DISSENTING OPINION BY ACOBA, J.

I respectfully dissent. There was insufficient evidence to support a conviction for the offense of disorderly conduct, either as a violation or a petty misdemeanor, because Defendant's conduct did not have the effect of causing actual or threatened alarm to a member or members of the public, pursuant to Hawai'i Revised Statutes (HRS) § 711-1101(1).

I.

HRS § 711-1101, pertaining to disorderly conduct, and HRS § 711-1106, pertaining to harrassment, were enacted in 1972 as part of "A Bill for an Act Relating to the Hawaii Penal Code." Conf. Com. Rep. No. 2-72, in 1972 Senate Journal, at 289, 740. Prior to the codification of separate disorderly conduct and harassment statutes, the two offenses were grouped in one statute,[1] HRS § 772-2, along with other offenses later separated

[1] The previous Hawai'i statute provided, in relevant part, as follows:

> Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
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> (1) Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
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> (2) Congregates with others on a public street or sidewalk and refuses to move on when ordered by the police;
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> (3) By his actions causes a crowd to collect, except when lawfully addressing such a crowd;
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> (4) Shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any three or more persons;
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> (5) Interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in proximity of such person's pocketbook or handbag;

(continued...)

and now encapsulated in statutes throughout HRS chapter 711. See Commentary on HRS § 711-1101; see also Commentary on HRS § 711-1106 (1993) ("Previous Hawaii law treated various forms of harassment as disorderly conduct."). It is no accident, then, that disorderly conduct and harassment are treated as separate offenses. The purpose of the 1972 bill was to

> effect the first complete reorganization of the criminal law of the State of Hawaii by a redefinition of criminal offenses, elimination of inconsistencies, modernization of language, logical rearrangement of the criminal provisions, and amendment of the substantive criminal law.

Conf. Com. Rep. No. 2-72, in 1972 Senate Journal, at 740 (emphases added).

Thus, HRS § 711-1101(1), the disorderly conduct statute, states in relevant part as follows:

> (1) A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person:

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[1](...continued)

> (6) Stations himself on the public streets or sidewalks or follows pedestrians for the purpose of soliciting alms, or who solicits alms on the public streets unlawfully;
> (7) Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;
> (8) Causes a disturbance in any street car, railroad car, omnibus or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees therein;
> (9) Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys such pedestrians;
> (10) Makes or causes to be made repeated telephone calls with intent to annoy and disturb another person or his family;
> (11) Wears clothing of the opposite sex in any public place with intent to deceive other persons by failing to identify his or her sex.

See Commentary on HRS § 711-1101 (1993) (emphases added).

> (a) Engages in fighting or threatening, or in violent or tumultuous behavior; or
> . . . .
> (c) Makes any offensively coarse utterance, gesture, or display, or addresses abusive language to any person present, which is likely to provoke a violent response.

(Emphases added.) HRS § 711-1106, the harassment statute, states in relevant part:

> (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
> . . . .
> (b) Insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response or that would cause another person to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another;
> . . . .
> (f) Makes a communication using offensively coarse language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another.

(Emphases added.) The commentary on HRS § 711-1101 clarifies that "this [disorderly conduct] section requires public alarm, etc., as distinguished from the private alarm which may accompany assault." (Emphases added.) On the other hand, the commentary on HRS § 711-1106 states that "[h]arassment, a petty misdemeanor, is a form of disorderly conduct aimed at a single person, rather than at the public." (Emphasis added.)

Aside from disorderly conduct, chapter 711 includes five other offenses that employ the term "public."[2] Thus, HRS

[2] The use of the definition "public," as set out in HRS § 711-1100, logically applies to the offenses of obstruction in HRS § 711-1105(1), which prohibits the offense of "obstruct[ing] any highway or public passage," and HRS § 711-1105(2)(b), which addresses refusal to obey a peace officer "maintain[ing] public safety by dispersing those gathered in dangerous (continued...)

§ 711-1100 qualifies the definition of "public," stating that the definition applies "[i]n this chapter, unless a different meaning plainly is required[.]" (Emphasis added.) A meaning of the term "public" different from the one set forth in the definition section of HRS § 711-1101 is plainly required.

II.

Applying HRS § 711-1100's default definition of "public" to HRS § 711-1101 places a paradoxical focus on the number of complainants involved, rather than on the category of complainants. HRS § 711-1100's definition for "public," meaning "affecting or likely to affect a substantial number of persons," could not logically be employed in the case where only one person is affected. (Emphasis added.) Yet, HRS § 711-1101 applies not only to conduct which affects or is likely to affect a substantial number of persons but also to "a [single] member . . . of the public." Similarly, it would be redundant to refer to "members of the public" when the term "public" already subsumes more than one person. Such an approach also effectively abolishes the distinction between harassment and disorderly conduct made in the Code.

[2](...continued)
proximity to a public hazard" (emphases added); it does not apparently apply to the offense of desecration in HRS § 711-1107(1)(a) which prohibits intentional desecration of "[a]ny public monument or structure" (emphasis added); to HRS § 711-1110.9 (Supp. 2002) and HRS § 711-1111(1) (Supp. 2002), which except from the offense of violation of privacy in the first and second degrees that which occurs "in the execution of a public duty" (emphasis added); and to HRS § 711-1112 (Supp. 2003), which prohibits "interference with the operator of a public transit vehicle" (emphasis added).

For example, HRS § 711-1101 provides that "the offense of disorderly conduct [is committed] if, with intent to cause alarm by a member or members of the public . . . the person . . . [m]akes any offensively coarse utterance . . . or addresses abusive language to any person present, which is likely to provoke a violent response." (Emphases added.) HRS § 711-1106 similarly states that "the offense of harassment [is committed] if [it is done] with intent to . . . alarm another person, [and] that person . . . [i]nsults, taunts or challenges another person in a manner likely to provoke an immediate violent response." (Emphases added.) Obviously either statute could be applied under the same circumstances where a single person is involved. As the legislative history indicates, the Code does not equate the offense of disorderly conduct with that of harassment. Otherwise there would be no meaningful distinction between the two offenses, and plainly each offense was formulated to address a different social interest. See Commentary on HRS § 701-103 (the Code codifies "specific offenses which constitute harms to social interests which the law in general and this Code in particular seek to protect").

That interpretation that comports with the term "public" as it is used in HRS § 711-1101 is described in the commentary on HRS § 711-1101. It states,

> Subsection (1)(a) is a standard clause in disorderly conduct legislation, aimed at actual fights and at other behavior tending to threaten the public

> generally,[3] for this section requires public alarm, etc., as distinguished from the private alarm which may accompany assault. This is an important point. A person may not be arrested for disorderly conduct as a result of activity which annoys only the police, for example. Police officers are trained and employed to bear the burden of hazardous situations and it is not infrequent that private citizens have arguments with them. Short of conduct which causes "physical inconvenience or alarm to a member or members of the public" arguments with the police are merely hazards of the trade, which do not warrant criminal penalties.

(Emphases added.) (Footnote omitted.) The commentary on HRS § 711-1106 indicates harassment is distinguished from disorderly conduct because it does not present a risk of public inconvenience or alarm." (Emphases added.) Since the public in general was not affected by Defendant's activities, there was no risk to the public at large, an essential ingredient of HRS § 711-1101.

As the police would likely come into contact with disorderly persons, the employees of Makaha Valley Towers (MVT) constituted a discreet group of persons who would come into contact with residents of the MVT. Such contact would

[3] State v. Lee, 51 Haw. 516, 517, 465 P.2d 573, 575 (1970) ("The classic statement of the rule in Lawton v. Steele, 152 U.S. 133, 137 (1894), is still valid today: 'To justify the State in [thus] interposing its authority in behalf of the public, it must appear, first, that the interests of the public [generally, as distinguished from those of a particular class] require such interference[.]'") (Emphases added.) (Also quoted in State v. Mallan, 86 Hawai'i 440, 457, 950 P.2d 178, 195 (1998).)); McKenzie v. Hawai'i Permanente Med. Group, Inc., 98 Hawai'i 296, 302, 47 P.3d 1209, 1215 (2002) ("Wilson suggests that physicians owe a duty to the public generally. Indeed, other courts have recognized that imposition of a tort duty upon physicians for the benefit of the general public is not new." (Citing Gooden v. Tips, 651 S.W.2d 364, 370-71 (Tex. Ct. App. 1983).); cf. Nat'l Subscription Tel., 644 F.2d 820, 824 (1981) (holding that a selection of individuals amongst a group would not constitute the general public, specifically, a subscription television service was not a "communication broadcast for the use of the general public" because broadcast was "not for the use of anyone who is somehow able to receive the signals, but only for the use of paying subscribers" and thus was not exempt from the Federal Communications Act provision prohibiting unauthorized interception of radio communications).

foreseeably involve complaints of residents such as Defendant. Defendant's comments were addressed to them only. The MVT employees were present because it was required of their employment. Defendant went to the MVT office for business purposes and the only people with whom he dealt were employees of the MVT residential association.

Presumably, if MVT residents have concerns about the MVT grounds, the MVT staffers are obliged to handle their complaints. Such obligation precludes the staffers from being considered members of the public generally. There is no circumstantial evidence suggesting that Defendant's conduct was intended to cause physical inconvenience or alarm to the public generally. There is no evidence that there were members of the public in the vicinity of the MVT office or affected by the activity.

III.

State v. Leung, 79 Hawai'i 538, 904 P.2d 552 (App. 1995) is similar. In that case, a theater patron who was detained by the theater manager as a suspect "was cursing at the manager, saying, 'F[*]ck you, we ain't [sic] doing nothing. . . . F[*]ck you, wasn't us. F[*]ck you. . . . It wasn't us. You don't know what you're talking about. F[*]ck you people.'" Id. at 540, 904 P.2d at 554 (internal quotation marks and brackets omitted). The defendant continued yelling "the same type of language" and "then standing almost directly in front of [a

police officer], replied in a loud, kind of disorderly voice, 'F[*]ck you, you can't tell me what to do, f[*]ck you.'" Id. (internal quotation marks and brackets omitted).

Leung clarified that "the police, of course, cannot be considered 'members of the public' for the purpose of establishing [d]efendant's culpability under the disorderly conduct statute." Id. at 543, 904 P.2d at 557. In Leung, the court determined that "[t]here is no evidence that [d]efendant caused physical inconvenience to any member of the public or that the public was alarmed because at the time he allegedly made 'unreasonable noise,' he was under the control of the four police officers and the theater manager." Id. at 544, 904 P.2d at 558 (emphases added). The Intermediate Court of Appeals determined that the activity involved was not aimed at the public generally and could not be considered disorderly conduct. Similarly here, Defendant's activity was not aimed at the public generally, but rather at the individual employees of the MVT office.

In State v. Bush, 98 Hawai'i 459, 50 P.3d 428 (App. 2002), when a hotel employee rebuffed the advances of a hotel visitor, the visitor began to raise his voice, "told her that she is 'a b[*]tch' and accused her of trying to 'start some sh[*]t with him.'" Id. at 461, 50 P.3d at 430. He then yelled, "B*tch, you wait, you wait what I'm gonna do something to you [sic]." Id. The defendant in Bush was convicted for harassment under HRS

§ 711-1106(1)(f).[4] Id. at at 459, 50 P.3d at 428. Similarly here, Defendant harassed the employees of his residential office, not the public generally. Consequently, his activity falls under HRS § 711-1106, the harassment statute.

IV.

Under the above circumstances, a person of reasonable caution would not conclude that Defendant intended to create or that he recklessly created a risk that the public generally would be affected. There was, thus, insufficient evidence to support a conviction for the offense of disorderly conduct. Whereas an essential element of the charge is not supported by substantial evidence, the conviction of disorderly conduct should be reversed.

[4] HRS § 711-1106(1)(f) states:

> (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
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> . . . .
>
> (f) Makes a communication using offensively coarse language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another.