DISSENTING OPINION BY NAKAYAMA, J.

I respectfully dissent from the majority's holding that a lifting restriction of twenty-five pounds raises a genuine issue of material fact as to whether, as a consequence of her limitation on lifting, Appellant is "disabled" under Hawai'i Revised Statutes (HRS) § 378-2 (1993).

The disposition of Appellant's claim of disability discrimination turns on the construction and application of administrative rules that interpret the State's statutory prohibition on employment discrimination based on an employee's disability. Central to Appellant's claim is HRS § 378-2, which protects an individual who is "disabled" from being discriminated against in the terms, conditions, or privileges of employment on account of her "disability." HRS § 378-2(1)(A) (1993). A "disability" in turn is defined under HRS § 378-1 as "the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment." HRS § 378-1 (1993).

While the parties dispute whether Appellant's lifting restriction causes her to be "disabled" within the meaning of HRS § 378-1, they do not contest that her inability to lift more than twenty-five pounds constitutes a "physical impairment," and that "lifting" is a "major life activity." Accordingly, the only question left to be determined is whether Appellant's lifting restriction "substantially limits" her ability to lift.

Because the statute does not define the term "substantially limits," the accompanying Hawai'i Administrative

Rules (HAR) may be looked to for guidance.[1] Under the HAR, "[c]ertain impairments such as blindness, deafness, HIV infection, and AIDS are by their nature substantially limiting" with respect to the individual's performance of major life activities. HAR § 12-46-182 (1998). An impairment that is not substantially limiting "by [its] nature" may alternatively be found to substantially limit a major life activity if the impairment renders the individual either

> (A) Unable to perform a major life activity that the average person in the general population can perform; or
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> (B) Significantly restricted as to the condition, manner, or duration under which a person can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id. Finally, in determining whether an individual's impairment satisfies the above criteria, the following factors should be considered:

> (A) The nature and severity of the impairment;
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> (B) The duration or expected duration of the impairment; and
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> (C) The permanent or long-term impact of, or the expected permanent or long-term impact of the impairment.

Id.

The HAR Rules therefore fashion a two-tiered inquiry to determine whether an individual's impairment is "substantially limiting." Cf. Lusk v. Ryder Integrated Logistics, 238 F.3d 1237, 1240-1241 (10th Cir. 2001) (discerning such an approach in

[1] Because the parties do not contest the issue, the validity of the pertinent HAR rules may be assumed for purposes of this appeal. See State v. Kotis, 91 Hawaiʻi 319, 331, 984 P.2d 78, 90 (1999) ("Administrative rules, like statutes, have the force and effect of law.").

analogous federal regulations). The impairment may, "by [its] nature," impose a substantial limitation on the individual's ability to perform a major life activity on account of its undeniably pronounced impact on the individual's physical or mental abilities. HAR § 12-46-182 (1998). An individual whose impairment is so classified is entitled to the presumption that her major life activities are substantially limited, and is consequently relieved of any further obligation to produce evidence that she is disabled.

Should the impairment fail to satisfy the threshold of severity necessary to establish that it is substantially limiting by nature, the burden remains with the individual to produce comparative evidence indicating that the "average person in the general population" can either perform the major life activity that the individual cannot; or else is able to perform the activity under conditions, in a manner, or for a duration that the individual cannot. The plain language of HAR § 12-46-182 unequivocally requires the production of such comparative evidence as an essential element of a discrimination claim based on disability. Cf. RGIS Inventory Specialist v. HCRC, 104 Hawai'i 158, 160, 86 P.3d 449, 451 (2004) ("If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning." (quoting Intern'l Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 323, 713 P.2d 943, 950 (1986))).

Applying the foregoing construction, Appellant's claim

that she is disabled cannot stand. Appellant makes no attempt to show that her lifting restriction is in some way analogous to the impairments of "blindness, deafness, HIV infection, [or] AIDS" that HAR § 12-46-182 identifies as being substantially limiting "by their nature." I am moreover convinced that any such attempt would fail, in light of the number of federal circuits now holding that a twenty-five pound lifting restriction does not, as a matter of law, constitute a substantial limitation on a person's ability to lift. See Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 644 (2d Cir. 1998) (ability to "lift objects . . . of maybe ten to twenty pounds" does not "support[] the conclusion that [plaintiff] is 'substantially' impaired in his ability to . . . lift . . . as compared with the average person"); Marinelli v. City of Erie, 216 F.3d 354, 364 (3d Cir. 2000) (ten-pound lifting restriction "does not render [plaintiff] sufficiently different from the general population such that he is substantially limited in his ability to lift"); Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996) ("[W]e hold, as a matter of law, that a twenty-five pound lifting limitation -- particularly when compared to an average person's abilities -- does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity."); Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1120 (5th Cir. 1998) (holding that plaintiff's inability to lift more than "twenty pounds frequently . . . is insufficient for a reasonable jury to find a substantial limitation on a major life activity"); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995) (plaintiff's

ability to "do lifting and reaching as long as she avoids heavy lifting and repetitive rotational movements . . . [presents] no evidence . . . on which a jury could find that this impairment substantially limited a major life activity"); Helfter v. United Parcel Svc., Inc., 115 F.3d 613, 617 (8th Cir. 1997) (inability to "lift more than ten pounds frequently and twenty pounds occasionally" does not substantially limit major life activities other than work); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (twenty-five pound lifting restriction held not to substantially limit any major life activities); Thompson v. Holy Family Hosp., 121 F.3d 537, 539-540 (9th Cir. 1997) ("restriction from lifting more than 25 pounds on a continuous basis" held not to substantially limit the major life activity of lifting); see also Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 22-23 (1st Cir. 2002) (noting that "cases holding that an inability to lift heavy objects does not constitute a substantial limitation on a person's overall ability to lift . . . seem to be correctly decided" (citing Williams, supra)); Mays v. Principi, 301 F.3d 866, 869 (7th Cir. 2002) (Posner, J.) ("We doubt whether lifting more than 10 pounds is [a major life] activity."). Because HRS § 378-2 and its accompanying agency rules are "textually similar" to the Americans with Disabilities Act and its supporting federal regulations, this court is free to credit our federal bretheren's considerable experience in construing a substantively identical federal statutory scheme. See, e.g., Shoppe v. Gucci America, Inc., 94 Hawaiʻi 368, 377, 14 P.3d 1049, 1058 (2000) ("In interpreting HRS § 378-2 in the context of race and gender

discrimination, we have previously looked to the interpretations of analogous federal laws by the federal courts for guidance."); Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 13, 936 P.2d 643, 649 (1997) ("The federal courts have considerable experience in analyzing these cases, and we look to their decisions for guidance.").

Accordingly, as Appellant's lifting restriction is not substantially limiting on its face, she retains the burden of producing comparative evidence that her impairment renders her either unable to perform, or else significantly restricts the condition, manner, or duration of her ability to perform, a major life activity in comparison to the "average person in the general population." See HAR § 12-46-182 (1998). By her own admission, this Appellant has failed to do.

A party moving for summary judgment bears the "burden of demonstrating that there is no genuine issue as to any material fact relative to the claim or defense," such that he or she "is entitled to judgment as a matter of law." First Hawaiian Bank v. Weeks, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989) (citing 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2727, at 121 (1983)). Because "[t]he evidentiary standard required of a moving party in meeting its burden on a summary judgment motion depends on whether the moving party will have the burden of proof on the issue at trial," see GECC Fin. Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (App. 1995), we have long recognized that a defendant who moves for judgment pursuant to Rule 56 may "discharge his burden by demonstrating that if the case went to trial there would be no

competent evidence to support a judgment for his opponent." Weeks, 70 Haw. at 396, 772 P.2d at 1190. Accordingly, a motion for summary judgment is properly granted

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Hall v. State, 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (App. 1988) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552-2553 (1986)); see also 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d § 2727, at 474 (1998) ("[I]t is not necessary for the movant to introduce any evidence in order to prevail on summary judgment" if, "in cases in which the nonmoving party will bear the burden of proof at trial, the movant can . . . establish[] that the opposing party has insufficient evidence to prevail as a matter of law[.]").[2]

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[2] The majority accordingly errs in assigning Appellee the burden, "as the moving party, to produce admissible evidence that the average person in the general population cannot lift more than twenty-five pounds." The majority's novel assessment of the movant's burden is well at odds with the established principle that "no express or implied requirement in Rule 56 [demands] that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1985) (emphasis in original). To the contrary, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the [trial] court -- that there is an absence of evidence to support the nonmoving party's case." Id. at 325, 106 S.Ct. at 2554.

In the instant case, Appellee discharged its burden by "pointing out" the absence of any evidence indicating that Appellant's ability to lift was restricted in comparison to the average person in the general population. Granting the motion for summary judgment was therefore proper, as Appellant failed to respond by proffering the comparative evidence essential to her disability discrimination claim.

Because Appellant admits that she lacks the comparative evidence necessary to prove an essential element of her case, the circuit court did not err in granting Appellee's motion for summary judgment.[3]

[3] In her briefing before this court, Appellant openly admitted to her lack of comparative evidence indicating the lifting ability of the average person in the general population. Specifically, Appellant claimed that such evidence was unnecessary to defeat Appellee's summary judgment motion because: (1) "[s]uch an approach would essentially require that the plaintiff in every disability case retain a vocational or other expert to establish the abilities of an 'average' person in the community vis-a-vis each major life activity at issue;" (2) some federal courts interpreting the Americans with Disabilities Act have held that "the plaintiff is not required to present evidence comparing the plaintiff's ability to lift with the ability of the average person for purposes of summary judgment;" and (3) there was abundant evidence that Appellant herself was restricted from lifting more than twenty-five pounds.

I read Appellant's argument as a clear admission that the record contains no evidence that her lifting restriction impaired her ability to lift in comparison to the average person in the general population. Indeed, Appellant's response establishes that she labors under the misimpression that comparative evidence is not, as a matter of law, required for her to prevail on her disability discrimination claim.