

*** FOR PUBLICATION ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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SCI MANAGEMENT CORPORATION; HAWAIIAN MEMORIAL PARK CEMETERY;
HAWAIIAN MEMORIAL LIFE PLAN, LTD. dba BORTHWICK MORTUARIES; and
DEREK KIM, Plaintiffs-Appellees,

vs.

DARRYLLYNNE SIMS, and TAMMY QUINATA; HARRY YEE, FAYE KENNEDY,
JACK LAW, JUNE MOTOKAWA, and ALLYCYN HIKADA TASAKA, in their
official capacities as Commissioners of the HAWAI'I CIVIL RIGHTS
COMMISSION, DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS, STATE OF
HAWAI'I; and WILLIAM D. HOSHIJO, in his official capacity as
Executive Director of the HAWAI'I CIVIL RIGHTS COMMISSION,
DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS, STATE OF HAWAI'I,
Defendants-Appellants.

NO. 24485

APPEAL FROM THE FIRST CIRCUIT COURT
(CIVIL. NO. 01-1-0776)

JUNE 18, 2003

MOON, C.J., LEVINSON AND NAKAYAMA, JJ.
AND ACOBA, J., DISSENTING SEPARATELY *

OPINION OF THE COURT BY LEVINSON, J.

The defendants-appellants Darryllynne Sims and Tammy
Quinata [hereinafter, "the complainants"]; Harry Yee, Faye
Kennedy, Jack Law, June Motokawa, and Allycyn Hikida Tasaka, in
their official capacities as Commissioners of the Hawai'i Civil
Rights Commission, Department of Labor & Industrial Relations,

* Associate Justice Ramil, who heard oral argument in this case,
retired from the bench on December 30, 2002. See Hawai'i Revised
Statutes (HRS) § 602-10 (1993), which provides in relevant part that,
"[a]fter oral argument of a case, if a vacancy arises . . . , the case
may be decided or disposed of upon the concurrence of any three members
of the court without filling the vacancy or the place of such justice."

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State of Hawai'i (HCRC) [hereinafter, "the commissioners"]; and William D. Hoshijo, in his official capacity as Executive Director of the HCRC [hereinafter, "the executive director"] [hereinafter, collectively, "the defendants"], appeal from: (1) the order granting summary judgment in favor of the plaintiffs-appellees SCI Management Corp., Hawaiian Memorial Park Cemetery, Hawaiian Memorial Life Plan, Ltd. dba Borthwick Mortuaries, and Derek Kim [hereinafter, "the plaintiffs"], filed on July 25, 2001; (2) the final judgment, filed on July 25, 2001 in favor of the plaintiffs; (3) the order denying the defendants Harry Yee, Faye Kennedy, Jack Law, June Motokawa, and Allycyn Hikida-Tasaka's and the executive director's [hereinafter, collectively, "the HCRC defendants"] motion for reconsideration, filed on September 24, 2001; and (4) the order denying the HCRC defendants' motion to stay the circuit court's injunction, filed on September 24, 2001, all entered by the circuit court of the first circuit, the Honorable Dan T. Kochi presiding.

The complainants argue on appeal that the circuit court erred in: (1) granting summary judgment in favor of the plaintiffs, on the bases that (a) the plaintiffs had waived any right to a jury trial that they otherwise might have had by virtue of an arbitration clause contained in each complainant's employment contract with the plaintiffs, which required the parties to the contracts to arbitrate any employment disputes, including allegations of discrimination; and (b) Hawai'i Revised Statutes (HRS) § 368-12 (1993)¹ and Hawai'i Administrative Rules

¹ HRS § 368-12 provides that:

The [HCRC] may issue a notice of right to sue upon written request of the complainant. Within ninety days after receipt of a notice of right to sue, the complainant may bring a civil action under this chapter. The [HCRC] may
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(HAR) Rule 12-46-20 (1993),² which provide a complainant before the HCRC, but not a respondent, with the option of pursuing his or her claim in circuit court, do not, contrary to the circuit court's conclusion, violate a respondent's constitutional right to a jury trial as guaranteed by article I, section 13 of the Hawai'i Constitution;³ and (2) granting plaintiffs injunctive

¹(...continued)

intervene in a civil action brought pursuant to this chapter if the case is of general importance.

² HAR 12-46-20 provides in relevant part that:

(b) A request, in writing, may be made to the executive director to issue a notice of right to sue:

(1) At any time after the filing of a complaint with the [HCRC], and no later than three days after the conclusion of the scheduling conference provided for in section 12-46-19, by a complainant alleging violations of [HRS] chapters 368, 378, or 489 . . . ;

(2) At any time after the filing of a complaint with the [HCRC] but before a finding of reasonable cause under [HRS §] 515-9(2) . . . by a complainant alleging violations of [HRS] chapter 515 . . . ; or

(3) Within twenty days after receipt of the notice of election to file a civil action under [HRS §] 515-9(3) . . . by any party to a complaint alleging violations of [HRS] chapter 515

(c) The . . . executive director shall issue a notice of right to sue provided that the [HCRC] has not:

(1) Previously issued a notice;

(2) Entered into a conciliation agreement to which the complainant is a party; or

(3) Filed a civil action.

(d) The . . . executive director shall issue a notice of right to sue:

(1) Upon dismissal of the complaint pursuant to section 12-46-11; or

(2) Where the [HCRC] has entered into a conciliation agreement to which the complainant is not a party pursuant to section 12-46-15(d).

³ Article I, section 13 of the Hawai'i Constitution provides in relevant part that, "[i]n suits at common law where the value in controversy
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relief -- specifically, enjoining the proceedings before the HCRC involving the plaintiffs until such time as they are permitted to "opt out" of the proceedings -- on the basis that injunctive relief is not available on a motion for summary judgment.

The HCRC defendants contend that the circuit court erred in granting summary judgment in favor of the plaintiffs, on the bases (1) that the right of a complainant to opt out of the HCRC process and proceed in circuit court under HRS § 368-12, see supra note 1, and HAR 12-46-20, see supra note 2, does not implicate the right to a jury trial pursuant to article I, section 13 of the Hawai'i Constitution, see supra note 3, nor permit similarly situated classes of persons unequal access to a jury trial and (2) that, even if it did, HRS chapter 368 does not violate the equal protection clause of the Hawai'i Constitution.⁴

The plaintiffs urge this court to affirm the judgment and orders of the circuit court on the following bases: (1) that the plaintiffs never waived their right to challenge the constitutionality of HRS chapter 368; (2) that the question whether the arbitration agreements between the plaintiffs and each of the complainants constituted a valid waiver of the plaintiffs' right to a jury trial was not properly before the circuit court; (3) that the defendants had argued below that the arbitration agreements were invalid and/or unenforceable; (4)

³(...continued)
shall exceed five thousand dollars, the right of trial by jury shall be preserved."

⁴ Article I, section 5 of the Hawai'i Constitution provides that:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

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that HRS chapter 368 violates article I, sections 5 and 13 of the Hawai'i Constitution, see supra notes 3 and 4; and (5) that the circuit court properly enjoined the proceedings before the HCRC in order to prevent the loss of the plaintiffs' constitutional right to a jury trial with respect to the complainants' common law damage claims that were pending before the HCRC.

For the reasons discussed infra in section III, we hold: (1) that the complainants are estopped from attempting to enforce any arbitration agreements in the circuit court; and (2) that the plaintiffs are not entitled to opt out of the proceedings before the HCRC; but (3) that, after the conclusion of the HCRC proceedings, the plaintiffs are entitled to a jury trial with respect to any common law damage claims for which they are found to be liable by the HCRC. Accordingly, we vacate the circuit court's orders and judgment and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. HRS Chapter 368

This appeal arises from a complaint filed in the HCRC by the complainants pursuant to HRS chapter 368 (1993 & Supp. 1998). The legislature enacted HRS chapter 368 in 1988 in order to "provide a mechanism which provides for a uniform procedure for the enforcement of the State's discrimination laws." HRS § 368-1 (1993). The HCRC has "jurisdiction over the subject of discriminatory practices made unlawful by chapters 489, 515, part I of chapter 378, and . . . chapter [368]. Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may file with the . . . executive director a complaint in writing[.]" HRS § 368-11(a) (1993). The executive director

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is required to investigate the complaint and determine whether there is "reasonable cause to believe that chapter 489, 515, part I of 378, or . . . chapter [368] has been violated." HRS § 368-13(a) (1993).⁵ If the executive director determines that there is no reasonable cause, he or she shall promptly notify the parties in writing, and the complainant may bring a civil action. HRS § 368-13(c) (1993). On the other hand, if the executive director determines that there is reasonable cause, he or she shall "immediately endeavor to eliminate any alleged unlawful discriminatory practice by informal methods such as conference, conciliation, and persuasion." HRS § 368-13(d) (1993). If the executive director is unable to resolve the problem by informal means within one hundred eighty days of the filing of the complaint and the HCRC has not granted an extension of time, the executive director shall "demand that the respondent cease the unlawful discriminatory practice." HRS § 368-13(e) (1993). If the case is not settled within fifteen days after service of the executive director's demand, the HCRC shall "appoint a hearings examiner and schedule a contested case hearing that shall be held in accordance with [HRS] chapter 91." HRS § 368-14(a) (1993).

Following the completion of the contested case hearing, the hearings officer shall issue a proposed decision containing a statement of the reasons including a determination of each issue of fact or law necessary to the proposed decision which shall be served upon the parties. . . . If the [HCRC] finds that unlawful discrimination has occurred, the [HCRC] shall issue a decision and order in accordance with [HRS] chapter 91 requiring the respondent to cease the unlawful practice and to take appropriate remedial action. If there is no finding of discrimination, the [HCRC] shall issue an order dismissing the case.

Id. "The remedies ordered by the [HCRC] or the court under [HRS chapter 368] may include compensatory and punitive damages and

⁵ HRS §§ 368-11(a) and 368-13(a) were amended in 2001 in respects not pertinent to the present appeal. See 2001 Haw. Sess. L. Act 55, §§ 17(2) and 17(4) at 92.

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legal and equitable relief[.]” HRS § 368-17(a) (1993).⁶ The complainant and the respondent are each entitled to appeal the final order of the HCRC, de novo, based on the record of the proceedings before the HCRC, in the appropriate circuit court. HRS §§ 368-16(a) and 368-16(c) (1993).

Although HRS chapter 368 was intended to “provide[] for a uniform procedure for the enforcement of the State’s discrimination laws[,] [i]t [was also] the legislature’s intent to preserve all existing rights and remedies under such laws.” HRS § 368-1. Accordingly, the legislature authorized the HCRC to “issue a notice of right to sue upon written request of the complainant.” HRS § 368-12 (1993). “The [HCRC] may intervene in a civil action brought pursuant to [HRS chapter 368] if the case is of general importance.” Id.

B. The Proceedings In The HCRC Based On The Complainants’ Allegations Of Discrimination

On January 20 and 22, 1998, respectively, Sims and Quinata filed complaints with the HCRC pursuant to HRS chapter 368, alleging, inter alia, that Derek Kim, an employee of SCI Management Corp., Hawaiian Memorial Park Cemetery, and Hawaiian Memorial Life Plan, Ltd. dba Borthwick Mortuaries, had sexually harassed them and that they had been subjected to retaliation because of their resistance to the alleged sexual harassment. The executive director investigated the complaints and, on January 24, 2000, informed the complainants that he had determined that there was reasonable cause to believe that Derek Kim had committed unlawful discriminatory practices against them and requested that the plaintiffs enter into informal discussions

⁶ In 2001, HRS § 368-17 was amended in respects not pertinent to the present appeal. See 2001 Haw. Sess. L. Act 55, § 17(5) at 92-93.

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with the complainants in order to settle the case. On July 5, 2000, after informal conciliation methods had failed, the executive director issued his final conciliation demand to the plaintiffs, in which the executive director insisted, inter alia, that the plaintiffs pay each of the complainants \$400,000.00 as "alleged general damages, including but not limited to emotional distress." On August 3, 2000, the plaintiffs having failed to respond, a contested case hearing was scheduled for each complainant. Sims and Quinata subsequently intervened as parties in their respective cases and the cases were consolidated over the plaintiffs' objections on January 11, 2001.

On March 2, 2001, in a letter to the executive director, the plaintiffs demanded a jury trial as to all of the allegations raised by the complainants, pursuant to article I, section 13 of the Hawai'i Constitution, see supra note 3. The record does not reflect whether the executive director ever responded to the plaintiffs' request.

C. The Plaintiffs' Prayer For Declaratory Relief In The Circuit Court

On March 9, 2001, the plaintiffs filed a complaint in the present matter in the first circuit court seeking declaratory and injunctive relief. In Count I, the plaintiffs alleged that HRS chapter 368 violates article I, section 13 of the Hawai'i Constitution, see supra note 3, on the basis that it "does not contain a provision for a respondent to opt out of the HCRC [proceedings] and obtain a jury trial in [c]ircuit [c]ourt on the allegations of discrimination that have been alleged against it by a complainant." In Count II, the plaintiffs alleged that HRS chapter 368 violates article I, section 5 of the Hawai'i Constitution, see supra note 4, on the basis that the denial of a

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respondent's right to a jury trial denied a respondent due process of law. In Count III, the plaintiffs alleged that HRS chapter 368 denies respondents the equal protection of the laws, in violation of article I, section 5 of the Hawai'i Constitution, see supra note 4, because it affords complainants but not respondents the right to a jury trial. In Count IV, the plaintiffs prayed for an order staying the proceedings before the HCRC involving the complainants' allegations, inter alia, "until final adjudication of the [plaintiffs'] constitutional claims[.]" On April 12, 2001, the plaintiffs filed an amended complaint, which did not differ substantively from the initial complaint, to which the defendants Sims, Quinata, the executive director, and commissioners each filed answers.

Also on March 9, 2001, the plaintiffs moved for a preliminary injunction ordering the executive director to stay the consolidated cases involving the complainants that were pending before the HCRC. The circuit court denied the motion on June 13, 2001.

On June 5, 2001, the plaintiffs filed a motion for summary judgment as to all of the counts contained in their first amended complaint. On June 20, 2001, the defendants Sims, Quinata, the executive director, and commissioners, each filed a memorandum in opposition to the plaintiffs' motion. Sims argued, inter alia, that, based on the "public rights doctrine," respondents before the HCRC are not entitled to a jury trial. Quinata urged the circuit court not to reach the plaintiffs' constitutional claims on the basis that, regardless of the constitutionality of HRS chapter 368, there were genuine issues of material fact as to whether the plaintiffs had waived any

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right to a jury trial.⁷ The executive director maintained that the plaintiffs had no fundamental right to a jury trial in administrative proceedings and were merely expressing their desire to select the forum of their choice. In addition, the executive director argued that the plaintiffs were required to exhaust their administrative remedies before they could even assert the right to a jury trial. The commissioners argued: (1) that, because the legislature had created a new statutory claim for relief, no constitutional right to a jury trial was implicated; (2) that the statutory scheme creating the HCRC did not infringe respondents' right to the equal protection of the laws, inasmuch as the scheme survived "rational basis" review; and (3) that the preponderance of the case law of foreign jurisdictions supported the proposition that there was no right to a jury trial in an administrative forum.

On July 15, 2001, the circuit court granted the plaintiffs' motion for summary judgment. The circuit court ruled: (1) that the public rights doctrine was inapplicable to HRS chapter 368 because the statutory framework provided for private remedies; (2) that, because HRS chapter 368 afforded complainants and respondents disparate access to a jury trial, thereby implicating a fundamental constitutional right, the state was subject to the burden of surviving "strict scrutiny" review; (3) that the state had failed to meet its burden of establishing that HRS chapter 368 survived strict scrutiny review; and (4) consequently, that HRS § 368-12, see supra note 1, and HAR 12-46-20, see supra note 2, violated article I, sections 5 and 13 of

⁷ Quinata contended that her employment agreement mandated that all disputes be resolved by binding arbitration, subject to the prerogative of employees to file complaints with the Equal Employment Opportunity Commission (EEOC) or similar state agency.

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the Hawai'i Constitution, see supra notes 3 and 4, and the fourteenth amendment to the United States Constitution.⁸ Accordingly, the circuit court enjoined the HCRC "from any further proceedings in the cases involving [the plaintiffs] until [the plaintiffs are] given a right to opt out of the HCRC administrative proceedings and seek a jury trial in the [c]ircuit [c]ourt on the common law damage claims alleged in the HCRC docketed cases." The circuit court limited its ruling to the parties in the present matter and specifically did not prohibit the HCRC from "continuing its activities with respect to other claims brought by complainants before the HCRC."

On August 6, 2001, the HCRC defendants filed motions to stay the circuit court's injunction and for reconsideration. On September 24, 2001, the circuit court denied both motions. On August 20, 2001, the complainants filed a joint notice of appeal. On August 23, 2001, the HCRC defendants filed a notice of appeal, which they amended to a joint notice on October 3, 2001.

II. STANDARDS OF REVIEW

A. Motion For Summary Judgment

We review the circuit court's grant or denial of summary judgment de novo. Hawaii Community Federal Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). The standard for granting a motion for summary judgment is settled:

[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

⁸ It is not clear why the circuit court ruled that HRS chapter 368 violated the plaintiffs' rights under the fourteenth amendment to the United States Constitution, inasmuch as the plaintiffs did not challenge the statute on the foregoing grounds. Accordingly, we need not decide whether any provisions of HRS chapter 368 violate the fourteenth amendment to the United States Constitution in the present appeal. See Birmingham v. Fodor's Travel Publications, Inc., 73 Haw. 359, 371, 833 P.2d 70, 77 (1992) ("The general rule in this jurisdiction is that we will not address a legal theory not raised by the appellant in the court below.").

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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.

Id. (citations and internal quotation marks omitted).

Coon v. City and County of Honolulu, 98 Hawai'i 233, 244-45, 47 P.3d 348, 359-60 (2002).

B. Constitutional Law

"We answer questions of constitutional law by exercising our own independent judgment based on the facts of the case. . . . Thus, we review questions of constitutional law under the 'right/wrong' standard." State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) (citations, some quotation signals, and some ellipsis points in original omitted).

III. DISCUSSION

A. The Arbitration Clauses Contained In The Complainants' Employment Contracts Do Not Foreclose The Plaintiffs' Constitutional Challenge To HRS Chapter 368.

As a preliminary matter, we address the complainants' argument, in which the HCRC does not join, that the circuit court erred in addressing the plaintiffs' constitutional challenge to HRS chapter 368 because, assuming arguendo that a respondent employer in an HCRC proceeding has a constitutional right to a jury trial, the plaintiffs in the present matter waived the right with respect to the resolution of any employment disputes with the complainants. The complainants maintain that an arbitration clause contained within each of their employment contracts, which required the parties to the contracts to arbitrate any employment disputes, including allegations of discrimination, constituted a

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waiver by the plaintiffs of any right to a jury trial. We disagree.

We are unable to discern how an agreement to arbitrate employment disputes abrogates whatever right to a jury trial an employer may have if an employee, who is a party to the agreement, files a complaint with the HCRC and seeks legal rather than equitable forms of relief. There is no dispute that none of the parties attempted to enforce the arbitration agreements in the proceedings before the HCRC. Indeed, the complainants unilaterally filed complaints with the HCRC rather than seeking to resolve their dispute by means of arbitration and eventually intervened as parties in the HCRC proceedings. Thus, the complainants would have this court hold that the arbitration clauses abrogated whatever right the plaintiffs had to a jury trial despite the fact that the complainants themselves sought to avoid the terms of the arbitration agreement. It is well-settled, however, that "a party is precluded from asserting to another's disadvantage[] a right inconsistent with a position previously taken by him." Maria v. Freitas, 73 Haw. 266, 274, 832 P.2d 259, 264 (1992) (quoting Aehegma v. Aehegma, 8 Haw. App. 215, 234, 797 P.2d 74, 80 (1990) (quoting Hartmann v. Bertelmann, 39 Haw. 619, 628 (1952) (quoting Montclair Trust Co. v. Russell Co., 39 A.2d 641, 643 (N.J. Ch. 1944))) (internal quotation signals omitted); see also Roxas v. Marcos, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1999) ("A party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action." (Quoting Rosa v. CWJ Contractors,

Ltd., 4 Haw. App. 210, 218, 664 P.2d 745, 751 (1983).) (Brackets omitted.). Accordingly, we hold that the complainants are judicially estopped from attempting to enforce their arbitration agreements in the circuit court.

B. The Plaintiffs Are Entitled To A Jury Trial On Any Common Law Damage Claims For Which They Are Found To Be Liable By The HCRC, But Only After The Conclusion Of The HCRC Proceedings.

As noted supra in note 3, article I, section 13 of the Hawai'i Constitution preserves the right to a trial by jury "[i]n suits at common law where the value in controversy shall exceed five thousand dollars" This court has explained that article I, section 13 preserves the right to a jury trial that "existed under the common law of this state at the time that the Hawai'i Constitution went into effect in 1959." Housing Fin. and Dev. Corp. v. Ferguson, 91 Hawai'i 81, 87, 979 P.2d 1107, 1113 (1999) (citations omitted). "[I]n the case of statutory actions without direct common-law antecedents," this court has applied "a simplified test focusing solely on whether the nature of the remedy sought is 'legal' or 'equitable.'" Id. at 88, 979 P.2d at 1114 (citing Mehau v. Reed, 76 Hawai'i 101, 110-11, 869 P.2d 1320, 1329-30 (1994) ("The test to determine whether a suit is 'at common law' is not whether the cause of action is statutory, but whether the cause of action seeks 'legal' or 'equitable' relief"); cf. Curtis v. Loether, 415 U.S. 189, 193-94 (1974) ("Although the thrust of the [seventh a]mendment [to the United States Constitution] was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. . . . By common law, [the Framers of the Amendment] meant . . . not merely suits, which the common law recognized among its

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old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered The [s]eventh [a]mendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law." (Citations and internal quotation signals omitted.) (Emphasis in original.) (Some ellipsis points added and some in original.)). Traditional forms of "legal" relief include compensatory and punitive damages. See Mehau, 76 Hawai'i at 110, 869 P.2d at 1329 (noting that plaintiff who sought monetary damages based upon invasion of privacy sought legal, rather than equitable, relief); Ross v. Stouffer Hotel Co. (Hawai'i) Ltd., Inc., 76 Hawai'i 454, 463, 879 P.2d 1037, 1046 (1994) (noting that compensatory and punitive damages are traditional legal remedies).

HRS § 368-17(a) (1993) provided that "[t]he remedies ordered by the [HCRC] or the court under [HRS chapter 368] may include compensatory and punitive damages and legal and equitable relief, including, but not limited to [p]ayment to the complainant of damages for an injury or loss caused by a violation of [HRS] chapters [368,] 489, 515, [or] part I of chapter 378, . . . including a reasonable attorney's fee . . . [and] [other relief [that] the [HCRC] or the court deems appropriate."⁹ Thus, by its plain language, HRS chapter 368 empowers the HCRC to award legal forms of relief. Moreover, in the proceedings before the HCRC from which the present matter

⁹ HRS § 368-17, as amended in 2001, see supra note 6, does not differ in any material respects from the foregoing.

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arises, the complainants and the executive director claim legal relief in the form of monetary damages -- i.e., \$400,000.00 in "alleged general damages, including but not limited to emotional distress" -- for each complainant. Consequently, we agree with the plaintiffs that they are entitled to a jury trial with respect to the complainants' allegations of sexual discrimination and retaliation.

The defendants do not deny that they claim, inter alia, legal forms of relief or even that such claims ordinarily trigger the right to a jury trial pursuant to article 1, section 13 of the Hawai'i Constitution. Rather, the defendants urge us to adopt the "public rights doctrine" articulated by the United States Supreme Court with respect to the seventh amendment to the United States Constitution, which, the defendants contend, "establishes that a jury trial is not available as a matter of right in cases where the legislature has established an administrative agency to oversee and rule on the action."

Although the seventh amendment is not applicable to the states, see Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916), "[b]ecause article I, section 13 was patterned after the seventh amendment to the United States Constitution, 'we have deemed the interpretation of [the seventh amendment] by the federal courts highly persuasive in construing the right to a civil jury trial in Hawai'i.'" Housing Fin. and Dev. Corp., 91 Hawai'i at 87, 979 P.2d at 1113 (quoting Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 513, 880 P.2d 169, 188 (1994) (citing Harada v. Burns, 50 Haw. 528, 532 & n.1, 445 P.2d 376, 380 & n.1 (1968))) (some brackets added and some in original). We need not reach the question whether Hawai'i should adopt the "public rights" doctrine, however, because, even if we

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were to hold that our state legislature, in certain cases, may abrogate a party's right to a jury trial, the doctrine would not assist the defendants in the present matter.

Pursuant to the "public rights" doctrine, Congress may assign the adjudication of "new statutory 'public rights'" to a tribunal that does not employ juries as fact-finders, "without violating the [s]eventh [a]mendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51 (1989) (quoting Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 455 (1977)). "Public rights," as defined by the United States Supreme Court, are statutory causes of action (1) that "inhere[] in, or lie[] against, the Federal Government in its sovereign capacity" or (2) that are "'so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.'" Id. at 53-54 (citing Atlas Roofing, 430 U.S. at 458, and quoting Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 593-94 (1985)). "Public rights" are distinguishable from "private rights," which concern "'the liability of one individual to another under the law as defined[.]'" Id. at 51 n.8 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)). See also In re MCI Telecommunications Corp. Complaint, 612 N.W.2d 826, 836 (Mich. Ct. App. 2000) (recognizing that the Michigan Constitution does not require adjudication by a jury where "the statutory right is so closely integrated into a public regulatory scheme as to be appropriate for resolution by an administrative agency"); Lisanti v. Alamo Title Ins. of Texas, 55 P.3d 962, 967 (N.M. 2002) (recognizing "public rights" to include rights vis-a-vis the state and rights that are "'closely

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intertwined' with a regulatory program"); FUD's, Inc. et al. v. State, 727 A.2d 692, 698 (R.I. 1999) (recognizing "public rights" under the Rhode Island Constitution to "include those 'statutory rights that are integral parts of a public regulatory scheme and whose adjudication [the legislature] has assigned to an administrative agency or specialized court of equity'" (brackets in original) (quoting National Velour Corp. v. Durfee, 637 A.2d 375, 379 (R.I. 1994) (quoting Granfinanciera, 492 U.S. at 55 n.10))); National Velour Corp., 637 A.2d at 379 (adopting "the public-rights doctrine developed by the United States Supreme Court in instances wherein the Legislature has assigned adjudication of civil penalties to an administrative agency"); Bishop Coal Co. v. Salyers, 380 S.E.2d 238, 245 (W. Va. 1989) ("When an individual acts to enforce 'public rights' and, as a minor part of such enforcement is awarded 'incidental' damages, a jury trial is not required. However, when an individual seeks substantial money damages as compensation for pain and suffering, the individual's role in enforcement of the 'public rights' is minor and the narrow exception to the requirement of a jury trial does not apply.").

Notwithstanding its embrace of the "public rights" doctrine, the Supreme Court cautioned in Granfinanciera that Congress

lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. As we recognized in Atlas Roofing, to hold otherwise would be to permit Congress to eviscerate the [s]eventh [a]mendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. 430 U.S. at 457-458

The Constitution nowhere grants Congress such puissant authority. "[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity," Ross v. Bernhard, 396 U.S. 531, 538 . . . (1970), nor can Congress conjure away the [s]eventh [a]mendment by

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mandating that traditional legal claims be brought there or taken to an administrative tribunal.

Granfinanciera, 492 U.S. at 51-52 (footnote and some citations omitted) (some brackets added and some in original); accord Atlas Roofing, 430 U.S. at 458 (cautioning that Supreme Court case law "support[s] administrative factfinding in only those situations involving 'public rights[';] . . . [w]holly private tort, contract, and property cases, as well as a vast range of other cases as well are not at all implicated").

Accordingly, in Granfinanciera, the United States Supreme Court held that "a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer[,]. . . notwithstanding Congress' designation of fraudulent conveyance actions" as triable by bankruptcy judges without a jury. Id. at 36. First, the Court determined that fraudulent conveyance actions by bankruptcy trustees "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it" and "are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. . . . They therefore appear [to be] matters of private rather than public right." Id. at 56 (citations and internal quotation signals omitted). Second, the Court concluded that such actions are not "integrally related to the reformation of debtor-creditor relations" -- i.e., the public regulatory scheme upon which the trustee sought to justify the adjudication of the action without a jury. Id. at 60. In this regard, the Court noted that permitting jury trials in fraudulent conveyance

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actions brought by a trustee would not “go far to dismantle the statutory scheme,” nor “be incompatible’ with bankruptcy proceedings, in view of Congress’ express provision for jury trials in certain actions arising out of bankruptcy litigation.” Id. at 61-62 (quoting Atlas Roofing, 430 U.S. at 450, 454). Although the Granfinanciera Court acknowledged that “providing jury trials in some fraudulent conveyance actions . . . would impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations[,]” it concluded that “these considerations are insufficient to overcome the clear command of the [s]eventh [a]mendment.” Id. at 63-64 (footnotes and citations omitted).

In Atlas Roofing, by contrast, the United States Supreme Court held that the Occupational Safety and Health Act of 1970 (OSHA), which permits the federal government, “proceeding before an administrative agency, (1) to obtain abatement orders requiring employers to correct unsafe working conditions and (2) to impose civil penalties on any employer maintaining any unsafe working condition[,]” did not violate employers’ seventh amendment rights. Id. at 445, 460-61. The Court noted, inter alia, that

Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation’s working men and women. It created a new cause of action, and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved. The [s]eventh [a]mendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law.

Id. at 461.

In the present matter, plaintiffs argue that they are entitled to a jury trial with respect to the complainants’ allegations of sexual harassment and retaliation. In the

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proceeding before the HCRC, the executive director seeks, inter alia, \$400,000.00 "in alleged general damages, including but not limited to emotional distress," payable to each complainant, based on the allegations of sexual harassment and retaliation contained in their complaints, and the complainants have intervened as parties in the proceeding in order to protect their interests. Thus, although the state is a party to the proceedings before the HCRC and, in addition to requesting monetary relief on behalf of the complainants, undertakes to protect Hawaii's working men and women from discrimination, the proceedings before the HCRC involve the adjudication of "the liability of one individual to another under the law as defined" and do not merely arise "between the [state] and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'" Granfinanciera, 492 U.S. at 51 n.8 (quoting Crowell, 285 U.S. at 50-51). Although we recognize that there may be circumstances in which individual relief furthers a public purpose, see, e.g., Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 290-96 (2002) (holding that the Equal Employment Opportunity Commission's (EEOC) pursuit of entirely victim-specific relief may vindicate a public interest), under HRS chapter 368, the adjudication of private rights has clear primacy over the adjudication of public rights, as demonstrated, inter alia, by the complainants' right, pursuant to HRS § 368-12 and HAR 12-46-20, see supra notes 1 and 2, to choose whether to pursue their claims before the HCRC or in the circuit court, where the right to jury trial is available to them.¹⁰ Cf. Waffle

¹⁰ During oral argument before this court, the HCRC defendants acknowledged that HRS § 368-12 gives complainants control over the prosecution (continued...)

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House, Inc., 534 U.S. at 291-92, 295 (noting that, pursuant to Title VII of the Civil Rights Act of 1964, the EEOC, rather than the employee, is "in command of the process" and "the employee has no independent cause of action" if the EEOC files suit on its own"); FUD's, Inc., 727 A.2d at 698 (recognizing that, "[a]lthough the [Rhode Island Commission for Human Rights's] ability to order an employer to reinstate with back pay an employee who has suffered job discrimination . . . directly 'foster[s] the employment of individuals in this state,' the [C]ommission's ability to order a private employer to compensate a former employee for his or her pain and suffering and -- in cases involving malice, ill will, or reckless or callous indifference -- to award punitive damages, . . . more closely resembles the adjudication of a tort dispute between two private parties" (some brackets added and some in original)). See also Dalis v. Buyer Advertising, Inc., 636 N.E.2d 212, 214-15 (Mass. 1994) (noting that a sex discrimination claim is "a suit between two persons which clearly sets forth a controversy concerning property" and is "analogous to common law actions sounding in both tort and contract").

Moreover, we do not believe that the involvement of a jury in the adjudication of an employer's liability to an employee for damages is incompatible with the statutory framework enacted by the legislature. Indeed, HRS § 368-12 authorizes the HCRC to "issue a notice of right to sue upon written request of the complainant" -- i.e., complainants are permitted to opt out of the HCRC proceedings and obtain a jury trial -- and the HCRC may "intervene in a civil action brought pursuant to [HRS chapter

¹⁰(...continued)
of their claims by affording them the option of pursuing them in the circuit court or before the HCRC, depending on their needs and means.

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368] if the case is of general importance" -- i.e., the statute authorizes the HCRC to enforce public rights by means of a jury trial in circuit court. Thus, HRS chapter 368 is not a statute in which the legislature has "create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the . . . judiciary." Granfinanciera, 492 U.S. at 54. Compare FUD's, Inc., 727 A.2d at 698 (holding that rights under Rhode Island's Fair Employment Practices Act (FEPA) are not public rights, because, "[a]lthough the right of employees to be free from employment discrimination is indeed 'statutory' and its 'adjudication has [been] assigned to an administrative agency,' their right to sue employers and to obtain compensatory and/or punitive damages for any violation of their rights to be free from employment discrimination falls more on the side of a traditional private remedy for legal wrongdoing than it does on the side of constituting an integral component of a public regulatory scheme"); Lisanti, 55 P.3d at 963 (holding that "a regulation which requires that all title insurance claims under \$1,000,000 be resolved through arbitration" violates the right to a jury trial guaranteed by the New Mexico Constitution); Bishop Coal Co., 380 S.E.2d at 246 ("[a]llowing the [West Virginia Human Rights Commission] to award money other than limited incidental damages, without a jury, would violate" the right to a jury trial under the West Virginia Constitution), with Atlas Roofing, 430 U.S. at 460-61 (holding that a jury trial was not necessary for the adjudication of actions brought by the government to "correct unsafe working conditions" and to "impose civil penalties on any employer maintaining any unsafe working condition"); Cavallari v. Office of Comptroller of Currency, 57

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F.3d 137, 145 (2d Cir. 1995) (holding that an action brought by a government agency to enforce an order issued by the agency pursuant to its regulatory authority did not require a jury trial); Pel-Star Energy, Inc. v. United States Dep't of Energy, 890 F. Supp. 532, 541 (W.D. La. 1995) (holding that an action brought by a government authority to seek restitution for charges in excess to those set by law did not require a jury trial); In re MCI Telecommunications Corp. Complaint, 612 N.W.2d at 836 (holding that an action brought by a government agency to enforce an order issued by the agency pursuant to its regulatory authority did not require a jury trial); National Velour Corp., 637 A.2d at 380 (holding that an environmental-enforcement action seeking civil penalties for violations of Rhode Island's Clean Air Act brought by the state agency entrusted with the act's enforcement "clearly involves a public right[,] because "[t]he state was a party to the action to enforce a statutory right that is part of a pervasive regulatory scheme").

The defendants maintain that prohibiting respondent-employers but not complainants from "opting out" of proceeding before the HCRC (and, consequently, affording complainants but not respondent-employers the means of obtaining a jury trial) "helps balance the economic and social barriers faced by many civil rights complainants[]" and "takes into account the functions and limited resources of the HCRC, which lacks both the means and statutory authority to prosecute all claims of employment discrimination on behalf of complainants if respondents were given the ability to opt-out of administrative proceedings." Even if the defendants' unsubstantiated assumptions were correct, however, such pecuniary concerns cannot in and of themselves abrogate a party's fundamental right to a

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jury trial. See Granfinanciera, 492 U.S. at 63-64 (noting that the expense and time of "providing jury trials in some fraudulent conveyance actions" are "insufficient to overcome the clear command of the [s]eventh [a]mendment"); Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 944 (1983) ("the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution"); Germain v. Connecticut Nat'l Bank, 988 F.2d 1323, 1332 (2d Cir. 1993) ("Although it may be more expeditious to eschew a separate jury trial, such concerns have little weight when balanced against a constitutional guarantee."); see also Lavelle v. Massachusetts Comm'n Against Discrimination, 688 N.E.2d 1331, 1335 (Mass. 1997) ("If one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right. We are dealing here with a fundamental right . . . and differing treatment of complainants and respondents in respect to the availability of that fundamental right . . . cannot be justified."). If the legislature wishes to provide employees with greater assistance in prosecuting claims of employment discrimination, there is a variety of ways in which it may do so without divesting employers of the constitutional right to trial by jury.

In sum, and to reiterate, we hold that, as HRS chapter 368 is currently written, a respondent before the HCRC is entitled to a jury trial with respect to claims that seek traditional forms of legal relief, including compensatory and punitive damages, on behalf of complainants before the HCRC.¹¹

¹¹ In so holding, we do not speculate as to whether a statutory scheme that prohibited both complainants and respondents from opting out of
(continued...)

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Accordingly, we further hold that, in the present matter, the plaintiffs are entitled to a jury trial with respect to the executive director's demand for \$400,000.00 in general damages, payable to each of the complainants, based on the complainants' allegations of sex discrimination and retaliation.

The foregoing does not require us to hold, however, that the plaintiffs are entitled to "opt out" of the proceedings before the HCRC.

Although trial by jury in civil cases is a "fundamental" right in the State of Hawai'i, see Lee Wing Chau v. Nagai, 44 Haw. 290, 293-94, 353 P.2d 998, 1000 (1960) [,] the right has never been construed so broadly as to prohibit reasonable conditions upon its exercise. . . .

Moreover, in holding that a procedure for non-judicial determinations prior to jury trial does not violate the seventh amendment, the United States Supreme Court has stated that the seventh amendment "does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it." [Kimbrough v. Holiday Inn, 478 F.Supp. 566,] 569 [(E.D. Pa. 1979)] (quoting Capital Traction Co. V. Hof, 174 U.S. 1, 23 . . . (1899)). Thus, with regard to mandatory arbitration programs that afford a right to trial de novo, it has been held that

[t]he only purpose of the [seventh amendment] is to secure the right of trial by jury before rights of person or property are finally determined. All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.

Id. . . . at 570 (quoting Application of Smith, . . . 112 A.2d 625 ([Pa.]1955) [,] appeal dismissed sub nom., Smith v. Wissler, 350 U.S. 858 . . . (1958)) (emphasis in original).

Thus, laws, practices, and procedures affecting the right to trial by jury under article I, § 13 are valid as long as they do not significantly burden or impair the right to ultimately have a jury determine issues of fact.

Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 513,

¹¹(...continued)

the proceedings before the HCRC would violate article I, section 13 of the Hawai'i Constitution. Such a statutory scheme would raise somewhat different constitutional questions, inasmuch as the complainant would not control the means of prosecution of his or her claim, and jury trial would not, in some cases, constitute an integral part of the regulatory regime. See, e.g., Lavelle, 688 N.E.2d at 1336 (suggesting authority that might support the elimination of both a complainant's and a respondent's right to a jury trial in discrimination suits).

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880 P.2d 169, 188 (1994) (footnote omitted) (some brackets added and some in original); accord Lavelle, 688 N.E.2d at 1335-36 (“differences in the treatment of complainants and respondents are permissible provided fundamental rights are not jeopardized”). Moreover, for this court to rewrite HRS chapter 368 in order to permit respondents as well as complainants to “opt out” of the HCRC proceedings would be contrary to the clear intent of the legislature as articulated in the plain language of the statute and, in many cases, unnecessary. The plaintiffs themselves concede that, if the HCRC were merely to conclude that a respondent is subject only to equitable remedies, such as back pay and injunctive relief, respondents before the HCRC would have no right to a jury trial pursuant to article I, section 13 of the Hawai'i Constitution. Likewise, “it would be contrary to the purpose of the statute for us to declare . . . complainant[s'] claim[s] unenforceable because the statutory scheme does not grant [respondents] a right to seek a trial by jury” in cases in which legal remedies are awarded. Lavelle, 688 N.E.2d at 1335.

Thus, we adopt the solution fashioned by the Massachusetts Supreme Judicial Court in addressing a similar statutory scheme in Lavelle, which permits a respondent before the Massachusetts Commission Against Discrimination to avail himself or herself of a jury trial “on any of the complainant’s claims that, after final agency action, has resulted in the granting of relief that departs from or exceeds the relief that a court of equity could traditionally have granted.” Lavelle, 688 N.E.2d at 1337. Therefore, we hold that a respondent who appeals a final order of the HCRC, pursuant to HRS § 368-16, is entitled to a jury trial on any claims that form the basis for an award of

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common law damages by the HCRC.¹²

We believe that the foregoing holding is the best means of curing the constitutional defect contained in HRS chapter 368 for a number of reasons. First and foremost, it does not require this court either to hold that HRS chapter 368 is unconstitutional or to rewrite it. In this connection, we note that central to Justice Acoba's dissent is the subtext that the only option available to this court in the event that HRS chapter 368 is deemed to be in conflict with the fundamental constitutional right to a jury trial with respect to common law claims is to strike down the statute in its entirety. We believe that such a drastic course is unnecessary when we can simply follow the persuasive example of the Massachusetts high court, in Lavelle, by harmonizing the imperatives of article I, section 13

¹² Like the petition for appellate review of an HCRC order pursuant to HRS § 368-16, the respondent must file his or her request for a jury trial "not more than thirty days after a copy of the [final] order of the [HCRC] is received," HRS § 368-16(e); otherwise, the respondent waives his or her right to a jury trial. By electing to seek a jury trial, however, the respondent waives his or her right to appellate review of the HCRC's final order in the circuit court, and the whole action is tried de novo in the circuit court. Cf. Kaulia v. Honolulu Rapid Transit Co., Ltd., 32 Haw. 446, 448 (1932) (reading the Workmen's Compensation Act of 1925 to permit an employee to elect either to pursue his or her claim under the statute or under the common law, but not both); Parr v. United States, 172 F.2d 462, 463-64 (10th Cir. 1949) (noting that where appellant had "two remedies, each for the same wrong, and both against the United States[,] [e]ffectively invoking one constituted an election which precluded resort to the other"). Where an action involves claims for both legal and equitable relief, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." Curtis, 415 U.S. at 196 n.11; accord Lytle v. Household Manufacturing, Inc., 494 U.S. 545, 550 (1990); Tull v. United States, 481 U.S. 412, 425 (1987). Moreover, "the trial court is precluded from ruling, in the first instance, on any equitable claims that may determine the outcome of the legal claims." Lee v. Aiu, 85 Hawai'i 19, 29, 936 P.2d 655, 665 (1997) (citing Harada v. Burns, 50 Haw. 528, 445 P.2d 376 (1968)). "[W]hen a jury is called upon to make findings in connection with both legal and equitable matters resting upon the same set of facts, the trial court is bound by the jury's findings of fact when making its equitable determinations." Id. (citations omitted). Cf. Mathewson v. Aloha Airlines, Inc., 82 Hawai'i 57, 79 n.22, 919 P.2d 969, 991 n.22 (1996) ("in a jury trial of an action seeking equitable and legal remedies, the jury decides legal questions and awards legal damages and the court decides equitable questions and awards equitable relief").

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of the Hawai'i Constitution and the statutory framework created by the legislature in HRS chapter 368.

But in addition,

[m]any disputes will be settled by the [executive director] and will not need to be adjudicated. Persons representing themselves will not be forced into unfamiliar court surroundings but will be heard instead in less intimidating [HCRC] proceedings. Courts, in turn, will not be unnecessarily inundated with . . . discrimination lawsuits demanded by respondents, perhaps in some instances for tactical reasons. Also, the [HCRC] may decide in favor of the respondent on the merits, thereby ending the matter. . . . Moreover, although the [HCRC] may decide in favor of the complainant, it might only grant traditional equitable relief. In such a case, a respondent would have no right to a jury trial. Additionally, an unsuccessful respondent may conclude that an appeal based on the [HCRC] record . . . provides an adequate avenue of relief from the agency decision. We adopt this solution recognizing that it gives certain respondents two chances to prevail, before the [HCRC] and then in [circuit] court, while a complainant unsuccessful before the [HCRC] may not proceed to court for a new hearing . . . , but may seek judicial review only on the agency record

Any other solution[, however,] must be left to the Legislature.

Id. at 1336 (citations omitted).

Finally, because the foregoing holding disposes of the present appeal, we decline to address the remaining arguments advanced by the parties.

IV. CONCLUSION

In light of the foregoing, we vacate the circuit court's orders and judgment and remand the matter for further proceedings consistent with this opinion.

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