CONCURRING OPINION OF ACOBA, J.

I concur in granting the application for a writ of certiorari filed by Petitioner/Employer-Appellee City and County of Honolulu, Honolulu Fire Department (the Department). I write additionally with respect to that part of the opinion of the Intermediate Court of Appeals (ICA) which relied upon and applied the 1998 amended version of Hawai‘i Revised Statutes (HRS) § 386-3 (Supp. 2000) to this case.[1] See Davenport v. City & County of Honolulu, Honolulu Fire Dept., No. 23141, slip op. at 2 n.1, 17-29 (Haw. Ct. App. Dec. 13, 2001) [hereinafter, the ICA's opinion]. Because the alleged work injuries suffered by Respondent/Claimant-Appellant David K. Davenport occurred prior to the 1998 amendment, that amendment did not apply; rather, the version of HRS § 386-3 then in effect governed. However, whereas the 1998 amendment would not affect stress-related claims resulting from non-disciplinary actions such as those filed by Davenport, the result reached by the ICA was correct.

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[1] The dissent contends that the application for writ of "certiorari [was] improvidently granted." Dissenting opinion at 2. I concur in granting certiorari primarily to clarify the applicability of the 1998 amended version of HRS § 386-3 to the case at bar. See State v. Hanson, 97 Hawai‘i 71, 73, 34 P.3d 1, 3 (2001) (affirming the ICA but granting certiorari "to clarify the basis for upholding airport security searches"); Korsak v. Hawaii Permanente Med. Group, 94 Hawai‘i 297, 300, 12 P.3d 1238, 1241 (2000) (granting certiorari "to clarify several aspects of the ICA opinion"). In contending that clarification is only as to the ICA's citation to the subsequent version of HRS § 386-3, the dissent is mistaken. As indicated infra, this opinion clarifies that: (1) in a 1998 amendment the legislature narrowed the scope of coverage for mental stress claims; (2) the 1998 amendment was not applicable to this case; and (3) however, the result would be same under the pre-1998 version of HRS § 386-3.

I.

The 1985 version of HRS § 386-3 provided as follows:

> **Injuries covered.** If an employee suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as hereinafter provided.
>
> Accident arising out of and in the course of the employment includes the wilful act of a third person directed against an employee because of the employee's employment.
>
> No compensation shall be allowed for an injury incurred by an employee by the employee's wilful intention to injury oneself or another or by the employee's intoxication.

HRS § 386-3 (1993). In Mitchell v. Department of Educ., 85 Hawai'i 250, 942 P.2d 514 (1997), disciplinary measures taken by Claimant Regina Mitchell's employer caused her to suffer a stress-related injury.[2] See id. at 251, 942 P.2d at 515. Mitchell claimed that the injury was therefore compensable under HRS chapter 386, while her employer maintained that such an injury did not fall within the scope of Mitchell's employment. See id. On appeal, the sole issue before this court was "whether an employee's stress-related injury resulting from disciplinary action taken by an employer in response to an employee's misconduct is a compensable injury under HRS § 386-3 (1985)." Id. at 254, 942 P.2d at 518. In determining whether Mitchell's misconduct involved a "prohibited overstepping of the boundaries defining the ultimate work to be done by the claimant[,]" id. at

[2] I observe that the Mitchell court construed the 1985 version of HRS § 386-3. See Mitchell, 85 Hawai'i at 254, 942 P.2d at 519 (stating that "this appeal presents a single question: whether an employee's stress-related injury resulting from disciplinary action taken by an employer in response to an employee's misconduct is a compensable injury under HRS § 386-3 (1985)").

255, 942 P.2d at 519 (citation omitted), this court distinguished between "(1) an unauthorized departure from the course of employment and (2) the performance of a duty in an unauthorized manner[,]" id. (internal quotation marks and citation omitted). It was determined that Mitchell was disciplined for actions she engaged in while performing a duty of her employment, albeit in an unauthorized manner. See id.

As for the question of whether injuries arising from disciplinary actions were compensable, the Mitchell court, guided by the "plain language of the statute and the legislature's intent that work-related injuries be considered as a cost of doing business[,]" held it was "compelled to hold [the injury] compensable under HRS § 386-3." Id. at 257, 942 P.2d at 521 (citation omitted). Specifically addressing the issue of whether mental stress-related injuries that arose out of and in the course of the employment should be excepted from coverage under the statute, Mitchell noted that "many jurisdictions with statutes similar to HRS chapter 386 [(1985)] have expressly amended them to exclude from coverage psychological or stress-related injuries resulting from good faith disciplinary actions." Id. It was concluded that absent such an exclusion, a stress related injury was a covered injury under the worker compensation statute:

> In the absence of an express exception in HRS § 386-3, we cannot unilaterally pronounce one. To do so would run counter to the clear import of HRS § 386-3. If the legislature should deem it advisable in the future, it can . . . amend HRS chapter 386 to exclude from coverage those injuries resulting from disciplinary action taken in good

> faith by the employer. However, unless and until the Hawai'i legislature chooses to amend HRS chapter 386, we are compelled to reach the result we have today.

Id. Intervening amendments made to the 1985 version of HRS § 386-3 are not material to the instant case (referred to herein as the pre-1998 version).[3]

II.

In its opinion, the ICA discussed the effect of the 1998 amendment on Davenport's claims. As the ICA indicated, in 1998, the legislature responded to the Mitchell invitation by adding HRS § 386-3(c), which excluded stress related injury arising from disciplinary action from worker compensation coverage, to HRS § 386-3. See ICA opinion at 23. The new sub-section carved out the category of claims involved in Mitchell, stating that "[a] claim for mental stress resulting solely from disciplinary action taken in good faith by the employer shall not be allowed[.]" HRS § 386-3(c) (Supp. 2001) (emphases added). As the ICA pointed out, in excluding only disciplinary action injury from coverage, the legislature impliedly left other non-

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[3] Davenport's claims arose out of incidents which occurred prior to the 1995 amendment of HRS § 386-3, which took effect on June 29, 1995. See 1995 Haw. Sess. L. Act 234, § 26, at 621. Davenport filed his second claim, however, on April 8, 1996, after the 1995 amendment took effect. Because both incidents occurred prior to the 1995 amendment, the 1985 version, which remained unchanged until 1995, was applicable. Thus, the 1985 version of HRS § 386-3 was relevant in this case. For citation purposes, inasmuch as the correct version of HRS § 386-3 applicable to these events was available in the 1993 Replacement of the Hawai'i Revised Statutes, this volume is cited to.

I note that the 1995 amendment would not affect Davenport's claims, inasmuch as it excluded those injuries incurred "by an employee by the employee's wilful intention to injure onself or another by actively engaging in any unprovoked non-work related physical altercation other than in self defense, or by the employee's intoxication." Id. (new material underscored). Accordingly, the 1995 amendment is irrelevant for purposes of the instant case.

disciplinary personnel actions covered under HRS § 386-3. See ICA opinion at 23-24. Where a matter is not explicitly excluded by a statute, it is impliedly included. See Evanson v. University of Hawai'i, 52 Haw. 595, 600, 483 P.2d 187, 191 (1971) (holding that, "except those specifically excluded[,]" student employees were included under workers compensation law) (citation omitted).

As observed by the ICA, the legislative history confirms this facial construction. See ICA Opinion at 24-25. In the course of the amendment's passage, "the legislature had considered, but rejected, expanding the scope of the amendment to exclude claims for stress arising out of other, non-disciplinary personnel actions." Id. at 24. As stated by the ICA, in the course of the proceedings, Representative Case remarked:

> The concerns relate to the restriction of this bill for now to "disciplinary actions." The House version had proposed to extend the applicability of this measure to "other personnel action" as well, and the House, in conference, in order to define that term as "counseling, work evaluation or criticism, job transfer, layoff, demotion, suspension, termination, retirement or other action associated ordinarily with personnel administration." . . . . Yet . . . the Senate conference co-chairs . . . refused to accede to the House's position to extend this measure to other personnel actions as well.

Id. (quoting Statement of Sen. Case in 1998 House Journal, at 884-85) (emphases added). I believe that, as a result of the 1998 amendment, the legislature narrowed the scope of coverage for mental stress claims, by prohibiting claims resulting "solely from disciplinary action taken in good faith by the employer[.]" HRS § 386-3(c). In other words, after the 1998 amendment, HRS

§ 386-3 still allowed for compensation of stress-related injury resulting from non-disciplinary personnel decisions.

III.

However, the ICA appears not only to have utilized the 1998 amendment as an interpretive aid, but to have incorrectly applied the amendment to the present case. See ICA Opinion at 1-2 ("The Director's decision determined, inter alia, that Davenport's claims . . . were therefore not compensable pursuant to Hawai'i Revised Statutes (HRS) § 386-3 (Supp. 2000)."), and id. at 2 n.1 (quoting from the amended version of HRS § 386-3). Absent clearly express contrary legislative intent, the well-established rule of statutory construction forbids the retrospective operation of statutes. See HRS § 1-3 (1993) ("No law has any retrospective operation, unless otherwise expressed or obviously intended."). In the present case, Act 224, which amended HRS § 386-3 in 1998, does not contain language that would indicate the legislature's direction or intention that the statute apply retroactively. Accordingly, the presumption of prospectivity is not rebutted. See HRS § 1-3.

IV.

But, had the ICA applied the pre-1998 HRS § 386-3 provision, it would have reached the same result as it did in applying the 1998 amendment. Under the pre-1998 amendment version of HRS § 386-3, as construed by this court in Mitchell,

coverage for Davenport's stress-related injury (1) arose out of and in the course of employment,[4] (2) was not barred by HRS § 386-3 (1985), and was thus compensable. Because the 1998 amendment to HRS § 386-3 excluded only stress-related injury stemming from disciplinary action, it did not preclude coverage for such injury resulting from other types of personnel actions, such as the promotion and demotion that Davenport experienced here, not disciplinary in nature.

Subject to the foregoing clarification, I join in affirming the ICA's opinion.

[4] Here, unlike in Mitchell, there was no question of whether the acts of the employee that resulted in the employment action constituted "an unauthorized departure from the course of employment[.]" The employment actions in the present case do not appear to be grounded in any conduct by Davenport, and, thus, the "unauthorized departure" exception discussed in Mitchell appears inapplicable.