plaintiff would fail to establish a prima facie case and would be

categorically barred from bringing suit against her employer. In contrast, the "totality of the circumstances" approach would likely allow such plaintiff to have her day in court. The majority argues that "the claimant's perception [must be] objectively reasonable." Majority at 32. And I agree. But that in no way contradicts examining (a) and (b) from both a subjective and objective standpoint. Indeed, it appears necessary. For example, to determine whether claimant's subjective viewpoint that conduct unreasonably interfered with her work performance is objectively reasonable, one would engage in a two-step analysis. First, one would examine whether claimant actually considered the conduct to unreasonably interfere with her work performance. Second, one would determine whether a reasonable woman would have considered the conduct to unreasonably interfere with her work performance.

A critical examination of my hypothetical only confirms my point that under the majority's separate element/alternative means method, such a claimant would fail and abandoned by the discrimination statute that is supposed to be "remedial and humanitarian" and "generously construed . . . to afford claimant hearings on the merits and to prevent the loss of valuable rights." Puchert v. Agsalud, 67 Haw. at 36-37, 677 P.2d at 458 (citations omitted).

In sum, the majority's "separate element/alternative means" approach directly contradicts the "remedial and humanitarian nature" of the employment discrimination statutes,

which should be "generously construed . . . to afford claimants hearings on the merits and to prevent the loss of valuable rights." Id.

Additionally, the "totality of the circumstances" approach is more flexible and better captures the actual analysis undertaken by courts. Not every observation and evaluation by the court can always be classified simply as either (a) or (b), as required by the "separate element/alternative means" method. The "totality of the circumstances" approach, in contrast, acknowledges the reality of the often complex balancing and weighing of multiple factors in examining the totality of the circumstances. Indeed, the factors to be considered, such as (a) and (b), may be interrelated and difficult to evaluate in isolation.[2] In an attempt to address the reality that conduct made illegal by sexual harassment law frequently defies easy categorization and classification such as (a) and (b), the majority argues that "[its] approach is consistent with the 'totality of the circumstances' approach." Majority at 34 n.13. But such application of the "totality of the circumstances" language from statute and case law defeats the language's very purpose. The majority's requirement is premised on the court's ability to separate (a) and (b), and reify each from the "totality of the circumstances" in a highly hypothetical vacuum.

[2] Of course, one factor may be so well-established that it would demonstrate, in examining the totality of the circumstances, that the conduct was sufficiently "severe or pervasive" to qualify as a HESH claim.

IV.

In this case, the trial court's jury instruction properly stated that sexual harassment was conduct "sufficiently severe or pervasive that it had the purpose or effect of altering the conditions of Plaintiff's employment and creating an intimidating, hostile, abusive, or offensive working environment." Moreover, it correctly added that, "in determining whether an environment is hostile or abusive, you must consider all of the circumstances[, including] whether [the conduct] unreasonably interferes with Plaintiff's work performance." (Emphasis added.) Accordingly, I would hold that such instruction -- consistent with the "totality of the circumstances" analysis -- was a proper statement of the law.