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*** **NOT FOR PUBLICATION** ***

NO. 26635

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

JACQUELYN K. TOKASHIKI, also known as Jackie Tokashiki,
Plaintiff-Appellant,

vs.

GEORGE FREITAS, in his capacity as Chief of Police,
County of Kauaʻi, COUNTY OF KAUAʻI, a political subdivision
of the State of Hawaiʻi, Defendants-Appellees,

and

JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10,
DOE PARTNERSHIPS 1-10, DOE ENTITIES 1-10 AND DOE
GOVERNMENTAL UNITS 1-10, Defendants

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K. HAMAKADO
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STATE OF HAWAII
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APPEAL FROM THE FIFTH CIRCUIT COURT
(CIV. NO. 02-1-0086)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Plaintiff-Appellant Jacquelyn K. Tokashiki, also known as Jackie Tokashiki, appeals from the Circuit Court of the Fifth Circuit's June 8, 2004 final judgment.[1] Tokashiki contends that the circuit court erred in granting summary judgment to Defendants-Appellees George Freitas, in his capacity as Chief of Police of the County of Kauaʻi, and the County of Kauaʻi.

Based on the following, we agree with Tokashiki and vacate the circuit court's June 8, 2004 final judgment and remand this case for trial.

[1] The Honorable George M. Masuoka presided over this matter.

I. BACKGROUND

A. Factual Background[2]

On February 1, 1980, Tokashiki was first employed as the Private Secretary for the Chief of Police of Kaua'i County, the Deputy Chief, and the Police Commission (the Commission), a position exempt from the civil service rules and regulations. Freitas was appointed Chief of Police of Kaua'i County in 1995.

In July and August 2001, Kaua'i Police Department Lieutenant Alvin Seto and Inspector Mel Morris submitted to Tokashiki, in her capacity as the Secretary for the Commission, written complaints against Freitas. Tokashiki processed the complaints and distributed them to Dede Wilhelm, the Chair of the Commission [hereinafter, Wilhelm or Chair Wilhelm], as well as the other Commissioners and Hartwell Blake, the county attorney and the attorney for the Commission. Tokashiki scheduled a special Commission meeting for August 10, 2001 to discuss the matter. At Wilhelm's request, Tokashiki then: (1) prepared a memo regarding the procedures to be followed by the Commission in handling the complaints; (2) contacted the Honolulu Police Department (HPD) to inquire if John Ko, one of HPD's

[2] Because the circuit court did not make any findings of fact, the following facts were taken mainly from the Stipulation By and Between Plaintiff and Defendants George Freitas and County of Kaua'i and Tokashiki's Declaration in her Cross Motion. Tokashiki's declaration, which was attached to her cross-motion for summary judgment, was "made on personal knowledge," Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e), and showed "affirmatively that [Tokashiki was] competent to testify to the matters stated therein." Id.

investigators, could assist in the investigation; (3) prepared draft letters to Freitas, Kaua'i County Mayor Kusaka, and Chairman Leong of the Honolulu Police Commission to inform them of the complaints; (4) requested that Mayor Kusaka attend the August 10, 2001 meeting; and (5) researched the "leave with or without pay" issue. Tokashiki also explained to Wilhelm how internal complaints were handled, as Wilhelm had never before dealt with such complaints.

Prior to the August 10, 2001 meeting, Commissioner Norman Holt visited Tokashiki's office and suggested that, since he had an investigative background as a police officer, he could investigate one of the charges against Freitas -- namely, that he had driven his girlfriend in his police vehicle -- which would allow Ko to focus on the other more serious charges against Freitas. Tokashiki told Holt that it would probably expedite the investigation, but that Holt would have to clear it with Wilhelm, the other Commissioners, and the county attorney.

Prior to the August 10 meeting, Tokashiki also talked to Blake over the phone, explaining to him the complaints filed against Freitas. Since Tokashiki maintained all the internal investigation files in her office, Blake requested that she provide him with a copy of the file on Officer Nelson Gabriel, who was charged with sexual assault of his stepdaughter.

Lieutenant Seto had accused Freitas of hindering the police investigation of that charge.

Tokashiki participated in the August 10, 2001 meeting, answering both procedural questions as well as questions about the complaints. At the meeting, the Commission decided to accept and investigate the complaints filed by Seto and Morris and place Freitas on leave with pay. The Commission instructed Tokashiki to send all the necessary letters, and to instruct Deputy Chief Wilfred Ihu that he was appointed Acting Chief in Freitas' absence.

On August 13, 2001, Tokashiki informed Freitas that he had a meeting at the Mayor's Office, at which time he was formally informed that the Commission placed him on leave with pay for 120 days, effective August 13, 2001, pending the investigation of the charges against him. At the meeting, the Commission gave Freitas a written directive, drafted by Tokashiki, requiring him to surrender his gun, badge, identification, pager, cellular phone, vehicle, and office keys. Freitas was also instructed not to go onto police premises and not to talk to others about the investigation.

One week later, on August 20, 2001, Freitas went to the police station where Tokashiki was working alone. After opening and closing drawers in his office, Freitas asked Tokashiki about his gun. Tokashiki, knowing that Freitas had not turned in his

gun and equipment as ordered by the Commission and that the loaded gun was sitting in an unlocked drawer in an unlocked office, had earlier removed the gun and equipment and, with the help of a police officer, disengaged the gun and placed the items in Freitas' office safe. Because she was concerned for her safety, Tokashiki told Freitas that she did not know the location of his gun. After Freitas left, Tokashiki immediately called Wilhelm, who instructed her to write a memorandum to Blake about the incident as well as Freitas' refusal to turn over his badge, gun, and identification, and that he continued to call and go to the police station contrary to the Commission's written directive. Wilhelm also requested Tokashiki to make travel arrangements for Ko, as well as prepare a list of questions for him to ask witnesses.

At a follow-up Commission meeting on August 24, 2001, Blake gave Tokashiki copies of two letters he had received from Freitas, dated August 22 and 23, 2001. The August 22, 2001 letter stated, in pertinent part:

> [T]he Police Commission/Chief's Secretary seems comfortable in publicly and repeatedly slurring my reputation. I am aware of the fact that some person(s) searched my office and removed property. . . . The facts are as follows:
>
> > On August 20th, at about 5:30 P.M., I entered my office to retrieve some personal items. I was with an officer. The Police Commission/Chief's Secretary was still at work. I discovered my duty weapon was missing from my private office. I asked The Police Commission/Chief's Secretary if she knew what happened to the weapon or where it was. She replied twice that she had no information. On August 21st, after talking to several command and supervisory officers, I was

> told the Commission/Chief's Secretary had possession of the weapon, one of my badges and other pieces of equipment. I have been unable to determine who authorized this search and seizure of property.
>
> I am concerned with these continued violations of my rights and my Secretary's vocal biases. Especially troubling is the fact that she has access to and control of documents which may be relevant to this investigation. Your office needs to take immediate steps to ensure that any relevant documents or evidence are preserved before there is any further opportunity for tampering or destruction.
>
> Please be advised that I am reserving my right and option to initiate a complaint with the Police Commission concerning this matter and other reported improprieties by the Commission/Chief's Secretary and other directly involved personnel.

The August 23, 2001 letter stated:

> I have information that indicates or at least alleges that the Police Commission/Chief's secretary may be more than a neutral observer in the investigation process that has been initiated against me. It is clear, for example, that she had some role in searching my office and removing and storing items. When questioned, she was untruthful concerning her role. I have received warnings from several persons that she has been an active participant in the collection of information that could possibly be used against me.
>
> The Police Commission/Chief's Secretary is privy to confidential information which is discussed during the Police Commission's Executive sessions. I must assume items of discussion during upcoming executive sessions will include confidential information relative to this on-going investigation. It is in my best interest and that of the County's that the Police Commission/Chief's secretary be excluded from having access to any of this information.
>
> I anticipate your prompt consideration and appropriate action.

(Emphases added.). Both letters were signed by Freitas.

Blake then advised Tokashiki that she should not attend the Commission meetings where the pending complaints against Freitas were discussed. Tokashiki agreed, but prepared a written response to Freitas' two letters, dated August 27, 2001, which, inter alia, explained that she removed Freitas' gun for safety

reasons and requested a temporary restraining order against Freitas to ensure that he comply with the Commission's directives. Tokashiki also attached various letters and evaluations from Freitas describing her loyalty and dedication.

In October or November 2001, in response to Ko's complaints that no one was volunteering to be interviewed for the investigation, Acting Chief Ihu instructed Tokashiki to assist Ko in scheduling interviews and to encourage employees to give statements to Ko.

In November 2001, at Ko's request, Tokashiki gave a statement to Ko in his investigation of the hindering prosecution charge against Freitas. Because she maintained the internal investigation file at issue, Tokashiki was a key witness in the investigation.

On January 7, 2002, Freitas returned to service as Chief of Police of the County of Kaua'i and immediately reassigned Tokashiki to a position as secretary in the Administrative and Technical Services Bureau of the Kaua'i Police Department. The reassignment did not involve a diminution in pay or benefits.

On January 16, 2002, Tokashiki attempted to explain to Freitas her role in the actions of the Commission. When questioned about this conversation during his deposition, Freitas testified that, although he could not recall whether he told

Tokashiki at that time, someone at the county attorney's office had told him that Tokashiki "screamed the loudest whenever [Freitas] showed up [at the police station]" while he was on leave during the investigation.

In a letter dated April 26, 2002, Freitas notified Tokashiki that her employment was to be terminated effective May 31, 2002.

B. Procedural History

On May 14, 2002, Tokashiki filed a Verified Complaint for Declaratory Relief and Injunctive Relief and Damages alleging that Freitas and the County wrongfully terminated her in violation of various civil service rules and regulations and Hawai'i Revised Statutes (HRS) § 378-62 (Supp. 2002), Hawaii's Whistleblowers' Protection Act [hereinafter, HWPA].[3] The basis

[3] The HWPA provides:

> **§ 378-62 Discharge of, threats to, or discrimination against employee for reporting violations of law.** An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) The employee, or a person acting on behalf of the employee, reports or is about to report to the employer, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of:
>
> (A) A law, rule, ordinance, or regulation, adopted pursuant to law of this State, a political subdivision of this State, or the United States; or
>
> (B) A contract executed by the State, a political subdivision of the State, or the United States,
>
> unless the employee knows that the report is false; or

(continued...)

for Tokashiki's whistleblower claim was that she was terminated for "participating" in an investigation against Freitas.

On February 25, 2003, Freitas filed a motion for partial summary judgment on all counts of the complaint, except the whistleblower claim [hereinafter, First MPSJ]. The County filed its joinder in Freitas' motion on March 3, 2002. Tokashiki filed a memorandum in opposition to Freitas' First MPSJ on March 21, 2003. On June 17, 2003, the circuit court filed its order granting Freitas' First MPSJ, which Tokashiki did not appeal.

On March 25, 2003, Freitas filed a second motion for partial summary judgment on the whistleblower claim [hereinafter, Second MPSJ]. The County filed its joinder on March 28, 2003. Tokashiki filed her memorandum in opposition to Freitas' Second MPSJ on May 20, 2003, and on August 26, 2003, Tokashiki filed her cross-motion for partial summary judgment as to liability on her whistleblower claim [hereinafter, Cross Motion].

On October 21, 2003, the circuit court heard Freitas' Second MPSJ and Tokashiki's Cross Motion. The circuit court classified Tokashiki's conduct as ministerial and secretarial, and thus, not "participation" in an investigation such that her

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[3](...continued)

(2) An employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

conduct constituted protected activity. The circuit court further found that Tokashiki failed to offer any evidence to prove that Freitas had any knowledge of any other conduct that may have been protected. On March 2, 2004, the circuit court filed: (1) its order granting the County's joinder in Freitas' First MPSJ and Second MPSJ; (2) its order denying Tokashiki's Cross Motion; and (3) its order granting Freitas' Second MPSJ.

During the period from February 18, 2004 to February 24, 2004, in Tokashiki's concurrent federal lawsuit against Freitas in the United States District Court for the District of Hawai'i, Tokashiki took the depositions of former Kaua'i County Police Assistant Chief Melvin Morris, former Kaua'i County Police Deputy Chief Paul Hurley, Kaua'i County Police Councilman Maurice "Joe" Munechika, as well as present and former Commissioners. Chair Wilhelm testified that the Commissioners considered the charge against Freitas of hindering prosecution, but Blake, the county attorney, advised them to "lay low on this and cool it" because if they decided against Freitas and were sued, the county would not pay their expenses. Holt testified that the Commissioners believed Freitas' failure to comply with the directives of the Commission was insubordination and they discussed disciplining or terminating Freitas, but Blake again advised them that if they did and Freitas sued them, the county would not pay their expenses. Morris testified that Tokashiki's

role as the Commission's secretary was a substantial and motivating factor of Freitas' decision to remove and terminate Tokashiki.

On March 12, 2004, Tokashiki filed a motion to reconsider the order granting Freitas' Second MPSJ and a motion to reconsider the order denying her Cross Motion, asserting that "the recently secured depositions of the Commissioners, Morris, Hurley and Munechika support her contentions that her activities with the Commission was [sic] substantial and there is a material issue of fact on whether these activities were a substantial or motivating factor in Freitas' decision to remove and terminate her." On April 5, 2004, Freitas filed his memorandum in opposition to both of Tokashiki's motions for reconsideration, in which the County joined.

On April 22, 2004, the circuit court heard Tokashiki's motions and found that the depositions were not newly discovered evidence under HRCP Rule 59 inasmuch as: (1) Tokashiki had prior knowledge of the subjects upon which the Commissioners would testify and the potential value of those testimonies; and (2) Tokashiki had an adequate opportunity to take such depositions, but failed to do so before the trial court ruled on the Second MPSJ and Cross Motion. The trial court therefore denied Tokashiki's motions for reconsideration on the ground that Tokashiki failed to satisfy her burden to establish a procedural

basis to bring the motions. On June 8, 2004, judgment was entered in favor of Freitas and the County and against Tokashiki on all claims asserted in the complaint. This timely appeal followed.

II. STANDARD OF REVIEW

A. Summary Judgment

> We review the circuit court's grant or denial of summary judgment de novo. Hawaii Community Federal Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). The standard for granting a motion for summary judgment is settled:
>
> > [S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.
>
> Id. (citations and internal quotation marks omitted).

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

B. Motion For Reconsideration

"The trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard." Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002) (citation omitted). "An abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or

disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Gold v. Harrison, 88 Hawai'i 94, 100, 962 P.2d 353, 359 (1998) (quoting State ex rel. Bronster v. United States Steel Corp., 82 Hawai'i 32, 54, 919 P.2d 294, 316 (1996)) (internal quotation marks omitted).

> As this court has often stated, "the purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.

Sousaris v. Miller, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (2000) (internal brackets and citations omitted).

III. DISCUSSION

As points of error, Tokashiki asserts: (1) that the circuit court erred in finding that there were no genuine issues of material fact as to whether Tokashiki's removal and termination violated the HWPA inasmuch as Tokashiki's acts were "protected conduct" under HRS § 378-62(2) and Freitas had knowledge about such protected activities; and (2) that the circuit court erred in denying Tokashiki's motions for reconsideration as to the granting of Freitas' Second MPSJ and denial of her Cross Motion. Freitas counters: (1) that the circuit court correctly found that there was no genuine issue of material fact regarding the Second MPSJ and that Tokashiki failed to articulate any justification for ruling in her favor on her Cross Motion; (2) that the circuit court did not err in denying

Tokashiki's motions for reconsideration because Tokashiki had not satisfied the procedural threshold requirements to bring such motions; and (3) that even if the untimely deposition testimony that Tokashiki submitted were considered by this court, Tokashiki would still fail to prevail on her claims because the purported "evidence" does not create a genuine issue of material fact to warrant going to trial.

To prevail under the HWPA, Tokashiki must first establish that she engaged in "protected conduct" as that concept is delineated in the HWPA. Tokashiki must then prove that Freitas removed and terminated her "because" she engaged in the protected conduct; in other words, Tokashiki must prove that a causal connection existed between the alleged retaliation and the protected conduct. Crosby v. State, 76 Hawai'i 332, 342, 876 P.2d 1300, 1310 (1994). Tokashiki has the burden of showing that her protected conduct was a "substantial or motivating factor" in the decision to terminate her employment. Id. "Once the employee shows that the employer's disapproval of [the protected conduct] played a role in the employer's action against him or her, the employer can defend affirmatively by showing that the termination would have occurred regardless of the protected activity." Id. (internal brackets, quotations marks, and citations omitted).

A. The Circuit Court Erred as a Matter of Law in Ruling That Tokashiki Did Not Engage in "Protected Conduct."

Tokashiki asserts that she engaged in protected conduct because she "participat[ed] in the Commission's investigation of Freitas[.]" Tokashiki concludes that she therefore was "an employee [who was] requested by a public body to participate in an investigation, hearing, or inquiry held by that public body" under HRS § 378-62(2). Given Tokashiki's extensive involvement with the Commission during the initial inquiry and the formal investigation, we agree.

Freitas asserts that Tokashiki's participation in the investigation as the Commission's secretary does not constitute "participation" under the HWPA. Specifically, Freitas contends that "[t]he performance of . . . routine administrative and ministerial duties, which are all part of [Tokashiki's] regular job duties, cannot be considered 'participation' in an investigation[.]" Freitas, however, fails to point to any authority to support the proposition that "routine administrative and ministerial duties" or "regular job duties" do not constitute protected activity, and as this court noted in Crosby, "the HWPA is a remedial statute. As such, the HWPA should be construed liberally to accomplish the purpose for which it was enacted." Crosby, 76 Hawai'i at 341-42, 876 P.2d at 1309-10 (citations omitted).

Nevertheless, assuming, without deciding, that Tokashiki's "ministerial" participation was not protected conduct under the HWPA, Tokashiki points to various other acts that are more than "ministerial," including researching and writing memoranda, preparing questions for the investigator, and discussing the investigation with the Commissioners, investigator, and the county attorney. Freitas counters that Tokashiki's conduct that occurred before the investigation began -- including her research and advice in initiating the investigation as well as her meeting with Commissioner Holt regarding the investigation prior to the formal commencement of the investigation -- is not protected conduct inasmuch as there can be no participation in an investigation prior to the commencement of the investigation. The HWPA, however, also protects an "employee [who] is requested by a public body to participate in an . . . inquiry held by that public body[.]" (Emphasis added.). Although the HWPA does not define the term "inquiry," the HWPA should be construed liberally to accomplish its purpose. See Crosby, 76 Hawai'i at 342, 876 P.2d at 1310. Accordingly, Tokashiki's research, advice, and other involvement prior to initiation of the formal investigation would appear to constitute participation in an "inquiry."

Assuming, arguendo, that Tokashiki's involvement prior to the commencement of the formal investigation does not

constitute participation in an "inquiry" under the HWPA, Tokashiki, nevertheless, points to four instances of non-ministerial conduct that occurred after the initiation of the formal investigation: (1) after Freitas confronted Tokashiki regarding the whereabouts of his gun on August 20, 2001, Tokashiki called Chair Wilhelm and Blake, who both told her to write a memorandum concerning the insubordination of Freitas in (a) his refusal to surrender his badge, gun, and identification card and (b) his conduct in continuing to call and go to the police station and speak to employees about the complaint and investigation contrary to the Commission's written directive; (2) at the request of Chair Wilhelm, Tokashiki prepared questions for Ko to ask witnesses in his investigation into the charges against Freitas; (3) Acting Chief Ihu instructed Tokashiki to assist Ko by scheduling appointments for interviews for the investigation and encouraging employees to give statements to Ko in response to Ko's complaints that no one was volunteering to be interviewed; and (4) Tokashiki provided testimony regarding the hindering prosecution charge against Freitas. We agree with Tokashiki: these acts amount to more than "ministerial" participation in an ongoing investigation and constitute "protected conduct." The next question, therefore, is whether Freitas terminated Tokashiki because of such protected conduct.

B. The Circuit Court Erred in Granting Summary Judgment, Inasmuch as Genuine Issues of Material Fact Exist as to Whether Freitas Reassigned and Terminated Tokashiki Because of Her Protected Conduct.

Freitas asserts that Tokashiki was reassigned and terminated because the "environment of trust had been eroded" between himself and Tokashiki. Freitas points to several incidents that he alleges led him to his decision to remove and terminate Tokashiki: (1) Tokashiki, in response to Freitas' stated intent to bring his girlfriend to Kaua'i to live with him while he was going through a divorce with his wife, told Freitas that he should put her in a hotel in Honolulu. Freitas admonished Tokashiki that she was "stepping over the line"; (2) after Freitas' girlfriend moved to Kaua'i, Tokashiki made comments to him about her; (3) Freitas and the head of the Department's custodians both though that Tokashiki seemed "increasingly upset and angry"; (4) In June or July 2001, Tokashiki told Freitas about a job opening at Wilcox Hospital and suggested that Freitas apply because he had served as Chief for five years, which was the period of time he had initially stated he wanted to serve; and (5) Tokashiki got upset over the construction of the new police station. Tokashiki asserts that, notwithstanding the foregoing, genuine issues of material fact exist as to whether her protected conduct was a substantial or motivating factor in her removal and termination. Freitas

counters that Tokashiki cannot prove that Freitas knew of Tokashiki's protected conduct and, therefore, cannot prove that such activities were substantially motivating factors for her termination.

In response, Tokashiki first points to Freitas' August 23, 2001 letter to assert that Freitas knew of Tokashiki's protected activities. In this letter, Freitas states that Tokashiki "may be more than a neutral observer in the investigation process that has been initiated against [him]." Freitas further describes Tokashiki as "an active participant in the collection of information that could possibly be used against [him]." Freitas contends, however, that the letter only illustrates that he had "concerns that [Tokashiki] was improperly attempting to influence the investigation and acting outside the scope of her duties" and that such improprieties did not qualify as protected conduct. While Ninth Circuit precedent suggests that conduct constituting a serious breach of trust is not protected conduct, see O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996) (holding that employee's conduct in stealing sensitive personnel documents was a "serious breach of trust" and was thus not protected conduct), this letter, at the very least, raises a genuine issue of material fact as to whether Freitas indeed knew about Tokashiki's more-than-ministerial involvement with the investigation initiated against him, and

whether this knowledge was a substantial or motivating factor in Freitas' decision to reassign and terminate Tokashiki.

Although Tokashiki does not set forth any specific evidence that Freitas knew she testified in the investigation or that she assisted Ko by setting up interviews and drafting questions, Tokashiki does point to Freitas' deposition testimony in which he testified that he knew Tokashiki complained to the county attorney's office whenever he showed up at the police station after he had been directed not to by the Commission.[4] In discussing the January 16, 2002 conversation between Tokashiki and Freitas, Tokashiki's attorney asked Freitas, "Do you recall making the statement to [Tokashiki] to the effect that from what you had heard in the county attorney's office, she was the loudest in screaming harassment?" Freitas responded: "I think at some point one of the county attorneys did tell me that [Tokashiki] screamed the loudest whenever I showed up [at the police station]." This evidence, viewed in the light most favorable to Tokashiki, is probative of Freitas' knowledge of Tokashiki's protected conduct -- namely, that at Chair Wilhelm's request, she reported Freitas' insubordination in disobeying the Commission's directives. Thus, there exists a genuine issue of

[4] This deposition, taken on May 6, 2003, was not taken in conjunction with Tokashiki's federal lawsuit and is therefore not one of the depositions at issue in Tokashiki's motion for reconsideration.

material fact as to whether this knowledge was a substantial or motivating factor in Freitas' decision to terminate Tokashiki.

Additionally, the Ninth Circuit has held that "in some cases, causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002) (citing Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 507 (9th Cir. 2000) (noting that causation can be inferred from timing alone)); Miller v. Fairchild Indus., 885 F.2d 498, 505 (9th Cir. 1989) (stating that prima facie case of causation was established when discharges occurred forty-two and fifty-nine days after protected conduct); Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (stating that sufficient evidence existed where adverse actions occurred less than three months after complaint filed, two weeks after charge first investigated, and less than two months after the investigation ended).

Here, Freitas reassigned Tokashiki the day he returned from his leave and terminated her employment approximately four months later. This court, in Crosby, held that the reassignment of Crosby to a different project within the department affected a "condition" of employment under the HWPA and therefore constituted retaliation. Crosby, 76 Hawai'i at 341, 879 P.2d at 1309. Accordingly, Freitas' reassignment of Tokashiki to the

Administrative and Technical Services Bureau of the Kaua'i Police Department, even if it did not result in a diminution of pay or benefits, would also constitute retaliation under the HWPA.[5]

IV. CONCLUSION

In summary, the record reflects that a genuine issue of material fact existed as to whether Tokashiki was reassigned and terminated because of her protected conduct. The circuit court thus erred in granting summary judgment in favor of Freitas and the County of Kaua'i. We vacate the circuit court's June 8, 2004 final judgment granting summary judgment to Defendants-Appellees and remand this case for trial.

DATED: Honolulu, Hawai'i, April 11, 2006.

On the briefs:

Clayton C. Ikei
and Jerry P.S. Chang
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Tokashiki

John Komeiji,
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in his capacity as Chief
of Police, County of Kaua'i

[5] Because we hold that the circuit court erred in granting summary judgment in favor of Freitas, we need not reach the issue of Tokashiki's motions for reconsideration.