NO. 26733

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KENNETTE L. DIAS, Plaintiff-Appellant, v. STATE OF HAWAI'I, DEPARTMENT OF HUMAN SERVICES, Defendant-Appellee, and JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 02-1-1840)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

In this employment discrimination lawsuit, Plaintiff-Appellant Kennette L. Dias (Dias) appeals from the July 19, 2004 Judgment entered against her and in favor of Defendant-Appellee State of Hawai'i, Department of Human Services (DHS) by the Circuit Court of the First Circuit (circuit court).[1]

Dias complains the circuit court erred in dismissing her claims based on (1) Intentional Infliction of Emotional Distress, (2) "Disparate Treatment" Disability Discrimination, (3) "Perceived" Disability Discrimination and (4) "Retaliation" Discrimination. After a careful review of the issues raised,[2]

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[1] The Honorable Victoria S. Marks presided.

[2] Kennette L. Dias's (Dias) opening brief is in noncompliance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28 insofar as it does not contain a subject index or a table of authorities as required by HRAP Rule 28(b)(1). Her "Supplement to Opening Brief" was filed without leave of court and was therefore unauthorized.

Dias also fails to comply with HRAP Rule 28(b)(3) by failing to append to her opening brief a copy of the findings and order relevant to her points of error. Assocs. Fin. Servs. Co. of Hawaii, Inc. v. Richardson, 99 Hawai'i 446, 459, 56 P.3d 748, 761 (App. 2002).

Furthermore, Dias's points of error do not conform to HRAP Rule 28(b)(4) as they do not specify "where in the record the alleged error occurred" nor "where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency," and do not contain a "quotation of the finding or conclusion urged as error."

(continued...)

arguments advanced, law relied upon, and the record in the instant case, we conclude that the circuit court did not err. Consequently, we affirm.

I.

A.

Procedurally, this case comes to us on appeal from the circuit court's granting of summary judgment in favor of DHS. Dias filed her complaint on August 2, 2002 and an amended complaint on October 15, 2002, alleging four causes of action: Count I: (Sections 378-1 and 378-2, Hawaii Revised Statutes (HRS) - Disability/Perceived Disability Discrimination); Count II: (Sections 378-1 and 378-2, HRS - Retaliation); Count III: (Wrongful Termination in Violation of Public Policy - Constructive Discharge) and Count IV: (Intentional Infliction of Emotional Distress). On December 11, 2002, Dias entered into a stipulation dismissing Counts III and IV with prejudice.

On April 23, 2004, DHS moved for summary judgment on Counts I and II. Dias opposed the motion, and the circuit court, after a hearing held on May 17, 2004, granted the motion as to these remaining two counts on June 10, 2004. Final judgment was

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[2](...continued)

It has long been held that failure to comply with HRAP Rule 28 may, alone, be a basis to affirm the judgment. Alamida v. Wilson, 53 Haw. 398, 405, 495 P.2d 585, 590 (1972) (construing the predecessor to HRAP Rule 28, Supreme Court Rule 3(b)(5)). This sentiment has been expressed more recently in Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 420, 32 P.3d 52, 64 (2001). "Nonetheless, inasmuch as 'this court has consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible,' we address the issues [the parties raise] on the merits." Hous. Fin. & Dev. Corp. v. Ferguson, 91 Hawai'i 81, 85-86, 979 P.2d 1107, 1111-12 (1999) (quoting Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995)).

Counsel is hereby warned that future violations will result in sanctions.

entered on July 19, 2004.[3] Dias timely filed her notice of appeal on July 30, 2004.

B.

We take the underlying facts in this case as found by the circuit court in its unchallenged findings of fact contained in the June 10, 2004 Order Granting Defendant State of Hawaii, Department of Human Service's [sic] Motion for Summary Judgment. Dias was employed by DHS as an income maintenance worker from 1987 through her resignation in November 2001. Dias's "major duties and responsibilities included interviewing, fact-finding, policy application, documentation, and caseload management." Dias's caseload, as was her colleagues', was augmented by "block assignments and overflow of cases from other units. The overflow of cases from other units was equally distributed to all employees, and block assignments were done on a rotational basis to assist absent employees with their caseload."

In October 1999, Dias was diagnosed with depression due to the death of her dog. This depression lasted one month. From November 2000 through May 31, 2001, Dias was on medical leave. In Dias's application for temporary disability benefits, dated December 29, 2000, Dr. Szeming Suen (Dr. Suen) provided a statement indicating his diagnosis was "anemia, fibromyalgia, and chronic fatigue syndrome" and "estimated that [Dias] would be able to perform usual work on March 7, 2001." However, on February 10, 2001, Dias submitted a medical certificate issued by Dr. Suen, stating that Dias would be incapacitated, from January 20, 2001 through May 31, 2001 "due to an 'auto accident.'" On May 10, 2001, Dr. Suen cleared Dias to return to work on June 1, 2001.

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[3] Defendants Cydni Medeiros and Elizabeth Kent, who were dismissed from the lawsuit by stipulation on December 22, 2002, are not parties to this appeal. The July 19, 2004 Judgment reflects that all claims against all parties were dismissed with prejudice and thus constitutes a final judgment as required by Jenkins v. Cades, Schutte, Fleming and Wright, 76 Hawai'i 115, 869 P.2d 1334 (1994).

Dias returned to work on June 1, 2001 without any restrictions, "felt good, strong and nourished," and "was able to perform all the functions of her job." Dr. Suen did not restrict Dias's work and he believed she "was able to perform the essential functions of her job."

Dias's unit was going through a reorganization when she returned to work. All employees would receive a generic caseload with an equal number of cases beginning in July 2001.

Also in July 2001, Dias complained to her supervisor, Cydni Medeiros (Medeiros) about alleged harassment by the security guard for her unit and derogatory comments made by her co-workers. Dias complained that the security guard made "certain gestures" and comments she didn't like. Her supervisor spoke to the security guard and Dias made no further complaints concerning him. Dias acknowledged that the derogatory comments stopped after her supervisor spoke to one of the co-workers who had allegedly made the comments.

Dias submitted a letter of resignation on October 25, 2001, to be effective on November 7, 2001. She requested that the letter be rescinded on October 31, 2001. This request was denied on November 7, 2001, by DHS Acting Director Elizabeth Kent (Kent) because Dias's letter was accepted and was binding under Administrative Rules and Regulations, Chapter 14-14-4.

Dias filed a complaint with the Hawai'i Civil Rights Commission on January 22, 2002. The Commission found no cause and issued a right to sue letter to Dias.

II.

> In *Kau v. City & County of Honolulu*, 104 Hawai'i 468, 92 P.3d 477 (2004), we explained that the following principles guide our review of a circuit court's grant of summary judgment:
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> > We review the circuit court's grant or denial of summary judgment *de novo*. *Hawai[i] 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 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).
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> *Coon v. City & County of Honolulu*, 98 Hawai'i 233, 244-45, 47 P.3d 348, 359-60 (2002) (second alteration in original).

Id. at 473-474, 92 P.3d at 482-483 (some brackets added, some in original). Subsequently, in *French v. Hawaii Pizza Hut, Inc.*, 105 Hawai'i 462, 99 P.3d 1046 (2004), we discussed the particular burdens of production and persuasion as follows:

> The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components.
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> First, *the moving party has the burden of producing support for its claim that: (1) no genuine issue of material facts exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts,* as opposed to general allegations, that present a genuine issue worthy of trial.
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> Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving part [sic] is entitled to summary judgment as a matter of law.

Id. at 470, 99 P.3d at 1054 (citing *GECC Fin. Corp. v. Jaffarian*, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (App. 1995) (emphasis added) (citations omitted)).

Lee v. Puamana Cmty. Ass'n, 109 Hawai'i 561, 567, 128 P.3d 874, 880 (2006). We address Dias's points of error in order:

1. Intentional Infliction of Emotional Distress. Dias's amended complaint alleged

> 51. The actions or inactions of Defendants DHS, MEDEIROS, and KENT constitute extreme and outrageous behavior which exceeds all bounds usually tolerated by decent society, all done with malice and the intent to cause, or the knowledge that it would cause, severe mental and/or emotional distress to Plaintiff. As a result of the above statements, acts and/or conduct of Defendants DHS, MEDEIROS, and KENT Plaintiff did suffer and continues to suffer severe mental and/or emotional distress and thereby sustains damages as aforesaid, in an amount to be demonstrated at the time of trial herein.

On December 11, 2002, a stipulation was duly signed by the attorneys for Dias and DHS and approved by the circuit court. It stated, in pertinent part,

> IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that pursuant to the Court's Order Granting In Part and Denying In Part Defendants' Motion for Judgment on the Pleadings, filed October 31, 2002, Count III (wrongful termination in violation of public policy - constructive discharge) and Count IV (intentional infliction of emotional distress) be and hereby are dismissed with prejudice. The parties further stipulate that all claims against Defendants Cydni Medeiros and Elizabeth Kent be and hereby are dismissed.

Dias does not assert any reason that this Stipulation should not be binding on her. Dias is therefore foreclosed from challenging the dismissal of Count IV. Office of Disciplinary Counsel v. Lau, 79 Hawai'i 201, 204, 900 P.2d 777, 780 (1995) (parties are ordinarily bound by their stipulations).

2. "Disparate Treatment" Disability Discrimination. Dias did not, in either her original or amended complaints, assert a claim alleging disparate treatment. Both versions of her complaint allege in "Count I (Section 378-1 and 378-2, HRS - Disability/Perceived Disability Discrimination)" the following:

> Plaintiff was disabled (depression, chronic fatigue syndrome, fibromyalgia); Plaintiff was qualified to perform the essential functions of her job with reasonable accommodation; the requested reasonable accommodation would not have created an undue hardship on Defendant DHS; but Defendant DHS denied Plaintiff the reasonable accommodation. In the alternative, if Plaintiff was not disabled, Defendant DHS "perceived" Plaintiff as disabled and therefore denied her reasonable accommodation. Defendant DHS [sic] actions and/or inactions caused Plaintiff to suffer damages to be proven at trial herein.

None of Dias's allegations of fact state that she was treated differently because of any disability. Dias did not seek leave to file a second amended complaint.

To the extent Dias first argued her disparate treatment theory in her opposition to DHS's motion for summary judgment, this claim was not timely. See Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (ruling that the court of appeals erred in applying disparate impact analysis after it had limited the employee's case to a disparate treatment theory because the employee had not raised a disparate impact claim until the employer's motion for summary judgment) and Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000) cert. denied, 533 U.S. 950 (2001) (sustaining the district court's denial of leave to proceed on a disparate impact claim asserted for the first time at the summary judgment stage). That the circuit court chose to address Dias's claim on the merits does not change this analysis. Taylor-Rice v. State, 91 Hawai'i 60, 73, 979 P.2d 1086, 1099 (1999) ("this court may affirm a judgment of the trial court on any ground in the record which supports affirmance.")

3. "Perceived" Disability Discrimination. With regard to this claim, Dias says only that the circuit court erred in

dismissing this claim due to the circuit court's "misunderstanding of the prima facie case for 'disparate treatment' as discussed above" and there was "sufficient evidence of a prima facie case as described above."

To establish a prima facie case of discrimination under Hawaii Revised Statutes (HRS) § 378-2 (Supp. 1999),

> a plaintiff has the burden of establishing that: (1) he or she is an individual with a 'disability' within the meaning of the statute; (2) he or she is otherwise qualified to perform the essential duties of his or her job with or without reasonable accommodation; and (3) he or she suffered an adverse employment decision because of his or her disability.

French v. Hawaii Pizza Hut, Inc., 105 Hawai'i 462, 467, 99 P.3d 1046, 1051 (2004) (adopting and applying the analysis of the Americans With Disabilities Act of 1990 and 42 United States Code (USC) § 12101 (1990) set out by the United States Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471, 477-78 (1999), to HRS Chapter 378).

HRS § 378-1 (1993), as does 42 USC § 12102(2)(C)(1990), defines disability as including a person who is being "regarded" as having an "impairment which substantially limits one or more major life activities."[4]

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.

Sutton, 527 U.S. at 489. Dias does not explain how the evidence she presented showed that DHS regarded her as being disabled

[4] The definition of "being regarded as having such an impairment," was amended in 2002, in a manner not relevant to this case.

under either construction. The circuit court did not err in ruling that Dias "failed to make any showing that her employer perceived her as having a disability."

4. "Retaliation" Discrimination. Dias's last point relies upon her argument that, "Record contained sufficient evidence of a prima facie case as described above and was dismissed in error pursuant to the Judge's erroneous finding of no adverse action as discussed above."

Dias alleged in her complaint and amended complaint that,

> Plaintiff opposed the disability discrimination, or perceived disability discrimination, and sexual harassment. In retaliation for opposing the unlawful employment practices, Plaintiff was constructively terminated and her request for rescission of her resignation letter was denied. Defendant DHS [sic] actions and/or inactions, caused Plaintiff to suffer damages to be proven at trial herein.

On appeal, Dias argues that the "adverse employment action" complained of was "constructive discharge[ ] [d]ue to Supervisor Medeiros['s]: 1) failure to investigate [Dias's] two (2) complaints of sexual harassment; and 2) failure to protect [Dias] from the co-worker hostilities resulting from her absences from work, due to her disabilities." However, the circuit court found, and Dias does not dispute, that Medeiros spoke to the employees involved and Dias made no further complaints thereafter.

Dias also appears to argue that Medeiros's letter to Acting Director Kent recommending against consent to rescission of Dias's resignation and the decision not to consent to the rescission itself, was evidence of "pretext." However, Dias does

not explain how these actions, even assuming they were pretextual, was evidence of retaliation as Dias does not explain what these actions were in retaliation for.

Although Dias alleged in her complaint that she "opposed" the alleged disability discrimination and perceived disability discrimination, it is undisputed that Dias submitted her resignation and there is nothing that Dias points to that requires DHS to consent to rescission of that resignation.

THEREFORE,

IT IS HEREBY ORDERED that the July 19, 2004 Judgment of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 16, 2007.

On the briefs:

Venetia K. Carpenter-Asui,
for Plaintiff-Appellant.

Dorothy Sellers and
Kimberly Tsumoto,
Deputy Attorneys General,
for Defendant-Appellee.

Presiding Judge

Associate Judge

Associate Judge