CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur in the order insofar as it affirms the dismissal of the discrimination claim. However, I respectfully disagree that it has been demonstrated, based on one conclusory finding and the record, that the retaliation claim should be rejected. Thus, I would remand for retrial on that claim.

Also, I believe the disposition in this case should be published inasmuch as changes in the federal case law presage modifications in our own case law and, as such, should be established for the benefit of the parties, the lower courts, and the general public, who will otherwise go without authoritative guidance until some unknown happenstance may present this court with another opportunity to rule on these issues. As counsel on the certiorari application said in oral argument, "We don't have much law [in age discrimination cases] so [this court's assistance] is needed to help develop the law, so the State can know and plaintiffs and the practitioners can know what the law is . . . it would certainly be appreciated."

Petitioner/Plaintiff-Appellant Stephanie C. Stucky (Petitioner) filed an application for writ of certiorari[1] on

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[1] Pursuant to Hawai'i Revised Statutes (HRS) § 602-59 (Supp. 2006), a party may appeal the decision of the intermediate appellate court (the ICA) only by an application to this court for a writ of certiorari. See HRS § 602-59(a). In determining whether to accept or reject the application for writ of certiorari, this court reviews the ICA decision for:

> (1) Grave errors of law or of fact; or
> (2) Obvious inconsistencies in the decision of the [ICA] with that of the supreme court, federal decisions, or its own decision,

(continued...)

February 27, 2007, requesting that this court review the judgment of the Intermediate Court of Appeals (the ICA) issued on November 30, 2006 pursuant to its Summary Disposition Order (SDO) filed on November 13, 2006 and its November 30, 2006 Order Denying Motion for Reconsideration,[2] affirming the March 8, 2004 final judgment of the Circuit Court of the Second Circuit (the court)[3] in favor of Respondents/Defendants-Appellees Paul R. Brown (Brown), in his official capacity as Interim District Superintendent, Department of Education, State of Hawai'i; Department of Education, State of Hawai'i (DOE); Elizabeth Ayson (Ayson), Individually and in her official capacity as Principal, Iao Intermediate School; and Noel Kuraya (Kuraya), in his official capacity as an employee of the Department of Education, State of Hawai'i [collectively, Respondents], and against Petitioner.

Respondents filed a memorandum in opposition.

I.

The following matters, some verbatim, are taken from the parties' submissions and from record. Petitioner's original complaint was filed on January 26, 1999. At the time Petitioner

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[1](...continued)
and the magnitude of such errors or inconsistencies dictating the need for further appeal.

HRS § 602-59(b). The grant or denial of a petition for certiorari is discretionary with this court. See HRS § 602-59(a).

[2] The SDO was issued by Presiding Judge John S.W. Lim and Associate Judges Daniel R. Foley and Alexa D.M. Fujise.

[3] The Honorable Joseph E. Cardoza presided.

was 53 years old, had been employed by the DOE since 1985, and had been teaching at Iao Intermediate School on Maui since 1987. According to Petitioner,

> [t]he claims that were ultimately tried, commencing on July 14, 2003, were 1) discrimination in employment by [Respondents] on the basis of age in violation of HRS [c]hapters 368 and 378; 2) retaliation by [Respondents] against [Petitioner] in violation of HRS [c]hapters 368 and 378; and 3) intentional infliction of emotional distress.
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> On March 8, 2004, the [c]ourt [entered] Findings of Fact [(findings)], Conclusions of Law [(conclusions)], and Decision and Order and Judgment [(Order). Petitioner's] Notice of Appeal was filed on March 19, 2004. . . .
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> . . . .
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> [In June, 1998,] . . . District Superintendent Ralph Murakami [(Murakami)] . . . rendered [a decision] on [Petitioner's] grievance[,] . . . direct[ing] that . . . [Petitioner] . . . should be assigned to teach a full music line ("second band line") for the 1998-99 school year rather than a younger teacher (Clarice Kaneshiro) [(Kaneshiro)] who was also qualified to teach music but who had 13 years less teaching experience and, thus less "seniority" as defined by the contract between the teachers union [Hawai'i State Teachers Association (HSTA)] and the State of Hawai'I [(State)]. Respondents ignored [Murakami's] June 28, 1998 directive, . . . forcing [Petitioner] to teach 3 social studies classes . . . that were outside her area of certification (music), while allowing the less senior teacher to teach the second band line, which consisted of all music classes.
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> On September 28, 1998, [Petitioner] initiated the grievance procedure as required by the HSTA contract . . . . On November 15, 1998, [Petitioner] filed her Charge of Discrimination with the Hawai'i Civil Rights Commission alleging she was being subjected to unequal terms of employment because of her age. . . .
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> On May 12, 1999, less than four months after [Petitioner] filed the Complaint in this action alleging age discrimination in employment, she was notified by [Ayson] that her teaching line for 1999-2000 would once again include classes outside of her certification -- she was assigned 3 music classes and 3 social studies classes. [Kaneshiro] was again assigned to teach the second band line -- six classes of music -- at Iao Intermediate School for the 1999-2000 school year. On May 19, 1999, [Petitioner] initiated a grievance through the HSTA, challenging the assignment to three social studies classes or be transferred.
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> On June 23, 1999, . . . [Brown] wrote [Petitioner] in response to her objection . . . that she would not be required to teach outside of . . . music, but as there were only 3 music classes for her to teach at Iao Intermediate for the 1999-2000 school year, . . . she would only be teaching half-time. . . . [I]f this . . . was not to her liking, she would be "staff reduced" to a full time teaching line at another school. . . .

> On July 28, 1999, [Petitioner] filed a Motion for Preliminary Injunction . . . , seeking to enjoin [Respondents] from cutting her . . . to half-time or transferring her . . . to another school. One of the bases . . . was that [Respondents] were . . . in violation of the collective bargaining agreement [(CBA)] requirement that . . . the less senior teacher be the one who is staff reduced. On August 4, 1999, . . . before the hearing on the Motion . . . , [Petitioner] received a second letter from [Brown] also dated June 25, 1999[,] . . . identical to the first June 25, 1999 letter except that the reason for [Petitioner's] being transferred . . . changed from being a "staff reduction" to being "for the good of the district." At time of the trial, [Brown] could not explain why the transfer . . . was "for the good of the district." [Petitioner] testified that [Brown] told her her transfer . . . [was] because she wasn't competent to teach band to end acrimony and to get rid of all of her grievances.
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> On August 17, 1999, [Brown] wrote to [Petitioner] informing her that she would be transferred to Maui Waena Intermediate School for the 1999-2000 school year. [Respondents] created a reserve position at Maui Waena to accommodate [Petitioner's] placement[.] . . .
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> . . . [A] significant adverse employment impact would be that at the end of the "reserve year," the teacher would not have a school to return to. Thus, the end result . . . of [Respondents] in assigning [Petitioner] to Maui Waena School for a year in a reserve position would be the . . . ouster of [Petitioner from] Iao School. . . .
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> [Petitioner taught] during the Fall semester, 1999 . . . . No questions were raised about her ability . . . . In November, 1999, after the Arbitrator rendered his decision that [Petitioner] rather than Kaneshiro was entitled . . . to teach the second band line, [on January 7, 2000, Brown] wrote to [Petitioner] . . . informing her that she would be returned to Iao Intermediate School for the Spring Semester. . . . [S]he was placed in the bandroom together with [Kuraya] and Ms. Kaneshiro and was subjected to a continuing hostile work environment until the end of the school year.
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> On January 10, 2000, [Petitioner] filed her second charge of discrimination, alleging retaliation with the Hawai'i Civil Rights Commission, and on May 11, 2000, a Second Amended Complaint was filed adding a second claim for . . . violation of HRS [c]hapter 378 -- this claim being a separate claim for Retaliation by [Respondents] as a result of [Petitioner's] filing of the initial Complaint which alleged age discrimination . . . .

(Emphases added.) (Footnote omitted.) A four-week bench trial commenced on July 14, 2003. As noted, the court issued findings, conclusions, and Order on March 8, 2004.

II.

Petitioner poses the following questions in her application:

> A. Did the ICA gravely err as a matter of law and fact in upholding the [court's d]ecision in favor of [Respondents] that the adverse employment actions taken by [Respondents] against [Petitioner], especially the teaching assignments forced on her for the 1998-99 school year, were not motivated by discrimination on the basis of age?
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> B. Did the ICA gravely err as a matter of law and fact in upholding the [court's d]ecision that the adverse employment action of [Respondents] in forcing [Petitioner] to transfer to another school to teach during the 1999-2000 school year on the threat that her employment would be cut to half time if she did not transfer not not [sic] in retaliation for [Petitioner's] pursuing her claims of discrimination against [Respondents]?

(Emphases added.)

III.

In relevant part, the SDO states:

> The [court] did not err in ruling [Petitioner] failed in her burden of proving age discrimination. Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 377-79, 14 P.3d 1049, 1058-60 (2000) (quoting Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the plaintiff remains at all time with the plaintiff") (internal quotations [sic] marks omitted). As the arbitrator did not consider whether [Respondents and Kaneshiro[4]] acted with a discriminatory motive, the [court] was not bound by the arbitration decision and was free to make its own determination regarding [Respondents'] motive. Keahole Def. Coalition, Inc. v. Bd. of Land & Natural Res., 110 Hawai'i 419, 429, 134 P.3d 585, 595 (2006).
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> The [court's] finding that differing views and approaches to teaching were taken by the individual [Respondents] and that these differences led to conflicts between them and motivated the personnel actions taken, notwithstanding the temporal proximity between the personnel actions and [Petitioner's] actions in litigating her claims, is supported by the evidence presented in the record.[5]

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[4] As Petitioner notes in her application, "[t]he ICA incorrectly list[ed Kaneshiro] as one of the Defendants-Appellees. Kaneshiro was never a party in the litigation."

[5] Petitioner does not contest the ICA's holding that "[t]he [court] did not clearly err in concluding [Petitioner] had not proved her claim of (continued...)

SDO at 1-2 (emphases added.) There does not appear to be an express reference in the SDO with respect to the retaliation claim.

On Petitioner's motion for reconsideration, the ICA stated in relevant part:

> [Petitioner's] . . . Motion for Reconsideration . . . points out that this court did not explicitly rule on, and urges that the recent decision in [Burlington] is relevant to[] her retaliation claim.
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> As to the former, we take this opportunity to make patent that this court's expression of approval of the trial court's determination, that the personnel actions taken against [Petitioner] in this case were not motivated by the filing of her complaints, was an adverse ruling on her retaliation claim.
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> As to the latter, [Petitioner's] retaliation claim is no longer based on any federal statute and [Burlington] was not a case construing [HRS c]hapters 368 and 378. . . . Assuming, arguendo, that [Burlington] should nevertheless be taken as guidance . . . , it is of no moment as it does not illuminate the topic . . . whether [Petitioner's] employer had non-retaliatory motives . . . .

(Emphasis added.)

IV.

In connection with Petitioner's first question relating to age discrimination, Petitioner's arguments rest on two contentions: (a) that the arbitration decision was binding on the court insofar as "a belief that Kaneshiro . . . was 'better able' to teach band" and that reassignment was a "non-discriminatory motive" and (b) alternatively, "as a matter of both fact and law," Respondents' actions were based on discriminatory motives.

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[5](...continued)
intentional infliction of emotional distress." SDO at 2.

V.

As to question 1(a), Petitioner maintains that "the issue of whether [Kaneshiro] was better qualified than [Petitioner] and, therefore, the proper person to be given the second band line in 1998" was "finally determined and could not be re-litigated in the instant case" because "the [court] was barred by the doctrine of issue preclusion [or collateral estoppel] from accepting the [Respondents'] purported reasons for not placing [Petitioner] in the second band line." Citing Reeves, she argues that

> the [court] was bound by the doctrine of issue preclusion from finding that [Respondents'] stated reason for assigning Ms. Kaneshiro to the second band line -- i.e. that she was "better qualified" than [Petitioner] to teach the band classes -- was a valid reason to support the adverse employment actions[.] . . . [T]his reason proffered by [Respondents] does not constitute a legally acceptable reason for their actions, and is thus a "false explanation" for their actions.

(Emphasis added.) She contends that "the only explanation for [Respondents'] continued adverse employment decision . . . [was that Respondents] would have the younger Kaneshiro teach the band."

Relying on Dorrence v. Lee, 90 Hawai'i 143, 976 P.2d 904 (1999), and Flores v. Baretto, 99 Hawai'i 270, 54 P.3d 441 (App. 2002), for the proposition that "an arbitration decision that addresses an issue is binding on the trial court in subsequent litigation involving the issue[,]" Petitioner declares that "[t]he arbitration decision plainly held that the only relevant matters were [Petitioner's] underlying qualifications

and certification as a music teacher." Thus, Petitioner asserts issue preclusion bars Respondents from "advancing the same reasons litigated and ruled against by the arbitrator as non-discriminatory motives[,]" specifically, that "the State defended arbitration by contending Kaneshiro's specialty and personality better suited her to team teach with Kuraya, and the arbitrator rejected that rationale[.]"

Respondents reply that the doctrine of "[c]ollateral [e]stoppel [d]oes [n]ot [p]reclude [c]onsideration [o]f [t]he [m]otives [u]nderlying [Respondents'] [a]ctions" because as the arbitration decision stated, "[t]he 1999 [a]rbitration [d]ecision only addresses the issue of . . . '[w]hether the Employer [State] . . . failed to implement a decision made by the then District Superintendent of Education for Maui dated June 23, 1998 to resolve a previous grievance filed by the grievant.'" (Emphasis added.) Therefore Respondents conclude that "[Respondents'] actual and subjective motivation for assigning [Petitioner] the reserve position was never at issue."

VI.

The doctrine of issue preclusion bars parties from relitigating issues that have already been addressed and decided in a prior action.

> Issue preclusion applies to a subsequent suit between the parties or their privies on a different cause of action and prevents the parties or their privies from relitigating any issue that was actually litigated and finally decided in the earlier action.

Exotics Hawaii-Kona, Inc. v. E.I. Dupont Denemours & Co., 104 Hawai'i 358, 365, 90 P.3d 250, 257 (2004) (citing Bremer v. Weeks, 104 Hawai'i 43, 85 P.3d 150 (2004)). The burden is on Petitioner to establish all of the elements of issue preclusion which requires as follows:

> (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom [issue preclusion] is asserted was a party or in privity with a party to the prior adjudication.

Id. (emphasis added).

VII.

With respect to the first element, it appears on the face of the litigation that no identity of the issues exists. As noted previously, after Petitioner filed her initial grievance contesting her unassigned status in February 1998, Murakami concluded that Petitioner should be awarded the second bandline and no further reprisals should be taken against her. Thus, as Respondents note, the issue before the arbitrator, as stated in the decision, was "[w]hether the Employer [State] . . . failed to implement a decision made by the then District Superintendent of Education for Maui dated June 23, 1998[,] to resolve a previous grievance filed by the grievant." In answering this question the arbitrator relied on the [CBA] and engaged in interpretation of the agreement, or contract, between the parties. The arbitrator determined that the decision by Murakami had not been implemented and in "upholding" the grievance, concluded that "[t]he principal

. . . could not alter the decision to award [Petitioner] the second bandline if there were only two bandlines." Further, because "[Petitioner] was a fully qualified teacher and could be assigned to teach any music classes including band[,]" (emphasis added), based on the above agreement, Petitioner, as the teacher with the most "seniority" was entitled to the position on the second bandline.

The issues involved in the present litigation, as noted previously, and as stated by Petitioner, are whether "the adverse employment actions taken by [Respondents] against [Petitioner] . . . [were] motivated by discrimination" and whether "forcing [Petitioner] to transfer to another school . . . [was in] retaliation for [Petitioner] pursuing her claims of discrimination against [Respondents]." (Emphasis added.) Thus, although the arbitrator concluded that Petitioner was qualified to teach the band class and was wrongfully denied a position on the second bandline, there was no conclusion that the reasons behind this denial were based on age discrimination or were in retaliation for Petitioner initiating her age discrimination case.[6] As Petitioner concedes, "the Arbitrator made no ruling on

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[6] Respondents state that "[a]lthough the [a]rbitration [d]ecision did not adjudicate the issue, it did imply that [Respondents] may have had non-discriminatory reasons for assigning [Petitioner] the reserve position[,]" inasmuch as it stated as follows:

> While that[, Ayson's stated reason for assigning Kaneshiro to the second band line,] is practical and to some extent understandable, the decision that the grievent is entitled to the second bandline cannot be altered although the principal may amend the assignment to shift duties among the now three bandlines if available to match the individual

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whether [Respondents] had acted with a prohibited discriminatory animus - that issue was not before him."

Additionally, the court concluded, regarding the present litigation, that "this case does not involve allegations related to breach of contract" but is a case "in which the [c]ourt has been asked to determine whether it has been established that the [Petitioner] in this case was the victim of age discrimination, retaliation due to the filing of age discrimination complaints, and the victim of intentional infliction of emotional distress." Further, as the court also explicitly concluded, "the competency of [Petitioner] and the competency of [Kaneshiro] was not truly at issue here. What was at issue is the manner in which the attitude of each individual -- [Petitioner, Kaneshiro, Kuraya], and the administration -- was perceived by those involved in this case." Because Petitioner failed to meet the first element of issue preclusion, the other three elements of the conjunctive test need not be examined.

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[6](...continued)
strengths with the tasks to achieve maximum effectiveness.

(Emphasis added.)

The arbitrator further indicated that there might not be discrimination involved and stated that "with the preference for band at Iao Intermediate School and the team teaching approach, the other music teachers were more suitable choices to teach band because of their background in the opinion of [Ayson]." However, "[i]n Hawaii, musical education is a specialized certification but there are no formal subspecialties such as band, vocal, and orchestra even though it is quite evident that there are considerable differences between the different disciplines within music."

VIII.

As to question 1(b), Petitioner's discrimination claim is based on HRS § 378-2(1)(A) (1993). That statute provides in relevant part:

> **Discriminatory practices made unlawful; offenses defined.** It shall be an unlawful discriminatory practice:
> (1) Because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record:
> (A) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment[.]

(Emphasis added.) In an age discrimination case, "this court in Shoppe laid out a prima facie test for age discrimination involving hiring and discharge." Schefke, 96 Hawai'i at 437, 32 P.3d at 81 (footnote omitted). As in Schefke, "[c]ertain common precepts identified in Shoppe with respect to an age discrimination claim apply here." Id. at 437-38, 32 P.3d at 81-82.

> In Shoppe, this court held that
> the plaintiff must establish a prima facie case of discrimination by demonstrating, by a preponderance of evidence, the following four elements: (1) that the plaintiff is a member of a protected class; (2) that the plaintiff is qualified for the position for which the plaintiff has applied or from which the plaintiff has been discharged; (3) that the plaintiff has suffered some adverse employment action, such as a discharge; and (4) that the position still exists. 94 Hawai'i at 378 14 P.3d at 1059 (citations omitted).

Id. at 438, 32 P.3d at 82 (brackets omitted). "Applying the McDonnell Douglas framework to an age discrimination claim," Schefke, 96 Hawai'i at 438, 32 P.3d at 82, Schefke stated:

> "The McDonnell Douglas framework involves three steps." [Shoppe, 94 Hawai'i] at 378, 14 P.3d at 1059. First, a plaintiff must establish a prima facie case of discrimination. See id. If the plaintiff establishes the

> prima facie case, an intermediate burden shifts to the defendant to articulate a "legitimate, nondiscriminatory reason for the adverse employment action." Id. at 378-79, 14 P.3d at 1059-60. If the defendant rebuts the prima facie case, the burden reverts to the plaintiff to present evidence demonstrating that the defendant's articulated reasons were pretextual. See id. at 379, 14 P.3d at 1060 (citations omitted).

96 Hawai'i at 438, 32 P.3d at 82.

In Reeves, the U.S. Supreme Court "granted certiorari[] to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in [McDonnell Douglas]), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." 530 U.S. at 140. The Court noted that pursuant to the [Age Discrimination in Employment Act (ADEA)] "it is unlawful for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[7] Id. at 141 (ellipses points, internal quotation marks, and citation omitted).

Observing that "the McDonnell Douglas framework [was] developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964," id. at 142, the Court "assume[d], arguendo, that the McDonnell Douglas framework is fully applicable here." Id. Under McDonnell Douglas, the Court pointed out that "[a]lthough intermediate evidentiary burdens

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[7] This language is similar to HRS § 378-2(1)(A).

shift back and forth . . . , the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id. at 143 (internal quotation marks and citation omitted). It was stated that

> proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiffs' proffered reason is correct." [St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502,] 524 [(1993)]. In other words, "it is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

Id. at 146-47 (emphases in original) (ellipses points omitted). But the Court declared that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Id. at 147 (emphasis in original). According to the Court,

> "[t]he factfinders' disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." [509 U.S.] at 511.

Id. (emphasis in original). Hence, the Court explained that falsity of the employer's explanation may be sufficient to establish discrimination.

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose[] . . . consistent with the general principle of evidence . . . that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." . . . [O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Id. at 147 (citations omitted). On the other hand, the Court indicated that such falsity does not necessarily prove discrimination in all cases.

> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision or . . . there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. at 148.

IX.

The relevant conclusions in part by the court in the instant case follow. HRS § 378-2 sets out what constitutes "unlawful discriminatory practice." "[T]he [c]ourt should follow the three step approach of [McDonnell Douglas]," which "was adopted by [Shoppe]." Under the McDonnell Douglas analysis, the plaintiff first has "to establish prima facie evidence of discrimination by demonstrating four elements[.]" The four elements are:

> [F]irst, that the plaintiff is a member of the protected class; second, that the plaintiff is qualified for the position for which the plaintiff has applied or from which the plaintiff has been discharged; third, the plaintiff has suffered some adverse employment action; and fourth, that the position still existed or existed during the relevant period of time.

Once the plaintiff establishes these elements, "the burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." Pursuant to Reeves, a finding that an employer's reason

"for its employment action is false . . . is sufficient to establish that the employer has discriminated against the plaintiff in this case on the basis of age." However, "[p]ursuant to McDonnell Douglas, once the employer rebuts the [plaintiff's prima facie case], the burden then reverts to the plaintiff to demonstrate the employer's proffered reasons were pretextual" and if the plaintiff is able to demonstrate this, the "trier of fact may, but is not required to, find for the plaintiff."[8]

X.

Applying the foregoing legal principles, the court apparently determined that Petitioner failed to prove Respondents had a legitimate nondiscriminatory reason for any adverse action and that Petitioner had failed to demonstrate Respondents' reasons were pretextual. The relevant findings in part follow. "[Petitioner] is a member of a protected class," "[Petitioner], during the relevant period of time, was qualified for the position in question, although she was never actually discharged from the position," "[Petitioner] has suffered some adverse employment action," "[A]pplying Shoppe, . . . [t]he [c]ourt is satisfied that the [Petitioner] has established a prima facie case of age discrimination."

However, "[a]fter careful consideration of the evidence presented and the [c]ourt's observation of the witnesses, the

[8] Although not material to the disposition here, it is unclear what authority the court relied on with respect to the underscored phrase.

[c]ourt is satisfied that the employer has . . . clearly set forth reasons that support a finding that unlawful discrimination was not the cause of the challenged employment action." (Emphasis added.) In so finding the court apparently rested on the findings following. "Kuraya was a band teacher at [Iao] who had . . . develop[ed] a strong band program" and to "achieve this goal any teacher, student, or parent . . . had to make a commitment that went beyond normal school hours[.]" "Kuraya clearly possessed strong beliefs concerning what would be necessary to maintain th[is] type of band program[.]"

Petitioner "was initially hired to develop the vocal program[.]" "[T]he methods and beliefs of [Kuraya and Petitioner] . . . differed, and indeed, clashed." "Kuraya was convinced that [Petitioner] lacked the type of commitment he demanded[.]" "Ayson could not effectively resolve this conflict." "Kaneshiro was hired to work with the band program[.]" "Kaneshiro is the type of individual who could adapt to any type of working condition. . . . This would include, in the court's view with [Kuraya and Petitioner]." "Kaneshiro possessed [the] ability to work within the existing structure of the band program. This had nothing to do with her age." "[T]he competency of [Petitioner] and the competency of [Kaneshiro] was not truly at issue here. What was at issue is the manner in which the attitude of each individual - [Petitioner, Kaneshiro, Kuraya], and the administration - was perceived by those involved in this case." (Emphasis in original.)

In sum, the court found "[Petitioner] has not met her burden of proof." It noted that it "is convinced that age was never a factor or cause of the challenged employment actions," "[Petitioner's] age played no role whatsoever in what occurred," and "that all of the key players in this case are in the same age protected class." Based on the foregoing, the findings would appear to support the court's ultimate finding that Petitioner had failed to prove age discrimination.

XI.

In her application, as noted, Petitioner argued that "as a matter of both fact and law . . . the only explanation for [Respondents'] continued adverse employment decision arose from discriminatory motives: . . . [Respondents] would have the younger Kaneshiro." However, the court expressly found that "[w]hat was at issue is the manner in which the attitude of each individual -- [Petitioner, Kaneshiro, Kuraya], and the administration -- was perceived by those involved in this case." As noted before, the court found that "[Petitioner's] burden with respect to the age discrimination has not been met." See State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1993) (stating that ordinarily "[i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact"). Based on the other foregoing findings, the court could determine that Petitioner had failed to carry her burden. Cf. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994) ("A conclusion of law that is supported by the trial court's

findings of fact and that reflects an application of the correct rule of law will not be overturned.").

XII.

In connection with Petitioner's second question relating to retaliation, this court in Schefke stated that, "[n]ot having previously dealt with a retaliation claim under HRS § 378-2(2) and (3), we may look, in construing HRS § 378-2, to interpretations of analogous federal laws by the federal courts for guidance." 96 Hawai'i at 425, 32 P.3d at 69 (internal quotation marks and citations omitted). As to the Hawai'i provision:

> HRS § 378-2(2) and (3) provide in pertinent part that it is "an unlawful discriminatory practice: (2) for any employer . . . to discharge, expel, or otherwise discriminate against any individual because the individual . . . has filed a complaint . . . in any proceeding respecting the discriminatory practices prohibited under this part" or "(3) for any person whether an employer, employee, or not, to aid, abet, incite, compel, or coerce the doing of any such practices . . . or to attempt to do so.

Id. at 441-42, 32 P.3d at 85-86 (brackets omitted) (ellipses points in original).

This court adopted the Ninth Circuit Court of Appeals test with respect to retaliation "[c]onsistent with the approach under Title VII." Id. at 426, 32 P.3d at 70. Schefke noted that:

> Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 to 2000e-17 (1994), an analogous federal law, federal courts have held that, in a prima facie case of retaliation, "an employee must show that (1) he or she engaged in a protected activity; (2) his or her employer subjected him or her to an adverse employment action; and (3) a causal link existed between the protected activity and the adverse action." Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000) (citing Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994)).

Id. at 425, 32 P.3d at 69 (emphasis added) (brackets and footnote omitted); see also Gonsalves v. Nissan Motor in Hawai'i, 100 Hawai'i 149, 162, 58 P.3d 1196, 1209 (2002) (setting forth the same test in order for a plaintiff to maintain a prima facie case of retaliation under HRS § 378-2(2)). Thereafter, "if the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for the adverse employment action." Schefke, 96 Hawai'i at 426, 32 P.3d at 70 (citation omitted). Then, "if the defendant articulates such a reason, the burden shifts back to the plaintiff to show evidence demonstrating that the reason given by the defendant is pretextual." Id. (citation omitted). Also, Petitioner's success on a retaliation claim is distinct from her success or failure on her discrimination claim. See Aloha Islandair Inc. v. Tseu, 128 F.3d 1301, 1304 (9th Cir. 1997) (stating that "[o]n its face, the Hawaii statute prohibiting retaliation does not condition the retaliation claim on the merits of the underlying discrimination claim").

XIII.

A.

In connection with the prima facie case set forth in Schefke, the U.S. Supreme Court has recently broadened the scope of the anti-retaliation provision in Title VII by expanding the definition of "adverse" employment action. Burlington, -- U.S. at --, 126 S.Ct. at 2415. In Burlington, the Court observed that

the "different Circuits have come to different conclusions about whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation."[9] -- U.S. at --, 126 S.Ct. at 2410. Granting certiorari to resolve this issue, the Court noted two issues: "[(1)] whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace[, a]nd [(2)] . . . how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope." Id. at --, 126 S.Ct. at 2411.

The Court perceived a difference between the semantic scope of the "substantive provision" in Title VII from that of the "anti-retaliation" provision.

> The underscored words in the substantive provision -- "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" -- explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision.

Id. at --, 126 S.Ct. at 2411-12 (emphasis added). Accordingly it was concluded that "purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike

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[9] The Title VII provision is substantially the same as HRS § 378-(2)(2) and (3). The Court indicated that retaliation is defined as follows:

> Title VII of the Civil Rights Act of 1964 . . . anti-retaliation provision [] forbids an employer from "discriminating against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. [42 U.S.C.] § 2000e-3(a).

Burlington, -- U.S. at --, 126 S.Ct. at 2408 (brackets omitted).

the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." Id. at --, 126 S.Ct. at 2412-13.

Inasmuch as in Schefke this court looked "to interpretations of federal law by the federal courts for guidance," Schefke, 96 Hawai'i at 425, 32 P.3d at 69 (quoting Shoppe, 94 Hawai'i at 377, 14 P.3d at 1058) (citations omitted), and applied the Ninth Circuit's test with respect to retaliation claims under HRS § 378-2(2) and (3), and the United States Supreme Court has adopted a new formulation controlling in all circuits, the Burlington test as set forth above should be adopted. The scope, then, of the retaliation provision in HRS § 378-2(2) and (3) is not limited to the "protected activity," or "adverse employment action" once employed by the Ninth Circuit. Id. at 426, 32 P.3d at 70. Rather, "[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." Burlington, -- U.S. at --, 126 S.Ct. at 2414.

B.

Accordingly, for a retaliation claim, a "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at --, 126 S.Ct. at 2415 (internal quotation marks and citation omitted). As explained by the Court, "material adversity . . . is [intended]

to separate significant from trivial harms," id., because "normally petty slights, minor annoyances, and simple lack of good manners will not" "deter victims of discrimination from complaining to the [Commission], the courts, and their employers," id. (emphasis in original) (internal quotation marks and citation omitted), the "reactions of a reasonable employee [are referred to] because . . . the provision's standard for judging harm must be objective," id. (emphasis in original), "the standard" is "phras[ed]" "in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances," id., and "this standard does not require a reviewing court or jury to consider the nature of the discrimination that led to the filing of the charge" because "the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the [discrimination] complaint," id. (emphasis in original) (internal quotation marks and citation omitted).

XIV.

In the instant case the court rejected the retaliation claim. The following relevant conclusions by the court in part follow. Retaliation claims are subject to HRS § 378-2(2). "[Petitioner] has the initial burden of establishing a prima facie case of retaliation." Plaintiff can do this by showing:

> (1) she engaged in an activity protected by HRS chapter 378 part I, Discriminatory Practices or filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practice prohibited under this part; (2) that the employer discharged, expelled or otherwise discriminated against the plaintiff; and (3) that a causal link exists

> between the protected activity and the adverse action. [Gonsalves], 100 Hawai'i [at] 162, 58 P.3d [at] 1209; Miller v. Fairchild Indus., Inc., 885 F.2d 498, 508 n.4 (9th Cir. 1989), cert. denied, 494 U.S. 1056 (1990).

"To show the requisite causal link" a plaintiff must "present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. Cohen v. Fred Meyer, Inc., 689 F.2d 793, 796 (9th Cir. 1982)." If the plaintiff meets this burden, then the McDonnell Douglas framework applies and the employer has to "show a legitimate, non retaliatory reason for the action taken; the plaintiff then has the burden of proving that the explanation of the employer was merely pretext for retaliation. Lam v. Univ. of Hawai'i, 40 F.3d 1551, 1559 n.11 (9th Cir. 1994)."

As its solitary finding on retaliation the court found "the conduct that followed the filing of the age discrimination complaints was not motivated by any age related factors, nor were they motivated by the filing of the complaints themselves." (Emphasis added.) The court made no findings as to any adverse action on the retaliation claim.

XV.

Petitioner argues that the court and ICA erred by "suggest[ing] that a discriminatory intent or 'motive' must be demonstrated to establish retaliation" and that Burlington "unequivocally affirms that a discriminatory motive is not necessary for a finding that retaliation has occurred." Petitioner focuses on the court's finding 31, the ICA's SDO, and

the ICA's denial of the motion for reconsideration.

The effect of Burlington on Hawaii's anti-retaliation provision was to expand what was previously denominated "adverse employment action." The evidence shows that in this case, Petitioner's reassignment to a different school followed Petitioner's filing of several grievances and a complaint. Respondents appear to argue that there was no adverse action because Petitioner is employed by the DOE and not Iao Intermediate, Petitioner was fully employed by the DOE and was "never terminated from her teaching position." However, it appears Petitioner's placement in this "reserve position" at a different school constituted an adverse employment action.

Although Petitioner was not terminated, she was given a "reassignment of job duties." As Petitioner argues, Burlington "reject[ed] the notion that 'reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description[.]' Burlington, supra, [-- U.S. at --,] 126 S.Ct. at 2416." Burlington pointed out that "retaliatory work assignments are a 'classic and widely recognized example of forbidden retaliation.'" Id. In this case, it can be "reasonably conclude[d] that the reassignment of responsibilities would have been materially adverse to a reasonable employee" under the circumstances. Id. at --, 126 S.Ct. at 2417. This reassignment could have resulted in Petitioner not having a school to return to the next year. As a teaching position was a reserve position,

the position was only good for one year so Petitioner either had to be reassigned to a new school or would be left without a designated teaching position.

XVI.

As said before, Burlington "reject[ed] the standard applied in the Court of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called 'ultimate employment decisions[.]'" Id. at --, 126 S.Ct. at 2414 (emphasis added). Insofar as Petitioner reads this statement to mean that Burlington eliminated the need to prove discriminatory intent, she was incorrect.

Inasmuch as the court made no finding of an adverse action in connection with the retaliation claim, it is not evident from the court's sole finding 31 that the court's determination was equivalent to that of a finding that the actions of Respondents would not have "dissuad[ed] a reasonable worker from making or supporting a charge of discrimination." Id. at --, 126 S.Ct. at 2409 (internal quotation marks and citations omitted).

The court's finding 31 states:

> Additionally, the [c]ourt is satisfied that regardless of the timing of the age discrimination complaints, that the conduct that followed the filing of the age discrimination complaints was not motivated by any age related factors, nor were they motivated by the filing of the complaint [sic] themselves.

(Emphasis added.) It appears apparent from the reference in

finding 31 to "age related factors" that the standard employed by the court with respect to retaliation was incorrectly tied to "the underlying conduct that forms the basis of the [discrimination] complaint." Id. at --, 126 S.Ct. at 2416. In finding as to the retaliation claim that the conduct in part "was not motivated by any age related factors," the court seemingly assumed that the "underlying conduct that form[ed] the basis of the [age discrimination] complaint," id., was a determinant of the retaliation claim. However, the U.S. Supreme Court indicated that "the anti-retaliation provision, unlike the substantive provision, is not limited to [age] discriminatory actions that affect the terms and conditions of employment." Id.

Similarly, the ICA, in affirming the court, recited in the SDO that

> [t]he [court's] finding that differing views and approaches to teaching were taken by the individual [Respondents] and that these differences led to conflicts between them and motivated the personnel actions taken, notwithstanding the temporal proximity between the personnel actions and [Petitioner's] actions in litigating her claims, is supported by the evidence presented in the record.

SDO at 2. The references to "differing views and approaches to teaching" and "that these differences led to conflicts" "and motivated the personnel action" were from findings 16, 18, and 23 relating to "Age Discrimination" in the court's decision. The reference to "temporal proximity between the personnel actions and [Petitioner's] actions" is to finding 31 under the "Retaliation" portion of the court's decision. Accordingly, the ICA itself seemingly perceived and approved the linkage of the

retaliation claim at least in part to the efficacy of the underlying age discrimination claim.

As noted before, in the ICA order denying the motion for reconsideration, the ICA said in part that, "that the personnel actions taken against [Petitioner] in this case were not motivated by the filing of her complaints, was an adverse ruling on her retaliation claim." Similarly Respondent argues, as indicated previously, that because the court found "that [Respondent] had a non-retaliatory motive . . . it did not need to reach [the] issue [of] whether 'the challenged [retaliatory] action has to be employment or workplace related," that had been considered in Burlington.

But the court made findings in part, see findings 16, 18, and 24, supra, regarding a non-retaliatory motive with respect to the age discrimination claim based on events prior to the filing of the age discrimination complaint. In affirming, the ICA referred to findings concerning the age discrimination complaint to support rejection of the retaliation claim. But the retaliation claim was based on events occurring after the complaint was filed. This approach would violate the admonition in Burlington against tying the disposition of the retaliation claim to the underlying discrimination complaint. Accordingly, in light of Burlington, which should be followed by this court, the ICA's decision regarding Petitioner's retaliation claim contained grave errors of law.

XVII.

For the foregoing reasons I would (1) modify the Hawai'i test for discrimination in line with Reeves and for retaliation in line with Burlington to provide guidance to counsel, the trial courts, and the general public, and (2) vacate and remand the court's decision as to the retaliation claim for application of the Burlington case in a new trial and for specific factual findings as to the basis for the court's determination as to the retaliation claim.