DISSENTING OPINION BY ACOBA, J.,
WITH WHOM LEVINSON, J., JOINS

I believe the attempts by Plaintiff-Appellant Steve Stevenson to serve Defendants-Appellees Elinor Suggs and the State of Hawaii's Department of Human Services (DHS) should not be reversed by technical errors as held by the majority. In this case, Stevenson is a pro se litigant who claims to be indigent and unable to hire an attorney. He also claims that he is not fluent in English, is unfamiliar with legal terminology and court rules, and has a poor sight condition related to the merits of his case that renders him unable to prepare documents in compliance with court rules.

Under such circumstances, we should follow the rule adopted by other courts which refuse to construe such service requirements "rigidly," Jordan v. United States, 694 F.2d 833, 836 (D.C. Cir. 1982), and take "a liberal and flexible construction," Borzeka v. Heckler, 739 F.2d 444, 447 (9th Cir. 1984), especially where a *pro se* litigant is involved, see id. at 447 n.2, as this approach is "sensible and necessary to prevent serious miscarriages of justice," id. at 447, and consistent with the mandate to construe the rules of procedure "to promote 'the just, speedy, and inexpensive determination of every action,'" Zankel v. United States, 921 F.2d 432, 438 (2d Cir. 1990) (quoting Federal Rules of Civil Procedure (FRCP) Rule 1).

In attempting to sue Suggs, likely in her capacity as a DHS employee, Stevenson caused Suggs to be personally served at

her place of employment at DHS and delivered, through certified mail, a copy of the summons and complaint to the Attorney General. Hawai‘i Rules of Civil Procedure (HRCP) Rule 4(d)(5) indicates that, in order to effect proper service on Suggs in her employee status, Stevenson had to serve the DHS by personally delivering the copy of the summons and complaint to the Attorney General.[1] Nevertheless, the Attorney General received actual notice that DHS was being sued.

The HRCP are modeled on the FRCP. In 1993, FRCP Rule 4 was amended to permit litigants to deliver a copy of the complaint and summons to the Attorney General of the United States through certified mail in the same manner that Stevenson served a copy of the complaint and summons on the Attorney General of Hawai‘i. Prior to the amendment of the FRCP, the United States Court of Appeals for the District of Columbia held that courts should not construe FRCP Rule 4(d)(4) "so rigidly . . . as to prevent relief from dismissal." Jordan, 694 F.2d at 835. In vacating the dismissal of a suit against the United States for failing to properly serve the United States, Jordan set out four factors for its decision: (1) the necessary parties in the government had actual notice of a suit; (2) such parties do not suffer prejudice from a technical defect in service; (3) the plaintiff has a justifiable excuse for the defect; and

[1] Stevenson did effectuate proper service upon Suggs in her individual capacity. See HRCP Rule 4(d)(1). If Stevenson's goal was to sue Suggs as such, the circuit court had jurisdiction over the claim.

4) the dismissal signals the demise of the plaintiff's claims. See id. at 836. The Ninth Circuit has followed the same rule under the prior language of FRCP Rule 4(d)(5):

> We have not previously considered whether dismissal is always required when there has been a technical defect in service. We have stated, however, that the provisions of Rule 4 should be given a liberal and flexible construction. Many other courts have made similar statements.
> . . . .
> We think that the exception the District of Columbia Circuit refers to is sensible and necessary to prevent serious miscarriages of justice. We therefore adopt the exception and hold that failure to comply with Rule 4(d)(5)'s personal service requirement does not require dismissal of the complaint if (a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed.

Borzeka, 739 F.2d at 447 (internal citations and footnote omitted) (emphases added). An additional consideration of the Ninth Circuit was the fact that a *pro se* litigant was involved:

> Second, appellant was proceeding *pro se* when the defective service was made. We are generally more solicitous of the rights of *pro se* litigants, particularly when technical jurisdictional requirements are involved.

Id. at 447 n.2 (emphasis added.) See also Zankel, 921 F.2d at 436-38 (adopting the four-part test enunciated in Jordan, in "that the reasons advanced for adopting such an exception are persuasive" and further noting that FRCP Rule 1 -- couched in the same language as HRCP Rule 1 -- requires the rules be construed "to promote 'the just, speedy, and inexpensive determination of every action'" (citations omitted)).

HRCP Rule 4 has not yet been amended in a similar manner as the FRCP. In Tropic Builders, Ltd. v. Naval Ammunition Depot Lualualei Quarters, Inc., 48 Haw. 306, 319 (1965), this

court stated that "service of process, not actual knowledge of the commencement of the action, . . . confers jurisdiction" and that the "crux of the matter is not . . . knowledge of the action but whether it has been put to the defendant, in the proper way." Tropic Builders is a 1965 case, however, decided long before Jordan. In these times, the Tropic Builders approach appears too formalistic, and if applied to a litigant in Stevenson's situation, too Draconian a measure. The flexible construction followed in Jordan, Borzeka, and Zankel rejecting dismissal because of a technical violation is sensible, necessary to do justice, and promotes the just, speedy, and inexpensive resolution of cases.

For the foregoing reasons, I would vacate the circuit court's final judgment and remand for the court to apply the rule adopted in Jordan and followed in Borzeka and Zankel.