IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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SUSAN C. MEDEIROS, Appellant-Appellant,

vs.

HAWAIʻI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, UNEMPLOYMENT INSURANCE DIVISION; EMPLOYMENT SECURITY APPEALS REFEREE'S OFFICE; CASTLE RESORTS & HOTELS; HILO HAWAIIAN HOTEL, Appellees-Appellees.

NO. 24318

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 00-1-0457)

SEPTEMBER 1, 2005

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FILED
CLERK, APPELLATE COURTS STATE OF HAWAII

NAKAYAMA, ACOBA, AND DUFFY, JJ.; AND LEVINSON, J., DISSENTING, WITH WHOM MOON, C.J., JOINS

OPINION OF THE COURT BY DUFFY, J.

Appellant-appellant Susan C. Medeiros appeals from the May 4, 2001 final judgment of the Circuit Court of the Third Circuit, the Honorable Riki May Amano presiding, alleging that the circuit court erred in entering the May 4, 2001 order affirming Decision No. 0001888 of the Employment Security Appeals Referees' Office (ESARO) for the following reasons: (1) "the third circuit court committed error in affirming the decision of the Appeals Officer because the findings of the Appeals Officer are inconsistent with the conclusion that [Medeiros] was terminated for misconduct connected with work as set forth in

[Hawai'i Administrative Rule (HAR)] § 12-5-51 [(1981)]";[1] and (2) "the third circuit court committed error by addressing the Appeals Officer's factual finding, although those findings had not been challenged, and the issue before the [circuit] court was

[1] HAR § 12-5-51 provides as follows:

> **Suspension or discharge for misconduct.** (a) A discharge occurs when an employer is the "moving party" in the termination of the employment relationship.
> (b) A suspension occurs when the employer takes action to refuse work and remuneration to an employee without terminating the employment relationship.
> (c) Misconduct connected with work consists of actions which show a wilful or wanton disregard of the employer's interests, such as deliberate violations of or deliberate disregard of the standards of behavior which the employer has a right to expect of an employee, or carelessness, or negligence of such a degree or recurrence as to show wrongful intent or evil design. Mere inefficiency, unsatisfactory conduct, poor performance because of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good-faith errors in judgment or discretion are not misconduct. The misconduct shall be related to the work of the individual or the individual's status as an employee.
> (d) In determining whether an individual's act constituted "misconduct" the department shall consider any relevant evidence presented which relates to:
> (1) Employee's reasons for the act or omission, and efforts to avoid the act or failure to act;
> (2) The relevant circumstances of the case and any causative effect therefrom upon the employee's actions;
> (3) The nature and importance to the employer of the offended interest of the employer;
> (4) Any lawful and reasonable company policy or custom;
> (5) Employer's actions to curtail or prevent, if possible, the objectionable conduct; and
> (6) The nature of the act or failure to act.
> (e) Situations where misconduct may be found include, but are not limited to, the following where the evidence demonstrates:
> (1) Unexcused absence or recurring unexcused tardiness; or
> (2) Altercation at work; or
> (3) Material false representations by the employee to the employer; or
> (4) Employee's gross neglect of duty; or
> (5) Employee's wilful disobedience of employer's directives or employee's insubordination; or
> (6) Intentional conversion of employer's property by the employee; or
> (7) Employee's unauthorized use of intoxicants on the job; or
> (8) Employee's wilful and substantial abuse of the employer's equipment or property.

whether the findings of the Appeals Officer supported the [ESARO's] **conclusion.**" (Emphasis in original.)

On appeal, Medeiros argues: (1) that she "is entitled to unemployment compensation because the findings of the Appeals Officer are inconsistent with [a] wilful or wanton disregard of the [appellees-appellees Castle Resorts' & Hotels' and Hilo Hawaiian Hotel's [collectively hereinafter, "the Employer"]] interest"; and (2) that "the third circuit court's [May 4, 2001] order affirming [the ESARO's] decision [No.] 0001888 [hereinafter, 'the May 4, 2001 order'], final judgment, [May 4, 2001] notice of entry of judgment[,] and order" are erroneous "because they fail to address the inconsistency of the Appeals Officer's findings with the Appeals Officer's conclusion."

The appellee-appellee Director of the Department of Labor and Industrial Relations' (DLIR), State of Hawai'i [collectively hereinafter, "the Director"] counters that, "under the employment insurance laws," Medeiros's "conduct of placing her hands all the way around her co-worker's neck and throat and shaking her co-worker for five seconds because she was angry at her co-worker for causing a work schedule change[] was misconduct" and asserts that this court should affirm the May 4, 2001 final judgment of the circuit court "that . . . Medeiros was disqualified for unemployment insurance benefits because she was discharged for misconduct connected with work."

Medeiros replies: (1) "that the Appeals Officer was incorrect" in affirming the Director's decision denying Medeiros unemployment benefits because the Appeals Officer (a) "either employed the hotel's 'zero tolerance policy,' which flies in the face of the legislative intent calling for liberal construction of Hawai'i's unemployment compensation statute" or (b) "the Appeals Officer . . . inconsistently concluded on one hand that Appellant's actions lacked wrongful intent but on the other hand concluded they were wilful and wanton"; (2) that the Director's argument on appeal "mis-characterize[s] the unchallenged findings [of the Appeals Officer] and . . . [would have] this Appellate Court . . . rely on findings which do not exist"; (3) that, "based on the findings of the Appeals Officer in this case, those cases relied upon by the Director which represent intentional acts or life threatening acts can not be factually relevant to the issue at hand"; and (4) that Medeiros "has met her burden of making a convincing showing that the decision is invalid because . . . it[is] unjust and unreasonable [in its] consequences." (Internal quotation signals and citations omitted.)

For the reasons discussed below in section III, we affirm the circuit court's (1) May 4, 2001 order affirming ESARO's Decision No. 0001888, and (2) May 4, 2001 final judgment.

I. BACKGROUND

The following unchallenged statement of procedural history and factual background is set forth in Decision No. 0001888:

> The claimant [(i.e., Medeiros)] worked as a hostess for the Employer from November 1978 until she was suspended on July 30, 2000 for placing her hands around the neck of a co-worker. She was discharged effective August 9, 2000.
>
> The claimant's co-worker was dissatisfied with a policy of the Employer related to work scheduling. The co-worker complained about the policy to the food and beverage director and thereafter the policy was changed. As a result of the policy change, many employees' schedules changed, including that of the claimant. On the morning of July 30, 2000, when the schedules changed, the claimant came up behind the co-worker in the bus station of the restaurant, put her hands around the co-worker's neck and throat and shook her lightly for about five seconds, and said[,] "It's all because of you." The claimant then voluntarily removed her hands from the [co-worker's] throat. The co-worker was shocked because she had not seen the claimant approaching her, and she was offended because she did not think she should be touched in that manner. She was not, however, actually afraid of being hurt by the claimant. The claimant and the co-worker had known each other for nine years and[] prior to this incident were on good terms and joked around with one another.
>
> This incident was witnessed by another co-worker, who did not perceive the claimant's actions as either violent or threatening[] and who was of the opinion that the co-worker whose throat was grabbed "took it the wrong way." After the incident, the three of them sat together and talked and laughed for a few minutes. Although she participated in the conversation, the co-worker who had been grabbed by the throat continued to be upset but did not say anything because she did not want to make [a] scene. She also did not want to disrupt the work schedule so she did not report the matter until her work schedule ended at about 9 or 9:30 a.m. Then she reported the matter to the food and beverage director. She also related the matter to the human resources manager and the general manager.
>
> These three managers then met and discussed the matter in light of the company's "zero tolerance for violence" policy. The company policy, which had been distributed to employees, including the claimant, in 1998, provides:
>
> > "[Employer] has zero tolerance for violence in the workplace. Violence is defined to include but is not limited to: physically harming another, shoving,

> pushing, harassment, verbal or physical intimidation, coercion, brandishing weapons, and/or threats or talk of violence. Workplace is defined to include but is not limited to: being on Company premises, Company time or Company business. No talk of violence, including joking about violence, will be tolerated."[2]

The managers discussed this policy and the manner it should be applied[] and determined that the claimant should be suspended pending an investigation. The food and beverage director prepared a corrective action suspending the claimant, called her into his office on July 31, 2000, read it to her[,] and then gave her an opportunity to make any written comments she wished. [The claimant] wrote that she had put her hands around her co-worker's neck, but that she wasn't punched in for work at the time and that she and her two co-workers were "laughing and playing" thereafter.[3]

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[2] The company policy continues in relevant part:

> Any employee who believes that the actions or words of a co-worker, or third-party, constitute intimidation, harassment, or a threat of violence should report it as soon as possible to the General Manager and the Corporate Human Resources department. All complaints of intimidation, harassment, or threats of violence will be investigated promptly and will be kept confidential to the extent possible. Any employee who is found to have engaged in any intimidation, harassment, or threat of violence to another employee will be subject to termination.

On August 15, 1998, Medeiros signed and dated a form entitled "Castle Resorts & Hotels Acknowledgment of Employee Handbook," which provides in relevant part:

> I acknowledge receipt of the Employee handbook and agree to read all policies and rules contained herein. I understand that violation of any rule and/or policy may result in corrective action up to [and] including termination.
>
> I acknowledge that employment is on an at-will basis and that I or Castle Resorts & Hotels may terminate employment at any time, with or without notice, with or without cause.
>
> I understand that the policies described herein are not conditions of employment and this Handbook is not intended to create or imply a contract between myself and Castle Resorts & Hotels. In consideration of employment, and continued employment, I agree to abide with the policies, procedures, rules and regulations of Castle Resorts & Hotels.

[3] The "corrective action," dated July 30, 2000, described the incident as follows:

> On 7/30/00 a complaint of physical assault has been filed against you. It has been stated that upon entering your work area, you came

(continued...)

The co-worker was then asked to make a written statement about the incident. She provided the statement on July 31, 2000. Her statement said, among other things:

> "I was quite in shock as well as very upset that this event had just occurred. My reaction consisted of swallowing the words and the neck grabbing, continuing on with my job duties."
>
> "To me, anytime someone places two hands or even one hand on another person's neck/throat area, the sole intent of that aggressive behavior is definitely to choke or even hang that person up. If she was so upset with the new changes and had a problem, I feel she should have taken the time to talk personally with you and our supervisors regarding her concerns."
>
> ". . . I strongly felt yesterday was [a] great example of how actions speak louder than words.[]"

The information about the incident, including this statement[,] was sent to the corporate office in Honolulu because the managers on the Big Island were not empowered to discharge employees. On August 08, 2000, the corporate office advised the general manager there were "no exceptions" to the "zero tolerance" policy and that the claimant should be discharged.

The claimant had worked for the Employer for 22 years and had never before been involved in such an incident. Although she had received a copy of the "zero tolerance" policy two years earlier, she did not remember it.

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[3](...continued)
from behind another employee, put your hands around her neck, [shook her] with a slight back and forth movement and accused her of being responsible for a change of schedule which was implemented in the Queen's Court restaurant. This is in violation of company policy located on page 37 of your handbook. It states under the Violence-Free Workplace section: **["]Castle Resorts & Hotels has zero tolerance for violence in the workplace. Violence is defined to include but not [be] limited to: physicall[y] harming another, shoving, pushing, harassment, verbal or physical intimidation, [and] coercion[."] It also states on page 38, ["]Any employee who is found to have engaged in any intimidation, harassment, or threat of violence to another employee will be subjected to termination.["]**

(Emphasis in original.)

Medeiros hand-wrote the following comments on the "corrective action" form, in a space "provided to the employee to agree or disagree and state reason(s) why": "When I walked in on [the complainant and the witness,] they were complaining about the schedule. I did put my hands around [the complainant's] neck and said[, ']because of this the schedule was changed[,'] but we were laughing and playing in the station before we all started to work. And <u>wasn't</u> punched in at that time." (Emphasis in original.)

As noted above, Medeiros was suspended on July 30, 2000. On August 2, 2000, Medeiros filed a "common application form" for "determination of insured status" and/or "work registration" with the Director's Unemployment Insurance Division (UID). On August 14, 2000, the UID mailed two notices of unemployment insurance decisions, which effectively ruled that Medeiros was disqualified from receiving any unemployment insurance benefits. The first notice of decision explained as follows:

> You were employed with the Hilo Hawaiian Hotel as a hostess from November 1978. On July 30, 2000, you were suspended until August 8, 2000, for physically assaulting another employee. On July 30, 2000, you placed your hands around the neck of another employee, and insinuated that a change[] in the work schedule was due to this employee. Although you intended the incident as joking around, the other employee felt offended and assaulted, and reported the incident to the Employer. The company has a zero tolerance policy regarding violence in the workplace, of which you were issued a copy at hire.
>
> You[r] physical assault on another employee[] constitutes a wilful and deliberate disregard of the Employer's and the other employee's interest. As such, you were suspended for misconduct connected with work.

The second notice of decision essentially provided the same explanation as the first.

On August 15, 2000, Medeiros filed an "application for reconsideration or notice of appeal" with the UID.

On September 28, 2000, an ESARO Appeals Officer conducted a hearing regarding Case No. 0001888, Medeiros's appeal from the UID's two August 14, 2000 unemployment insurance decisions. Medeiros testified, inter alia, that "[she] was not

joking about violence . . . [but] was just joking with her[co-worker.]" The Appeals Officer also heard testimony that Medeiros was a senior line employee in the highest pay grade ("Hostess I"), while the co-worker was a part-time bus person.

As recited above, on September 29, 2000, the Appeals Officer issued Decision No. 0001888, which, inter alia, cited HAR § 12-5-51, see supra note 1, and ruled as follows:

> REASONS FOR DECISION:
>
> . . . .
>
> The relevant issue in this case is whether the claimant (i.e., Medeiros) was discharged for misconduct connected with work.
>
> Misconduct connected with work consists of actions which show a wilful or wanton disregard of the employer's interests, such as deliberate violations of or deliberate disregard of the standards of behavior which the employer has a right to expect of an employee. [See HAR § 12-5-51(c).] On the other hand, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion are not misconduct. [See id.] The burden of proof is on the employer to show that the claimant was discharged for misconduct.
>
> In this case, the claimant's attorney argues that the claimant was discharged for an isolated instance of poor judgment, and the claimant testified she believes she was not "joking about violence," but was only "joking." Clearly, this was an isolated instance. Nothing like it had happened in the claimant's 22 years of prior employment. In addition, it clearly constituted poor judgment. While the claimant did not intend to actually threaten or harm her co-worker, she touched her co-worker in a clearly offensive manner and without her permission.
>
> However, when the claimant testified she was not "joking about violence," but was only "joking," she demonstrated a lack of forthrightness. In this case, when the claimant approached her co-worker for behind, placed her hands around the claimant's neck and throat and shook her, however lightly, her actions clearly constituted a "joke about violence." Jokes about violence were prohibited by the Employer's zero tolerance policy. Although the policy refers to "talk" about violence, including "jokes about violence," this should not be interpreted as excluding physical jokes about violence. Jokes need not be verbal,

> they can consist of physical actions. As the offended co-worker stated, sometimes "actions speak louder than words." This is one of those times.
>
> With or without a "zero tolerance policy" against violence, employers have the right to expect that their employees will refrain from treating co-workers in a manner that can shock and upset them. The claimant in this case breached that duty. Furthermore, she did so wilfully. Although she did not intend to harm or threaten the co-worker, she did not p[ut h]er hands around her co-worker's neck and throat inadvertently or accidentally, but intentionally. Under these circumstances, it is concluded the claimant did commit acts which showed a deliberate disregard of standards of behavior which the Employer had a right to expect of her. It is therefore concluded the claimant was discharged for misconduct connected with . . . work.
>
> <u>DECISION</u>:
>
> The determinations of the [UID] are affirmed. The claimant is disqualified for benefits . . . on the basis that she was discharged for misconduct connected with . . . work.

On October 27, 2000, Medeiros filed a notice of appeal to the circuit court, requesting judicial review of Decision No. 0001888, pursuant to HRS § 91-14 (1993), Hawaiʻi Rules of Civil Procedure (HRCP) Rule 72 (2000), and HAR § 12-5-51.

On December 22, 2000, Medeiros filed her opening brief in the circuit court, arguing as follows: (1) that "the [UID] did not correctly apply HAR § 12-5-51 when it found that . . . Medeiros's isolated instance of poor judgment, not intended to actually harm or threaten, rose to the level of misconduct connected with work"; (2) that "the DLIR incorrectly used the Employer's 'zero tolerance' for violence policy to determine if [Medeiros's] conduct rose to the level of misconduct connected with work as defined by HAR § 12-5-51"; (3) that "the DLIR's

conclusion that [Medeiros's] actions rose to the level of misconduct connected with work is clearly erroneous in view of the testimony and HAR § 12-5-51," inasmuch as (a) "Medeiros did not violate the 'violence-free workplace' policy" and (b) "Medeiros['s] actions did not rise to the level of misconduct according to the standards of HAR § 12-5-51(c)"; and (3) that "the decision of the DLIR is unjust and unreasonable under the circumstances and consequences of this case."

On February 5, 2001, the Director filed an answering brief in the circuit court, contending that "the Appeals Officer's credibility determination that [Medeiros] was joking about violence when she placed her hands around a co-worker's neck should not be disturbed, and therefore, the Appeals Officer's decision that [Medeiros] violated [the] Employer's zero tolerance policy against violence is not clearly erroneous." On February 8, 2001, the Employer filed an acknowledgment of service of, and joinder in, the Director's answering brief.

On February 14, 2001, Medeiros filed a reply to the Director's answering brief, asserting, inter alia, as follows: (1) that "Cam[a]ra v. Agsalud, 67 Haw. 212, 685 P.2d 794 (1984)[,] is the controlling case as it provides that it is not the action of the claimant which is at issue but it is the intent of the claimant," such that, "[w]here the claimant's intent does not rise to the level of wilful or wanton disregard of the

employer's interest[,] the act itself does not allow for a denial of unemployment benefits"; (2) that she "reaffirms [her] position that . . . [the] DLIR's reliance on the [E]mployer's 'zero tolerance for violence policy' is an improper narrowing of the unemployment security law which is to be liberally construed in order to achieve the beneficent legislative purpose of relief of workers under the stress of unemployment through no fault of their own"; (3) that "[t]he threat of violence was neither intended nor perceived and therefore the 'zero tolerance to violence policy' does not apply"; (4) that "the Appeals Officer's decision is clearly erroneous because it is inconsistent with a determination that . . . Medeiros acted in a manner inconsistent with her employer's interests"; (5) that "[t]he decision is unjust and unreasonable because . . . Medeiros was suspended and terminated after 22 years of employment without so much as her employer investigating the circumstances of this incident"; (6) that "the DLIR's reliance on [the Employer's 'automatic suspension/zero tolerance/no case-by-case decision'] policy in determining whether . . . Medeiros was entitled to unemployment insurance compensation is wholly unfair and leaves the determination of unemployment benefits in the hands of the employer." (Some internal quotation signals and citations omitted.) Medeiros also stated that she would not submit a reply to the Employer's joinder in the Director's answering brief.

On March 16, 2001, the circuit court conducted a hearing regarding Medeiros's appeal, entertaining arguments from counsel for Medeiros, the Director, and the Employer. Following the parties' arguments, the circuit court orally ruled as follows:

> THE COURT: I agree with the appellees. I think that not just one matter that we look at or one dimension that we look at and certainly that's not what the hearings officer or appeals officer looks at. [The Appeals Officer] looks at all the circumstances, and she did make a finding that it was not . . . Medeiros's intention to scare someone or intention to choke someone. . . . But that in the context of all that was occurring that the act constituted [a] sufficient basis for [a] finding of misconduct under the unemployment law and, therefore, precluded the recovery by the appellant for the same benefits.
>
> I also agree that the record as it currently stands . . . sufficiently supports the finding of . . . the appeals officer. And . . . I have looked at it carefully. I read the transcript. I try to read the transcript because I know how important it is. Given that, I look for errors, procedural and . . . factual[] mistakes. There are none in this record.
>
> So I am going to accord the appeals officer[] due deference and going to deny or rather affirm the appeals officer's decision.
>
> You understand, of course, [Medeiros's Counsel,] that there is another remedy and that is further appeal.
>
> [Medeiros's Counsel:] Yes, Your Honor.
>
> THE COURT: And I think we've made a record today of my reasons.

On May 4, 2001, the circuit court entered an order affirming Decision No. 0001888, ruling in relevant part as follows:

> The Appeals Officer considered all the facts of this case in reaching the decision that . . . Medeiros was discharged for misconduct connected with work. The Appeals Officer's decision is supported by the reliable, probative, and substantial evidence in the record and the [circuit c]ourt is satisfied that . . . Decision [No.] 0001888 is not clearly erroneous.
>
> Based on the foregoing, . . . Decision [No.] 0001888 dated September 29, 2000, is affirmed and the appeal of . . . Medeiros is denied.

That same date, the circuit court entered final judgment in favor of the Director and the Employer and against Medeiros.

On May 30, 2001, Medeiros timely filed a notice of appeal.

II. STANDARD OF REVIEW

A. Secondary Appeal

> Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) [(1993)] to the agency's decision.
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> HRS § 91-14, entitled "Judicial review of contested cases," provides in relevant part:
>
> > (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
> >
> > (1) In violation of constitutional or statutory provisions; or
> > (2) In excess of the statutory authority or jurisdiction of the agency; or
> > (3) Made upon unlawful procedure; or
> > (4) Affected by other error of law; or
> > (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> > (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> [U]nder HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2) and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6).

Lingle v. Hawaii Government Employees Ass'n, AFSCME, Local 152, AFL-CIO, 107 Hawaiʻi 178, 183, 111 P.3d 587, 592 (2005) (quoting Paul's Elec. Serv., Inc. v. Befitel, 104 Hawaiʻi 412, 416, 91

P.3d 494, 498 (2004) (citations and some quotation signals omitted) (brackets in original)).

B. Construction of Administrative Rules

> The general principles of construction which apply to statutes also apply to administrative rules. As in statutory construction, courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.
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> International Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 323, 713 P.2d 943, 950 (1986) (citations omitted).

Allstate Ins. Co. v. Ponce, 105 Hawaiʻi 445, 454, 99 P.3d 96, 105 (2004) (quoting In re Doe Children: John, Born on January 27, 1987, and Jane, Born on July 31, 1988, 105 Hawaiʻi 38, 53, 93 P.3d 1145, 1160 (2004) (quoting In re Waiʻola O Molokaʻi, Inc., 103 Hawaiʻi 401, 425, 83 P.3d 664, 688 (2004) (quoting Lee v. Elbaum, 77 Hawaiʻi 446, 457, 887 P.2d 656, 667 (App. 1993)))).

III. DISCUSSION

Medeiros contends in her opening brief that (1) in light of the Appeals Officer's findings of fact (FOFs) in Decision No. 0001888, the Appeals Officer wrongly concluded that Medeiros "did commit acts which showed a deliberate disregard of standards of behavior which the Employer had a right to expect of her," such that Medeiros "was discharged for misconduct connected with . . . work," and (2) the circuit court erred in entering its order affirming Decision No. 0001888 and the accompanying final

judgment because of the foregoing inconsistency between the Appeals Officer's FOFs and conclusion of law (COL). We disagree.

A. "Disqualification for Benefits" under HRS § 383-30

The clear and unambiguous language of HRS § 383-30 (1993) states that an individual is disqualified from receiving benefits under Hawai'i unemployment security law when the employee is discharged for misconduct connected with work. Specifically, section 383-30 provides:

> **Disqualification for benefits.** An individual shall be disqualified for benefits:
>
> . . . .
>
> (2) Discharge or suspension for misconduct. For any week prior to October 1, 1989, in which the individual has been discharged for misconduct connected with work, and continuing until the individual has, subsequent to the week in which the discharge occurred, been employed for at least five consecutive weeks of employment. For the week in which the individual has been suspended for misconduct connected with work and for not less than one or more than four consecutive weeks of unemployment which immediately follow such week, as determined in each case in accordance with the seriousness of the misconduct. For the purposes of this paragraph, "weeks of employment" means all those weeks within each of which the individual has performed services in employment for not less than two days or four hours per week, for one or more employers, whether or not such employers are subject to this chapter. For any week beginning on and after October 1, 1989, in which the individual has been discharged for misconduct connected with work, and until the individual has, subsequent to the week in which the discharge occurred, been paid wages in covered employment equal to not less than five times the individual's weekly benefit amount as determined under section 383-22(b).

(Emphasis added.) The statute's lack of ambiguity is both confirmed and explained by a review of its statutory history within the context of Hawai'i unemployment security law. As set

forth below, this history shows that the intent of the unemployment benefits provisions is to pay benefits only to those claimants who became involuntarily unemployed through no fault of their own.

1. HRS § 383-30(2) Prior to 1976

Prior to 1976, HRS § 383-30(2)[4] allowed individuals discharged for misconduct to receive unemployment benefits after waiting out a minimum disqualification period of three weeks, and which allowed those suspended for misconduct to receive benefits without any disqualification period.[5]

2. The 1976 Amendment to HRS § 383-30(2)

In 1976, Section 383-30(2) was amended by Act 157 of the Session Laws of Hawai'i of 1976 to provide that an individual be disqualified for benefits:

> For the week in which he [or she] has been discharged or suspended for misconduct connected with his [or her] work, and continuing until he [or she] has, subsequent to the week in which the discharge or suspension occurred, been employed for at least five consecutive weeks of employment. For the purposes of this subsection, "weeks of employment" means all those weeks within each of which he [or she] has performed services in employment for not less than two days or four hours per week, for one or more

[4] The pre-1976 HRS § 383-30(2) provided that an individual was disqualified for benefits:

> For the week in which he has been discharged for misconduct connected with his work and for not less than two or more than seven consecutive weeks of unemployment which immediately follow such week, as determined in each case in accordance with the seriousness of the misconduct.

HRS § 383-30(2) (1968).

[5] In 1973, this court held that the words "discharged for misconduct" as then provided for by HRS 383-30(2) did not include suspension for misconduct. Matson Terminals, Inc. v. Hasegawa, 54 Haw. 563, 566, 512 P.2d 1, 3 (1973).

> employers, whether or not such employers are subject to this chapter.

1976 Haw. Sess. L. Act 157, § 2 at 293. The effect of the 1976 amendment to HRS § 383-30 was to narrow the scope of unemployment benefits coverage by expanding the minimum disqualification period for receiving unemployment benefits to five weeks when an individual was discharged or suspended for misconduct connected with work.

Act 157 arose out of Senate Bill (SB) 2326-76, entitled "A Bill for an Act Relating to Employment Security." In explaining the purposes of SB 2326, the Senate Human Resources Committee stated as follows:

> The purpose of this bill is to make several amendments to the Unemployment Compensation Law to ensure that benefits are paid only to those claimants who are <u>involuntarily unemployed through no fault of their own</u>, to provide the means to detect and prevent fraudulent claims, and to provide adequate financing of the Unemployment Insurance Trust Fund to restore its solvency.
>
> The specific proposals are:
>
> . . . .
>
> 2. To amend the provisions for disqualification due to voluntary separation from employment without good cause (Section 383-30(1)), discharge or suspension for misconduct (Section 383-30(2)), and failure without good cause to apply for or accept suitable work (Section 383-30(3)) in order to require an individual to requalify for benefits by becoming employed for a minimum of five consecutive weeks subsequent to the disqualification, and then being separated from such subsequent employment under non-disqualifying conditions. Under the present law, an individual disqualified for any of the aforementioned reasons may not draw benefits for three to eight weeks; however, after serving his [or her] disqualification period, the individual may then draw his [or her] full benefit entitlement, if he [or she] is otherwise eligible to do so. <u>The intent of the law is to pay benefits to workers who are involuntarily unemployed. Under the proposed amendment, an individual who caused his [or her] own unemployment would not draw benefits until he [or she] has amply demonstrated</u>

> <u>his [or her] attachment to the labor force by working subsequent to his [or her] voluntary unemployment</u>.

Sen. Stand. Comm. Rep. No. 352-76, in 1976 Senate Journal, at 1037-38 (emphases added). The House Labor and Public Employment Committee similarly noted that the disqualification provisions for misconduct and voluntary separation were being amended to require "unemployment insurance claimants to work five consecutive weeks in order to requalify for benefits if they voluntarily quit their jobs without good cause, <u>were suspended or fired for misconduct</u> or failed to apply for suitable work" in order to "correct weaknesses in benefit provisions." Hse. Stand. Comm. Rep. No. 776-76, in 1976 House Journal, at 1647 (emphasis added). The report added:

> [B]ecause the State's unemployment program was established to mitigate the effects of sudden or extended unemployment on the involuntarily unemployed, <u>eligibility for benefits should not be automatic for the worker who by his actions, creates his own unemployment</u>.

<u>Id.</u> at 1648 (emphasis added).

The statutory history of HRS § 383-30(2) is thus consistent with the plain language of the statute: individuals discharged for misconduct connected with work are disqualified from receiving unemployment benefits, at least until the statutory disqualification period has been satisfied.

B. HAR § 12-5-51

As noted above in note 1, HAR § 12-5-51(c), adopted to define "misconduct connected with work" under HRS § 383-30(2), provides that:

> Misconduct connected with work consists of actions which show a wilful or wanton disregard of the employer's interests, such as deliberate violations of or deliberate disregard of the standards of behavior which the employer has a right to expect of an employee, or carelessness, or negligence of such a degree or recurrence as to show wrongful intent or evil design. Mere inefficiency, unsatisfactory conduct, poor performance because of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good-faith errors in judgment or discretion are not misconduct. The misconduct shall be related to the work of the individual or the individual's status as an employee.

(Emphases added.)

HAR § 12-5-51(d) in turn provides that, in determining whether an individual's act constituted "misconduct" for unemployment insurance purposes, the Director shall consider any relevant evidence presented which relates to:

> (1) Employee's reasons for the act or omission, and efforts to avoid the act or failure to act;
> (2) The relevant circumstances of the case and any causative effort therefrom upon the employee's actions;
> (3) The nature and importance to the employer of the offended interest of the employer;
> (4) Any lawful and reasonable company policy or custom;
> (5) Employer's actions to curtail or prevent, if possible, the objectionable conduct; and
> (6) The nature of the act or failure to act.

C. Analysis of HAR § 12-5-51 Factors in Determining Misconduct

An analysis of the factors listed in HAR § 12-5-51(d) shows that Medeiros's actions constituted "misconduct" for unemployment insurance purposes.

1. Employee's reasons for the act or omission, and efforts to avoid the act or failure to act.

The Appeals Officer found that Medeiros's conduct was prompted by a change in her work schedule, which she attributed to her co-worker's complaint to management about work schedules. Medeiros's statement, "It's all because of you," accompanying her physical contact with her co-worker's neck and throat, further shows that Medeiros's reason for acting was that she blamed her co-worker for a change in her work schedule with which she was displeased.

2. The related circumstances of the case and any causative effect therefrom upon the employee's actions.

The Appeals Officer found that Medeiros's conduct was related to the change in her work schedule, which became effective on the day of the incident. The Appeals Officer also found that change in work schedules was occasioned by her co-worker's complaint to management.

3. The nature and importance to the employer of the offended interest of the employer.

As noted above in note 2, the Employer had a "zero tolerance for violence in the workplace" policy, which policy was distributed to employees, including Medeiros, in 1998. This policy defined "violence" as follows:

> <u>Violence is defined to include</u> but is not limited to: physically harming another, shoving, pushing, harassment, verbal or physical intimidation, coercion, brandishing weapons, <u>and/or threats or talk of violence</u> . . . . <u>No talk</u>

> of violence, including joking about violence, will be tolerated.

(Emphases added.) The policy further provided the following warning: "Any employee who is found to have engaged in any intimidation, harassment, or threat of violence to another employee will be subject to termination." (Emphasis added.) The importance of the Employer's "zero tolerance for violence in the workplace" policy cannot be disputed.

4. Any lawful and reasonable company policy or custom.

It cannot reasonably be disputed that the Employer's "zero tolerance for violence in the workplace" policy is a lawful and reasonable company policy.

5. Employer's actions to curtail or protect, if possible, the objectionable conduct.

The Employer's "zero tolerance for violence in the workplace" policy was distributed to all employees, including Medeiros, in 1998, and Medeiros acknowledged receiving it.

6. The nature of the act or failure to act.

Medeiros, then a full-time, senior restaurant hostess, does not dispute the Appeals Officer's finding that she approached her co-worker, a part-time restaurant bus person, from behind in the workplace, placed her hands around her co-worker's neck and throat, and shook her lightly for approximately five seconds, while saying, "It's all because of you." Medeiros also does not dispute that her above-described actions were

intentional with respect to her <u>conduct</u> (<u>i.e.</u> that she intended to place her hands around the co-worker's neck and throat). Although Medeiros does not dispute her objective conduct, she contends that because she did not subjectively intend to harm or threaten her co-worker as a result of that conduct, she cannot be said to have wilfully or wantonly disregarded her Employer's interest in eliminating violence in the workplace. We disagree because, as set forth in this court's prior decisions and discussed below, the level of culpability required to show wilful or wanton disregard is not subjective intent, but conscious disregard of a known (or which should have been known) risk with respect to a result of the conduct.

In summary, an analysis of the HAR § 12-5-51(d) factors shows that Medeiros's actions constituted "misconduct connected with work." We thus agree with the Appeals Officer's conclusion that Medeiros's conduct demonstrated a wilful or wanton disregard for the standards of behavior which the Employer had a right to expect of Medeiros, and constituted misconduct connected with work. We are not persuaded by the dissent's contention that the Appeals Officer's findings that the incident in question was "an isolated instance" and "constituted poor judgment" necessarily result in Medeiros's conduct falling within instances enumerated in HAR § 12-5-51(c) of what does not constitute misconduct. The portion of this rule which Medeiros refers to as not constituting

misconduct is "isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion," both situations of simple negligence or mistake. The nature of Medeiros's conduct, however, was not negligence; as discussed herein, Medeiros admitted that she intended the physical contact with her co-worker (and does not deny telling the co-worker, "It's all because of you," while placing both of her hands around her co-worker's neck and throat, and lightly shaking her). Therefore, although Medeiros's conduct did represent an isolated incident, it nevertheless fits within the definition of "misconduct connected with work" set forth in HAR § 12-5-51, as the Appeals Officer correctly concluded.

D. Relevant Prior Decisions of This Court

This court has on two previous occasions considered the issue of "misconduct connected with work" under HAR § 12-5-51 as related to disqualification for unemployment benefits pursuant to HRS § 383-30(2). See Camara v. Agsalud, 67 Haw. 212, 685 P.2d 794 (1984); Hardin v. Akiba, 84 Hawai'i 305, 933 P.2d 1339 (1997). A comparison and contrast of those cases to the instant case, set forth below, also persuades us that Medeiros was properly found to be disqualified from unemployment benefits due to having been discharged for misconduct connected with work.

1. <u>**Camara v. Agsalud**</u>

We respectfully submit that the dissent's reliance upon Camara v. Agsalud is misplaced, as Camara is distinguishable. In Camara, the employee was discharged because he was involved in a traffic accident. Camara, 67 Haw. 212, 213, 685 P.2d 794, 795. The employee, while trying to pass a slow-moving truck, crossed the center line on the highway near an intersection. Id. The employee felt that he could safely pass the truck; his view in front was unobstructed, there was no oncoming traffic, and the center line was about to change from solid to broken. Id. at 213-14, 685 P.2d at 795-96. However, a collision ensued when the truck made an unsignalled left turn[6] at the intersection. Id. The employee was discharged and subsequently denied unemployment insurance benefits based upon a decision of the Appeals Officer (also known as "referee") for unemployment compensation appeals that the employee "acted in wilful disregard of the Employer's best interest when he proceeded to cross the solid line." Id. at 214, 685 P.2d at 796. The circuit court reversed the Appeals Officer's decision, stating that (1) the Appeals Officer's finding that the employee believed that he could safely pass the truck was inconsistent with his (Appeals Officer's) determination

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[6] The truck driver had activated his left turn signal light but he later found out that the signal light was inoperable. Id. at 214, 685 P.2d at 796. Also, the Appeals Officer found that the truck was partially at fault for the accident because it was slow-moving. Id.

that the employee acted in wilful disregard of the Employer's interest, and (2) the employee's single driving error does not demonstrate a wanton disregard of the employer's interests absent other evidence of poor driving or other misconduct connected with work. Id. at 214-15, 685 P.2d at 796. Under these facts, we agreed with the circuit court that the Appeals Officer's conclusion was inconsistent with and not supported by the undisputed facts. Id. at 217, 685 P.2d at 798. We further stated that the Appeals Officer's decision was not consistent with the beneficent and humane purpose of the unemployment compensation statute to relieve the stress of economic insecurity due to unemployment, and held that the statute should be liberally construed to promote the intended legislative policy. Id. at 218, 685 P.2d at 798.

In affirming the circuit court's reversal of the Appeals Officer's decision, we noted that "[a]t best, the Employee's action was an isolated instance of negligence or a good-faith error in judgment." Id. We then specifically limited our holding to the negligence facts of Camara as follows: "We hold that Employee's actions does not approach the degree of negligence or carelessness to show wrongful intent or evil design amounting to misconduct." Id. at 219, 685 P.2d at 798. In other words, Camara stands only for the proposition that simple negligence does not constitute misconduct sufficient to

disqualify an employee for unemployment benefits under HRS § 383-30 and HAR § 12-5-51.

The dissent makes much of the beneficent intent and rule of liberal construction cited in Camara. While we agree that, as a general matter, the unemployment benefits statute does evince a beneficent intent and should be liberally construed, neither such intent nor liberal construction trumps the clear and unambiguous language of HRS § 383-30(2) that an individual is disqualified from receiving unemployment benefits when the individual is discharged for misconduct connected with work. The Intermediate Court of Appeals spoke to this point in Keanini v. Akiba, 93 Hawaiʻi 75, 86, 996 P.2d 280, 291 (App. 2000):

> With respect to the legislative purpose, Claimant cites the general principle that the "Hawaiʻi Unemployment Security Law should be liberally construed in order to achieve the beneficent legislative purpose of relief of workers under stress of unemployment through no fault of their own." Berkoff v. Hasegawa, 55 Haw. 22, 27, 514 P.2d 575, 579 (1973) (internal quotation marks and citation omitted). We agree; however, based upon the foregoing discussion, Claimant cannot be said to be without fault.

(Emphases added.) We concur; where a claimant, such as Medeiros, is found to have been discharged for misconduct connected with work, neither the beneficent intent of the unemployment benefits statute nor the rule of liberal construction, trumps the clear and unambiguous language of HRS 383-30(2) that the individual is disqualified from receiving unemployment benefits.[7]

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[7] While Camara is thus distinguishable on its facts, we take this opportunity to reconfirm Camara's holdings that (1) a single act of negligence (continued...)

2. **Hardin v. Akiba**

Thirteen years after Camara, this court revisited the issue of "misconduct connected with work" in Hardin v. Akiba, 84 Hawai'i 305, 933 P.2d 1339 (1997). In Hardin, an employee was discharged on the basis of a single unexcused absence after "numerous counseling sessions and notices from [her employer] regarding her poor dependability." Id. at 318, 933 P.2d at 1352. When she applied for unemployment benefits, the Director ruled that she was disqualified due to having voluntarily abandoned her position without compelling reason. Id. at 309, 933 P.2d at 1343. The circuit court reversed, holding that the employee had in fact been discharged due to unsatisfactory performance and had not voluntarily separated. Id. The circuit court also held that because her discharge was not due to misconduct, she was not disqualified from receiving benefits. Id.

On appeal, this court vacated the circuit court's decision and directed that judgment be entered in favor of the employer, holding that the employee had been discharged due to misconduct connected with work pursuant to HRS § 383-30(2) and HAR § 12-5-51(c), and was thus disqualified from receiving

[7](...continued)
in driving a motor vehicle does not demonstrate a wanton disregard of the employer's interests absent other evidence of poor driving or other misconduct connected with work, and (2) our unemployment compensation statute should, as a general matter, be liberally construed to promote the intended legislative policy of relieving the stress of economic insecurity due to unemployment which occurs through no fault of the employee.

benefits. Id. at 318, 933 P.2d at 1352. The Hardin court set forth the basis for its decision as follows:

> We agree with the [Director] that [the employee], after numerous counseling sessions and notices from [the employer] regarding her poor dependability, knew or should have known that her job would be in jeopardy if she chose to leave work early without permission on June 11, 1994. Accordingly, we hold that [the employee's] conscious decision to leave work early on June 11 in the face of this risk constituted an unexcused absence which demonstrated a "wilful or wanton disregard of the employer's interests[,]" HAR § 12-5-51(c), thereby disqualifying [her] for unemployment insurance benefits. Consequently, we also hold that the circuit court's finding that [she] was not discharged for misconduct connected with work was clearly erroneous.

Id.

The Hardin facts are different from the instant case in that Hardin had numerous counseling sessions regarding her prior dependability before the final incident of leaving work early without permission which led to her termination and subsequent disqualification from receiving unemployment benefits, while Medeiros had no such history. The facts are similar, however, to the extent that the misconduct involved intentional actions by the employee. Considering the similarity, and the fact that the misconduct by Medeiros (violation of the Employer's "zero tolerance for violence in the workplace" policy) is at least as serious (and presumably more so) as the misconduct in Hardin (poor dependability), we believe that it is appropriate to apply the Hardin rationale to this case.

Applying the Hardin rationale to the facts here, we conclude that Medeiros "knew or should have known that her job would be in jeopardy" if she violated her employer's zero

tolerance policy regarding violence in the workplace.[8] Medeiros consciously disregarded that risk when she approached her co-worker from behind, placing her hands around her co-worker's neck, and shaking her while saying, "It's all because of you" (i.e. blaming the co-worker for a change in the employees' work schedule), even if Medeiros did not subjectively intend any physical harm and the co-worker did not subjectively perceive any physical threat. In its best light, Medeiros's conduct constituted a "joke about violence," which conduct was in violation of the Employer's zero tolerance for violence in the workplace policy, as found by the Appeals Officer. Consequently, Medeiros's conduct showed a wilful or wanton disregard of her employer's interest in having a violence-free workplace, and was in deliberate disregard of the standards of behavior which the employer had a right to expect of an employee. As such, Medeiros's conduct constituted misconduct connected with work, as found by the Appeals Officer and affirmed by the circuit court. Accordingly, we hold that Medeiros's misconduct connected with

[8] We note, however, that an employer may not, by way of a policy or otherwise, unilaterally narrow the qualifications for unemployment benefits or redefine a legal term of art such as "misconduct connected with work." See Gonzales v. Industrial Commission of the State of Colorado, 740 P.2d 999, 1003 (Colo. 1987) ("adoption of such an approach would in effect grant employers ultimate authority to determine that some claimants automatically should not receive unemployment compensation benefits"). To put it plainly, an employer's policy (and evidence of its distribution to the claimant) can be relevant in identifying (1) the existence and nature of an employer's interest under HAR § 12-5-51(c); and (2) an employee's awareness of that interest, but an employee's violation of such policy is not in itself sufficient to justify a finding of misconduct connected with work so as to disqualify a claimant for unemployment compensation benefits.

work disqualified her from receiving unemployment benefits pursuant to HRS § 383-30(2).

IV. CONCLUSION

Based on the foregoing analysis, we affirm the circuit court's (1) May 4, 2001 order affirming Decision No. 0001888 and (2) May 4, 2001 final judgment.

On the briefs:

Robert J. Crudele,
Brian J. De Lima,
Howard H. Shiroma, and
David H. Lawton, for
appellant-appellant
Susan C. Medeiros

Li-Ann Yamashiro,
Deputy Attorney General
for appellee-appellee
Director of Labor and
Industrial Relations,
State of Hawai'i