

NOT FOR PUBLICATION

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NO. 23334

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

ROBERT W. ENGELKING II, Plaintiff-Appellant, v.  
HAWAIIAN ELECTRIC COMPANY, INC., a Hawaii  
corporation; GLENN NOHARA, ALAN MOMOHARA, THEODORE  
NORMAN, JR., RONALD WALLENHORST, STEVEN ODA, TONY  
RAMELB, MARK KASHIWAMURA, JOEL MOSLEY, CHUCK  
KELIIPAAKAUA aka JOE K. KELIIPAAKAUA, ANTHONY  
KEARNEY, and TOM CLEEK, individually and as agents  
of HAWAIIAN ELECTRIC COMPANY, INC., Defendants-Appellees  
and  
DOE INDIVIDUALS 1-10, and DOE CORPORATIONS,  
PARTNERSHIPS or OTHER ENTITIES 1-10, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT  
(CIVIL NO. 98-3504)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Plaintiff-Appellant Robert W. Engelking, II (Engelking) appeals from the Final Judgment filed March 28, 2000, in the Circuit Court of the First Circuit (circuit court). The judgment was against Engelking and in favor of Defendants-Appellees Hawaiian Electric Company, Inc., a Hawai'i corporation, Glenn Nohara, Alan Momohara, Theodore Norman, Jr., Ronald Wallenhorst, Steven Oda, Tony Ramelb, Mark Kashiwamura, Joel Mosley, Chuck [aka Joe K. aka Joseph] Keliipaakaua, Anthony Kearney, and Tom Cleek (collectively, Hawaiian Electric). The judgment was entered pursuant to the "Order Granting Defendants Hawaiian Electric Company, Inc.; Glenn Nohara, Alan Momohara, Theodore

Norman, Jr., Ronald Wallenhorst, Steven Oda, Tony Ramelb, Mark Kashiwamura, Joel Mosley, Joe K. [sic] Keliipaakaua, Anthony Kearney, and Tom Cleek's Motion to Dismiss First Amended Complaint Filed June 30, 1999" entered on March 1, 2000 by the Honorable Gail C. Nakatani (Order Granting Motion to Dismiss).

We vacate and remand.

### **I. BACKGROUND**

Engelking, an employee of Hawaiian Electric Company, Inc., filed his Complaint for Damages (Complaint) on August 5, 1998 based on claims of, inter alia, sexual harassment, discrimination, and hostile work environment. On March 22, 1999, the circuit court issued a Notice of Dismissal, pursuant to Rules of the Circuit Courts of the State of Hawai'i (RCC) Rule 28,<sup>1</sup> because Engelking failed to effect service. Engelking filed his Objections to Notice of Dismissal on March 29, 1999. His counsel's declaration attached to the objections stated in part:

3. Plaintiff objects to dismissal for the following reasons:

a. After filing my client's Complaint on August 5, 1998, and within the window required for serving the initial Complaint, Defendants' further actions and negligence created additional causes of action that required procedural satisfaction through the Hawaii Civil Rights Commission ("HCRC"). I had intended to file and serve on Defendants Plaintiff's First Amended Complaint following compliance with statutory requirements governing those additional claims.

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<sup>1</sup>**Rule 28. Dismissal for want of service.**

A diligent effort to effect service shall be made in all actions, and if no service be made within 6 months after an action has been filed then after notice of not less than 5 days the same may be dismissed.

b. The filing of an amended Complaint does not require judicial approval, and I had intended to avoid filing a Motion seeking amendment by delaying service of the initial Complaint.

c. I have not yet received the HCRC's revised complaint, presumably because of its backlog.

3. I respectfully urge this Court to consider this as a request for extension of time to serve Complaint, to enable me to file and serve an amended Complaint on Defendants.

4. An extension of six weeks should enable the HCRC to complete its complaint, provide notice to Defendants, and to issue another right-to-sue notice.

Finding good cause, in an Order Withdrawing Notice of Dismissal (Order Withdrawing Dismissal) filed on April 6, 1999, the Honorable Kevin S.C. Chang ordered that the dismissal was withdrawn on the condition that "service is filed within 3 months." On June 30, 1999, Engelking filed his First Amended Complaint for Damages (First Amended Complaint). All defendants, except for Mark Kashiwamura, were served on July 1, 1999 with the First Amended Complaint. An answer was filed on July 21, 1999 on behalf of Hawaiian Electric Company, Inc., Nohara, Momohara, Norman, Wallenhorst, Oda, Ramelb, Mosley,<sup>2</sup> Keliipaakaua, Kearney, and Cleek.

On January 13, 2000, counsel for Hawaiian Electric became aware of the prior withdrawn dismissal. On January 21, 2000, Hawaiian Electric moved to dismiss Engelking's First Amended Complaint (Motion to Dismiss) on the bases of

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<sup>2</sup>No return of service for Mosley appears in the record; however, the answer was filed on his behalf and judgment was entered in his favor.

insufficient service of process, pursuant to Hawai'i Rules of Civil Procedure (HRCPP) Rule 12(b)(5) and RCC Rule 28, and lack of personal jurisdiction over Mark Kashiwamura who had never been served.<sup>3</sup> Challenging the Order Withdrawing Dismissal, Hawaiian Electric argued that Engelking could not show good cause for his failure to effect service within six months from the filing of his original Complaint.

On March 1, 2000, Judge Nakatani granted Hawaiian Electric's Motion to Dismiss, stating in her order:

The Court finds that first, inasmuch as the prior Order Withdrawing Notice of Dismissal was based on Plaintiff's ex parte objections, said Order is not the law of the case. Moreover, although a court must ordinarily hesitate to revisit prior interlocutory orders issued by another judge, it may do so if "cogent reasons" exist. Wong v. City and County of Honolulu, 66 Haw. 389, 665 P.2d 157 (1983). In this case there are cogent reasons for concluding that Plaintiff's grounds for objecting to the Court's Notice of Dismissal dated March 22, 1999 did not constitute "good cause" for Plaintiff's failure to comply with Rule 28.

Plaintiff's ex parte objection to the Court's Notice of Dismissal stated that Plaintiff was awaiting "procedural satisfaction" of unspecified additional causes of action so that he could file an amended complaint. As to Plaintiff's intent to file an amended complaint, this reason does not constitute good cause for his failure to serve Defendants in a timely manner. Wei v. State of Hawai'i, 763 F.2d 370 (9<sup>th</sup> Cir. 1985). In addition, neither the supplemental declaration of Mary A. Wilkowski nor the attached letter from William Hoshijo submitted by Plaintiff sufficiently establishes that the Hawai'i Civil Rights Commission ("HCRC") had additional matters pending before it during the time period for service. Although Ms. Wilkowski's declaration states that Mr. Engelking filed another pre-complaint questionnaire with the HCRC, this assertion is not made by Ms. Wilkowski upon personal knowledge. As such, this reason also does not constitute good cause. Accordingly, Plaintiff's claims against Defendants Hawaiian Electric Company, Inc., Glenn Nohara, Alan Momohara,

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<sup>3</sup>Engelking did not oppose the dismissal of Kashiwamura, and Kashiwamura was dismissed as a party on March 1, 2000.

Theodore Norman, Jr., Ronald Wallenhorst, Steven Oda, Tony Ramelb, Mark Kashiwamura, Joel Mosley, Joseph Keliipaakaua, Anthony Kearney, and Tom Cleek are hereby dismissed.

Engelking filed a motion for reconsideration of the dismissal on March 8, 2000, arguing that Hawaiian Electric waived the defense of insufficiency of service of process, that the Order Withdrawing Dismissal allowed Engelking to file a first amended complaint as a matter of course, and that the Order Withdrawing Dismissal determined good cause and was the law of the case. The motion for reconsideration was denied on May 25, 2000 on the basis that Engelking's arguments and evidence could have been or were raised and considered in connection with Hawaiian Electric's Motion to Dismiss.

## II. DISCUSSION

"Unless *cogent reasons* support the second court's action, any modification of a prior ruling of another court of equal and concurrent jurisdiction will be deemed an abuse of discretion." Wong v. City and County of Honolulu, 66 Haw. 389, 396, 665 P.2d 157, 162 (1983) (emphasis in original). Exceptional circumstances may warrant a modification of a prior order of a fellow judge, such as the correction of a patent error. Tradewinds Hotel, Inc. v. Cochran, 8 Haw. App. 256, 264-65, 799 P.2d 60, 66 (1990).

Judge Nakatani's stated cogent reason for reviewing Judge Chang's Order Withdrawing Dismissal was the fact that

"Plaintiff's grounds for objecting to the Court's Notice of Dismissal dated March 22, 1999 did not constitute 'good cause.'" Given "the public policy in favor of deciding cases on their merits" and the interest of judicial economy in avoiding the filing of unnecessary motions as set forth in Engelking's counsel's declaration objecting to the Notice of Dismissal, Judge Chang was certainly within his discretion in considering Engelking's objections to the Notice of Dismissal and in granting the Order Withdrawing Dismissal. Compass Dev., Inc. v. Blevins, 10 Haw. App. 388, 402, 876 P.2d 1335, 1342 (1994).

Judge Nakatani reviewed the Order Withdrawing Dismissal in light of events that occurred after the withdrawal and examined factual issues related to the discrimination charges. Judge Nakatani found that Engelking could not sufficiently establish that he had additional matters pending before the Hawai'i Civil Rights Commission (HCRC), noting that Engelking's counsel's declaration that Engelking had filed another pre-complaint questionnaire with the HCRC was not based upon personal knowledge. We cannot accept that this stated reason rises to the Wong standard that a prior interlocutory order of another judge of the same court "commands even greater respect than the doctrine of 'law of the case' which refers to the usual practice of courts to refuse to disturb all prior rulings in a particular case." Wong, 66 Haw. at 396, 665 P.2d at 162. Nor does the fact

that Engelking's First Amended Complaint essentially mirrors his original Complaint rise to the level of "exceptional circumstances." We also note that Judge Nakatani did not find that Hawaiian Electric was prejudiced in any way by the delay in service of the complaint or by the Order Withdrawing Dismissal.

### **III. CONCLUSION**

The circuit court's March 28, 2000, Final Judgment is vacated, and this case is remanded for further proceedings in the circuit court.

DATED: Honolulu, Hawai'i, May 29, 2003.

On the briefs:

Mary A. Wilkowski  
for plaintiff-appellant.

Chief Judge

Robert S. Katz,  
Sabrina R. Toma,  
Clayton A. Kamida,  
for defendants-appellees.

Associate Judge

Associate Judge