

DOUGLAS S. CHIN 6465
Attorney General of Hawai'i

JAMES E. HALVORSON 5457
MARIA C. COOK 6836
Deputy Attorneys General
Department of the Attorney
General, State of Hawai'i
235 South Beretania Street, 15th Floor
Honolulu, Hawai'i 96813
Telephone: (808) 587-2900
Facsimile: (808) 587-2965

Attorneys for Defendant-Appellant
ROSALYN H. BAKER

Electronically Filed
Intermediate Court of Appeals
CAAP-15-0000034
29-APR-2015
04:31 PM

CAAP-15-0000034

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

ROSALYN H. BAKER, STATE OF
HAWAII, DOES 1-10,

Defendants-Appellants,

and

MARK H. K. GREER,

Plaintiff-Appellee.

ORIGINAL PROCEEDING
Civil No. 14-1-2004-09 RAN
(Other Non-Vehicle Tort)

APPEAL FROM THE:

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
ROSALYN H. BAKER'S MOTION TO
DISMISS COMPLAINT FILED ON
SEPTEMBER 23, 2014, WITH PREJUDICE,
IN LIEU OF ANSWER, FILED WITH THE
CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAII ON DECEMBER 24,
2014

CIRCUIT COURT OF THE FIRST CIRCUIT
JUDGE: HON. RHONDA A. NISHIMURA

DEFENDANT-APPELLANT ROSALYN H. BAKER'S OPENING BRIEF

STATEMENT OF RELATED CASES

EXHIBITS A- D

CERTIFICATE OF SERVICE

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	1
1.	The Nature of the Case	1
2.	The Facts as Alleged in the Complaint	2
3.	Proceeding Below	4
II.	STATEMENT OF THE POINTS OF ERROR	6
III.	STANDARD OF REVIEW	7
IV.	ARGUMENT	7
1.	Legislative Immunity Framework	7
2.	Senator Baker Engaged in a Quintessential Legislative Function	10
3.	Senator Baker's Alleged Motivation or Subjective Intent is Irrelevant	16
V.	CONCLUSION	23

TABLE OF AUTHORITIES

<u>Federal Cases</u>	<u>Page(s)</u>
<u>Aitchison v. Raffiani</u> , 708 F.2d 96 (3d Cir. 1983).....	13
<u>Baird v. Board of Educ. for Warren Cmty. Unit School Dist. No. 205</u> , 389 F.3d 685 (7th Cir. 2004)	14
<u>Baraka v. McGreevey</u> , 481 F.3d 187 (3d Cir. 2007).....	11, 12
<u>Bogan v. Scott-Harris</u> , 523 U.S. 44 (1998).....	1, 9-12, 15-16, 20-21
<u>Bryant v. Jones</u> , 575 F.3d 1281 (11th Cir. 2009)	12
<u>Canary v. Osborn</u> , 211 F.3d 324 (6th Cir. 2000)	15
<u>Chappell v. Robbins</u> , 73 F.3d 918 (9th Cir. 1996)	10
<u>Dombrowski v. Eastland</u> , 387 U.S. 82 (1967).....	9
<u>Drayton v. Mayor and Council of Rockville</u> , 699 F. Supp. 1155 (D.Md. 1988).....	13, 21
<u>Eastland v. United States Servicemen's Fund</u> , 421 U.S. 491 (1975).....	9
<u>Gross v. Winter</u> , 876 F.2d 165 (D.C. Cir. 1989).....	14
<u>Herbst v. Daukas</u> , 701 F. Supp. 964 (D. Conn. 1988).....	14
<u>Kaahumanu v. County of Maui</u> , 315 F.3d 1215 (9th Cir. 2003)	7
<u>Orange v. County of Suffolk</u> , 830 F. Supp. 701 (E.D.N.Y. 1993)	14

<u>Pierson v. Ray,</u> 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)	22
<u>Rateree v. Rockett,</u> 852 F.2d 946 (7th Cir.1988)	13
<u>Rini v. Zwirn,</u> 886 F. Supp. 270 (E.D.N.Y 1995)	13
<u>Roberson v. Mullins,</u> 29 F.3d 132 (4th Cir. 1994)	14
<u>San Pedro Hotel Co., Inc. v. City of Los Angeles,</u> 159 F.3d 470 (9th Cir.1998)	7
<u>Tenney v. Brandhove,</u> 341 U.S. 367 (1951)	9-10, 13, 20-21
<u>U.S. v. Brewster,</u> 408 U.S. 501 (1972)	9
<u>U.S. v. Helstoski,</u> 442 U.S. 477 (1979)	8, 9
 <u>State Cases</u>	
<u>Abercrombie v. McClung,</u> 54 Haw. 376 (1973)	1
<u>Abercrombie v. McClung,</u> 55 Haw. 595 (1974)	1, 15-19
<u>Biscoe v. Tanaka,</u> 76 Haw. 380, 878 P.2d 719 (1994)	21
<u>Kerttula v. Abood,</u> 686 P.2d 1197 (Alaska 1984)	15
<u>Mehau v. Gannett Pacific Corporation,</u> 66 Haw. 133 (1983)	8
<u>Mental Health Ass'n in Penn. v. Corbett,</u> 54 A.3d 100 (Pa. Commw. Ct. 2012)	15

<u>Seibel v. Kemble,</u>	
63 Haw. 516 P.2d 173 (1981).....	22
<u>Trustees of the Office of Hawaiian Affairs v. Yamasaki,</u>	
69 Haw. 154, 170, 737 P.2d 446, 455 (1987).....	15, 22

State Statutes

Haw. Const. Art. III	1, 7, 15
Haw. Const. Art. VII.....	15
Hawai`i Organic Act of 1900.....	8

DEFENDANT-APPELLANT ROSALYN H. BAKER'S OPENING BRIEF

I. STATEMENT OF THE CASE

1. The Nature of the Case

This appeal raises the fundamental issue of absolute legislative immunity granted under the Haw. Const. Art. III, § 7, and whether a legislator's subjective intent in performing a legislative act is relevant in determining whether legislative immunity should apply. While this is a question of first impression in Hawai'i, it is well-settled under federal law. Under federal case law, a legislator's motive or intent is irrelevant in resolving the question of whether an act is legislative and thus absolutely privileged. *See, Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998).

State Senator Rosalyn Baker appeals directly from a denial of her assertion of legislative immunity in a motion to dismiss a civil action. A denial of legislative immunity is directly and immediately appealable. *See, Abercrombie v. McClung*, 54 Haw. 376, 381 (1973) and *Abercrombie v. McClung*, 55 Haw. 595, 600 (1974).

The case against Senator Baker was brought by a former employee of the State Department of Health who alleges his position was eliminated by Senator Baker through budget legislation in retaliation for his whistleblowing activities. The circuit court erroneously considered Senator Baker's *alleged* subjective intent in deciding whether her act, of proposing or voting for budget legislation eliminating the employee's position, was legislative. This was fundamentally flawed as a matter of law, because the Senator's alleged intent is not relevant to a determination of legislative immunity. The order of the circuit court should be reversed as to Senator Baker and the claims against her dismissed.

2. The Facts as Alleged in the Complaint

The facts provided below are drawn from the Complaint filed on September 23, 2014.

Senator Baker is the Senator for the Sixth Senate District (South and West Maui) in the State of Hawai'i. (ROA, Doc. 19, p. 14, ¶ 4). The complaint alleges she was the Chair of the Senate Ways & Means Committee during the relevant period. (ROA, Doc. 19, p. 16, ¶ 15).

From 1987 to 2010, Appellee Mark H.K. Greer ("Greer") was the Chief of the Dental Health Division at the Hawai'i State Department of Health ("DOH"). (ROA, Doc. 19, p. 15, ¶ 9). From 2010 until January 31, 2013, Greer was the Chief of the General Medical and Preventive Services Division at the DOH. (ROA, Doc. 19, p. 15, ¶ 10).

As the Chief of the Dental Health Division and Chief of the General Medical and Preventive Services, Greer claims he uncovered what he believed to be systematic fraud and corruption among dental health providers on the island of Maui. (ROA, Doc. 19, p. 16, ¶ 11). The fraud Greer alleges included a dentist on Maui who Greer believed billed Medicaid for examinations but who failed to render treatment. Id.

Greer alleges Senator Baker continued to promote the financial and professional interests of the Maui dentist. (ROA, Doc. 19, p. 16, ¶ 12).

Greer alleges he testified as an expert witness for the State resulting in the indictment of the Maui dentist for Medicaid fraud. (ROA, Doc. 19, p. 16, ¶ 13).

Greer acknowledges Senator Baker was never his employer. (ROA, Doc. 19, p. 14, ¶¶ 3-4, pp. 9-10, p. 65; Tr. November 26, 2014 at p. 30, lines 12-16 (JEFS #13)). Greer, however, alleges in retaliation for his whistleblowing activities, and in order to prevent more whistleblowing, Senator Baker attempted to use her power as Chair of the Senate Ways & Means Committee to eliminate his position from the 2008 State Budget. (ROA, Doc. 19, pp. 17-18,

¶ 15). Greer contends Senator Baker eliminated the wrong position in 2008, but finally succeeded in eliminating his position in 2011 under the guise of fiscal necessity. (ROA, Doc. 19, p. 16, ¶¶ 16-19).

Greer alleges Senator Baker colluded with the then Department of Health Director, Loretta J. Fuddy, who issued an announcement on August 24, 2011, stating two filled positions would be eliminated based on budget reduction requiring the need to implement a reduction in force. (ROA, Doc. 19, p. 17, ¶ 18).

The two positions that were eliminated were the Dental Health Administrator, Position Number 9606, EM 08, BU 35, occupied by Greer, and Secretary III, Position Number 09999, SR 16, BU 63, occupied by Caroline Albano, Greer's secretary. (ROA, Doc. 19, p. 16, ¶ 19).

Greer alleges he was laid off from his position on January 13, 2012, and was laterally transferred into the Dental Health Program Manager position due to his seniority. (ROA, Doc. 19, pp. 17-18, ¶¶ 20-21).

Greer alleges the elimination of his position through budget legislation was not based on fiscal necessity but based on Senator Baker's personal vendetta to support a friend or constituent and to retaliate against him. (ROA, Doc. 19, p. 16 ¶ 15, p. 18 ¶ 22). In support of his position, Greer claims only two positions were eliminated and the elimination of his position did not significantly affect the State of Hawai'i's budget, because the person he displaced transferred to a vacant position with a reduction in salary of \$3,000. (ROA, Doc. 19, p. 18, ¶¶ 21-22). Greer contends the \$3,000 reduction in salary of that employee represents the only savings to the State of Hawai'i from the elimination of his position. (ROA, Doc. 19, p. 18, ¶ 22).

3. Proceeding Below

On September 23, 2014, Greer filed a complaint in the circuit court, naming as defendants Senator Baker and the State of Hawai'i ("State"). (ROA, Doc. 19, p. 291, ¶ 35).

Greer alleges that the defendants' actions in abolishing his position violated the Hawai'i Whistleblower Protection Act (HWPB) and caused him emotional distress. He alleges the following counts against the defendants in his complaint: HWPB (Count I); Intentional Infliction of Emotional Distress (IIED) (Count II); and Negligent Infliction of Emotional Distress (NIED) (Count III). (ROA, Doc. 19, pp. 18-22).

On October 15, 2014, Senator Baker filed a motion to dismiss the complaint based on absolute legislative immunity. (ROA, Doc. 19, pp. 28-47). Senator Baker also moved to dismiss the HWPB claim on statute of limitations grounds and because Senator Baker was not Greer's employer. Further, Senator Baker moved to dismiss the IIED and NIED claims based on the statute of limitations and the lack of an underlying cognizable claim. *Id.*

On December 24, 2014, the circuit court issued its order granting in part and denying in part Senator Baker's motion to dismiss. (Exhibit A; ROA, Doc. 19, pp. 114-17). The circuit court denied Senator Baker's legislative immunity defense entirely. *Id.* The circuit court further denied the motion as to the IIED claim, but granted the motion as to the HWPB and NIED claims and dismissed them. *Id.* The circuit court dismissed the HWPB claim on the ground that Senator Baker cannot be liable under the HWPB because she was never Greer's employer, and also dismissed the NIED claim because Greer failed to allege an underlying cognizable claim. *Id.* The IIED claim is the only remaining claim against Senator Baker. *Id.* All three claims against the State remain. *Id.*

On January 5, 2015, Senator Baker filed a motion for leave to file interlocutory appeal and for stay pending appeal pursuant to § 641-1(b), Hawai'i Revised Statutes, on the grounds the appeal will result in the speedy termination of the litigation of the claims against her. (ROA, Doc. 19, pp. 201-217). By order dated February 25, 2015, the circuit court denied the motion ruling that the appeal will not result in the speedy termination of the litigation for "all parties." (Exhibit B - February 25, 2015 Order; ROA Doc. 19, p. 3).¹

On January 19, 2015, Greer filed a motion for leave to file First Amended Complaint. (ROA, Doc. 19, pp. 280-296). By order dated February 13, 2015, the circuit court denied, without prejudice, Greer's motion because Senator Baker had filed a notice of appeal and the circuit court was divested of jurisdiction over the appealed case. (Exhibit C – February 13, 2015 Order).²

On January 20, 2015, Senator Baker filed a timely Notice of Appeal from the circuit court's Order granting in part and denying in part Senator Baker's motion to dismiss, filed on December 24, 2014. (ROA, Doc. 1).

¹ The circuit court's February 25, 2015 order denying Senator Baker's motion for leave to file interlocutory appeal was not included in the ROA because that order was filed in the circuit court after the ROA had been filed with this Court. Attached hereto as Exhibit B is a copy of the February 25, 2015. On April 24, 2014, Senator Baker filed a motion for leave to supplement the record on appeal to add the February 25, 2015 order.

² The circuit court's February 13, 2015 order denying, without prejudice, Greer's motion for leave to file a First Amended Complaint, was not included in the ROA. Attached hereto as Exhibit C is a copy of the February 25, 2015. On April 24, 2014, Senator Baker filed a motion for leave to supplement the record on appeal to add the February 13, 2015 order.

II. STATEMENT OF THE POINTS OF ERROR

1. The circuit court erred when it denied Senator Baker absolute legislative immunity by considering Senator Baker's subjective intent in performing a quintessential legislative act in determining whether legislative immunity applies.

This error occurred in the circuit court's order granting in part and denying in part Senator Baker's motion to dismiss complaint and during the hearing on the motion to dismiss. (Exhibit A; Exhibit D, pp. 13-24; Tr. November 26, 2014, at pp. 29-40).³ Although the circuit court's order does not explain the reason for denying legislative immunity, statements made by the circuit court judge during the hearing on the motion to dismiss shed light on the circuit court's reasoning. The circuit court concluded that pursuant to Abercrombie, 55 Haw. 595, legislative immunity shields a legislator from civil action only if the legislative function or act is based on a "legitimate legislative concern." The circuit court, however, erroneously relied on Senator Baker's alleged subjective intent or motive in construing the terms "legitimate legislative concern" and in resolving the logically prior question of whether her act was legislative.

Senator Baker objected to this error and brought it to the circuit court's attention in her memorandum in support of the motion to dismiss, her reply memorandum, and during the hearing on the motion to dismiss. (ROA, Doc. 19, pp. 37-40, 73-74; Exhibit D, pp. 3-8, 21-24; Tr. November 26, 2014 at pp. 8-13, 37-40 (JEFS # 13)). Senator Baker explained that she is entitled to absolute legislative immunity because voting on budget legislation that includes elimination of positions is a quintessential legislative act and her intent or motive in performing the act is irrelevant in determining whether she is entitled to legislative immunity. Id.

³ The page reference to Exhibit D is to the bates number located at the bottom right of Exhibit D and not to the page of the transcript.

III. STANDARD OF REVIEW

1. A review of a lower court's decision to grant or deny legislative immunity is de novo. *See, e.g., Kaahumanu v. County of Maui*, 315 F.3d 1215, 1219 (9th Cir. 2003) *citing San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 476 (9th Cir.1998).

IV. ARGUMENT

1. Legislative Immunity Framework

In virtually every state, members of the state legislature are entitled to assert their absolute legislative immunity in litigation that arises from the role they play. In Hawai'i, the grant of legislative immunity is in Haw. Const. Art. III, § 7.⁴ In relevant part, Article III, section 7, reads:

No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of the member's legislative functions

Thus, what a state legislator says or does in the exercise of the legislator's legislative function cannot be questioned before any other tribunal -- judicial or executive branches. The legislative immunity is absolute. *Abercrombie*, 55 Haw. at 600-01, 525 P.2d at 597 (holding that the statement made in the exercise of the senator's legislative function was absolutely privileged and the senator cannot be held to answer in the courts).

The United States Constitution grants a similar immunity to members of Congress. U.S. Const. Art. I, § 6, cl. 1, known as the Speech and Debate Clause provides:

The Senators and Representatives shall . . . be privileged . . . for any Speech or Debate in either House, they shall not be questioned in any other Place.

⁴ Haw. Const. Art. III, § 7 was renumbered to its current section by the Constitutional Convention of 1978.

The Hawai`i Constitution affords a broader protection for legislators than the protection provided by the United States Constitution. Abercrombie, 55 Haw. at 600 (“We are of the opinion that the above record of the proceedings of the Constitutional Convention shows that the delegates to the Convention purposefully intended to broaden the scope of the legislative immunity . . .”).

The Hawai`i Supreme Court has only twice discussed the issue of legislative immunity, and neither is factually and legally on point.⁵ But several U.S. Supreme Court cases have discussed the underlying policy for legislative immunity and the inquiry necessary to determine whether it applies in the same context presented in this case as will be discussed below. These federal cases are instructive in determining whether Senator Baker’s act is entitled to absolute legislative immunity, especially because the current language of Article III, Section 7, was derived from the Hawai`i Organic Act of 1900, the law that established the territory of Hawai`i. 1 *Proceedings of the Constitutional Convention of Hawai`i* (1950) at ix (preface). The Organic Act included a provision substantively identical to the relevant portion of Article III, Section 7: “That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions in either house.” Hawai`i Organic Act, § 28, HRS Vol. 1 at 95. In this respect, the Organic Act is similar to U.S. Const. Art. I, § 6.

The Speech or Debate Clause is grounded in separation of powers principles that are necessary “to preserve the constitutional structure of separate, coequal, and independent branches of government. U.S. v. Helstoski, 442 U.S. 477, 491 (1979). The Clause “insure[s] that the legislative function the Constitution allocates to Congress may be performed

⁵ The two cases were Abercrombie v. McClung, 55 Haw. 595 (1974) and Mehau v. Gannett Pacific Corporation, 66 Haw. 133 (1983)). In both cases, the Court addressed legislative immunity in the context of a slander lawsuit and the temporal or spatial limitations on legislative immunity.

independently,” and that the “wisdom of congressional approach or methodology is not open to judicial veto.” Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 502, 509 (1975).

The Speech or Debate Clause protects not only “against inquiry into acts that occur in the regular course of the legislative process” but also against inquiry “into the motivation for those acts.” U.S. v. Brewster, 408 U.S. 501, 525 (1972). A privilege is no longer absolute if the actor must explain his motive. *See* Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (“The privilege would be of little value if [legislators] could be subjected . . . to the hazard of a judgment against them based upon a jury’s speculation as to motives.”); *Id.* (“The claim of an unworthy purpose does not destroy the privilege [I]t [is] not consonant with our scheme of government for a court to inquire into the motives of legislators”). All acts, no matter how reprehensible, that are within the legislative sphere are beyond court review. Eastland, 421 U.S. at 510. This is true even though the conduct in question, “if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.” *Id.*

Legislative immunity is designed to protect legislators “not only from the consequences of litigations’ results but also from the burden of defending themselves.” Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). Court adjudication is permissible only if the case “does not rely on legislative acts or the motivation for legislative acts.” Brewster, 408 U.S. at 512. The Clause precludes any person from advancing his case by “[r]evealing information as to a legislative act,” and speaking or debating “to a jury would subject a Member to being “questioned” in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause.” Helstoski, 442 U.S. at 490 (1979).

Under federal law, a state legislator is entitled to absolute legislative immunity for acts undertaken within the “sphere of legitimate legislative activity.” Bogan v. Scott-Harris, 523

U.S. 44, 54 (1998) *quoting* Tenney, 341 U.S. at 376 (1951) (holding that state legislators were absolutely privileged in their legislative acts). *See also* Chappell v. Robbins, 73 F.3d 918, 920 (9th Cir. 1996) (“Legislators have an absolute common-law immunity against civil suit for their legislative acts.”).

2. Senator Baker Engaged in a Quintessential Legislative Function

Senator Baker is entitled to absolute legislative immunity for the legislative activity Greer has identified in his complaint. Senator Baker was sued solely because of her action as a State legislator. ((ROA, Doc. 19, pp. 16-17, ¶¶ 15-19). The complaint alleges Senator Baker used her power as Chair of the Senate Ways & Means Committee to remove Greer from his position by introducing and/or voting for a budget legislation that eliminated the position Greer occupied.⁶

Id. As discussed in the following cases, such act is quintessentially legislative and thus entitled to absolute legislative immunity.

The Hawai`i appellate courts have not considered legislative immunity in the context of actions that affect employment. However, federal courts that have addressed this issue distinguish between the firing of an employee (administrative action) and the elimination of a position (legislative action).

The leading recent U.S. Supreme Court case on the issue of absolute legislative immunity discussing the elimination of a public employment position is Bogan v. Scott-Harris, 523 U.S. 44 (1998). Bogan is especially instructive because it is factually similar to the present case. That case involves the elimination of a single position through legislation allegedly motivated by a desire to retaliate against the occupier of the position. The plaintiff in that case was the

⁶ The complaint alleges that Senator Baker eliminated the wrong position in the 2008 state appropriations budget, but finally succeeded in eliminating the position occupied by Greer in 2011. (ROA, Doc. 19, pp. 16-17, ¶¶ 15-19).

administrator of a city department who filed suit against the members of the city council who slashed the funding for her position and the mayor who signed the ordinance. Bogan, 523 U.S. at 46-47. The plaintiff alleged that the elimination of her department of which she was the sole employee was motivated by racial animus and desire to retaliate against her for exercising her First Amendment rights. The district court denied defendants' motion to dismiss on the ground of legislative immunity, and the case proceeded to trial. The jury found against the mayor and the city council. Id. at 47. The court of appeals affirmed the judgments and held that although defendants had absolute immunity from civil liability for their performance of legitimate legislative activities, their conduct in voting for and signing the ordinance that eliminated plaintiff's position was motivated by consideration relating to a particular individual (plaintiff) and her protected speech in the decision making calculus and was therefore administrative rather than legislative. Id. at 48.

The Supreme Court reversed and held that the members of the city council and mayor were protected by absolute legislative immunity. The Bogan court held that **whether immunity attaches turns not on the official's motive or intent but on the nature of the act in question.** Id. at 54. The elimination of positions through legislation, even if only one position was eliminated, was the type of policy-making that traditional legislation entails. Id. at 55. The elimination of a position, unlike the hiring or firing of an employee, may have prospective implications that reach well beyond the particular occupant of the office. Id.

Another case applying absolute legislative immunity in the context of the elimination of a public employment position is Baraka v. McGreevey, 481 F.3d 187 (3d Cir. 2007). The plaintiff in Baraka was appointed poet laureate of New Jersey in 2002, a position created by the New Jersey legislature in 1999. Id. at 193-94. The plaintiff alleges his First Amendment right to free

speech had been violated when, in reaction to a poem he had read at a poetry festival, which many found racist and anti-Semitic, the governor de-funded his position and the state passed a law abolishing the state's poet laureate position. Id. at 194. The plaintiff brought claims against the state of New Jersey and against a variety of state officials, including the governor. Id. The court of appeals affirmed the lower court's dismissal of the claims against the governor on the basis of absolute legislative immunity. Noting earlier cases that drew a "distinction between the elimination of a position and the termination of an individual employee," the court of appeals reasoned that the elimination of a position which was legislatively created was the type of policy-making that "traditional legislation entails." Id. at 199. Citing the Supreme Court's decision in Bogan, the court of appeals further noted that the officials' motive and intent in enacting the law eliminating the poet laureate position, whether concerned specifically with Baraka or with more global public concerns, was immaterial. Id. at 200 (*citing Bogan*, 523 U.S. at 54-55).

Similarly, the Eleventh Circuit in Bryant v. Jones, 575 F.3d 1281 (11th Cir. 2009) applied the U.S. Supreme Court and Third Circuit precedent when it concluded a public official was entitled to absolute legislative immunity when the official developed a budget that eliminated an employee's position. In that case, the plaintiff alleged that the budget proposal that eliminated his position was "an artifice for what was in fact a retaliatory personnel decision." Bryant, 575 F.3d at 1303. The court held that "[u]nlike the termination of an individual employee, the elimination of a public employment position 'may have prospective implications that reach well beyond the particular occupant of the office.' " Id. at 1306 (*quoting Bogan*, 523 U.S. at 56). A "decision to abolish the position" and prepare the budget proposal "is properly construed as embodying a policy decision with prospective implications." Id. at 1306-07. Even though the

“facts obviously suggest an improper motive,” the court held that a “claim of an unworthy purpose does not destroy the privilege.” *Id.* (quoting *Tenney*, 341 U.S. at 377). Thus, the court refused to consider the official's intent or motive in preparing the budget, as the inquiry is “whether, stripped of all considerations of intent and motive, [the official's] actions were legislative.” *Id.* at 1307. The court found the official was entitled to absolute legislative immunity. *Id.*

Court's around the country have reached the same result:

- Elimination of certain jobs by budgetary decision “quintessential legislative function, reflecting the legislators' ordering of policy priorities in the face of limited financial resources.” *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir.1988).
- “The Town Board members acted within the scope of their legitimate legislative capacity in voting to eliminate the funding for plaintiffs' positions. Even assuming an illegitimate motive in voting for the budget resolutions, the Board members are entitled to personal immunity for these legislative acts.” *Rini v. Zwirn*, 886 F. Supp. 270, 283 (E.D.N.Y. 1995).
- Elimination of assistant building inspector position by members of the borough council and governor through ordinance was legislative function entitled to legislative immunity despite allegation it was politically motivated and done in bad faith. *Aitchison v. Raffiani*, 708 F.2d 96, 97-99 (3d Cir. 1983).
- “[T]he job elimination, which is the injury for which plaintiff seeks compensation, was a legislative act.” *Drayton v. Mayor and Council of Rockville*, 699 F. Supp. 1155, 1157 (D.Md. 1988).

- “This Court finds that the act of voting for Resolution No. 53–1992 by the legislature defendants was a purely legislative function and therefore absolutely immune from attack in a § 1983 action. . . Plaintiffs' claims that the resolution did not achieve the projected savings and that political patronage was the underlying factor behind the resolution are insufficient to deprive the legislator defendants of absolute legislative immunity.”
Orange v. County of Suffolk, 830 F. Supp. 701, 705 (E.D.N.Y. 1993).
- “The elimination of one Lieutenant's position was clearly a legislative action. . . While the decision to hire or fire a municipal employee is generally considered an administrative or managerial decision . . . abolition of a municipal position has consistently been held to constitute a legislative act.” Herbst v. Daukas, 701 F. Supp. 964, 968 (D. Conn. 1988).

In contrast, courts decline to apply legislative immunity when the action relates to the termination of a specific employee rather than the elimination of a position. For example, in Gross v. Winter, 876 F.2d 165, 170-73 (D.C. Cir. 1989), the court did not extend legislative immunity to a city council member because she acted in an administrative, not legislative, capacity when she discharged her legislative researcher employee allegedly on account of the employee's religion. In Baird v. Board of Educ. for Warren Cmty. Unit School Dist. No. 205, 389 F.3d 685, 696 (7th Cir. 2004), the court did not extend legislative immunity to a school board's termination of a principal for reasons cited in an evaluation because termination of an employee is an administrative act that is not taken in the sphere of “legitimate legislative activity.” In Roberson v. Mullins, 29 F.3d 132, 135 (4th Cir. 1994), the court did not extend legislative immunity to members of a county board when they terminated the public works superintendent, allegedly on account of his political affiliation. Similarly, courts have refused to extend legislative immunity in cases where the terminated individuals were replaced with other

individuals with the same title or duties. *See e.g., Canary v. Osborn*, 211 F.3d 324, 330-31 (6th Cir. 2000) (holding that the action was not a position's elimination because the board assigned others to fill the plaintiff's old position and to fulfill his job duties).

In the present case, Greer's complaint plainly demonstrates that, at the very core, his claim against Senator Baker concerns legislative activity. Senator Baker eliminated Greer's position through budget legislation. Introducing or voting on budget legislation that eliminates a position is a quintessential legislative act. *Bogan*, 523 U.S. at 55-56. Although no Hawai'i court has held that elimination of a position through legislation is a legislative function, under *Abercrombie*, the Hawai'i legislative immunity is broader than federal law, so the elimination of position through legislation is undoubtedly a legislative act subject to absolute legislative immunity. *See also, Kerttula v. Abood*, 686 P.2d 1197, 1202 (Alaska 1984) (interpreting constitutional provision modeled after Hawai'i's legislative immunity provision; legislative acts necessarily include activities internal to the legislature such as voting, speaking on the floor of the house or in committee, and introducing legislation).

The passage and signing of bills is "demonstrably" "commi[ed]" by the "constitution[]" "to a coordinate political department[.]" *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 170, 737 P.2d 446, 455 (1987). The Hawai'i Constitution vests the Legislature with the authority to pass and sign bills. Haw. Const. Art. III §§ 14, 15, 16. "A challenge to the Legislature's exercise of a power which the Constitution commits exclusively to the Legislature presents a non[-]justiciable 'political question.'" *Mental Health Ass'n in Penn. v. Corbett*, 54 A.3d 100, 104 (Pa. Commw. Ct. 2012).

The passage of an appropriations budget is clearly a legislative function authorized and mandated by the Hawai'i Constitution. Haw. Const. Art. VII, § 9 entitled, "Legislative

Appropriations; Procedures; Expenditure Ceiling” provides that “In each regular session in odd-numbered year, the legislature shall transmit to the governor an appropriation bill or bills providing for the anticipated total expenditures of the State for the ensuing fiscal biennium.”

Further, the elimination of Greer’s position has prospective implications that reach well beyond Greer himself, especially because there is no allegation the position was re-established. Thus, the decision to eliminate Greer’s position through budget legislation can be construed as embodying a policy decision with prospective implications. This act is unlike a termination of an employee. Senator Baker did not, and cannot terminate Greer, because she was not Greer’s employer and had no authority over Greer’s employment such as hiring or firing.⁷ Moreover, the elimination of Greer’s position did not result in his termination from public employment. Instead, Greer was **laterally transferred** to a comparable position with no loss in pay.⁸ Nor does Greer allege Senator Baker re-established the eliminated position or that she replaced Greer with another individual. In short, the case against Senator Baker is a classic elimination-of-position through legislation and thus subject to absolute legislative immunity.

3. Senator Baker’s Alleged Motivation or Subjective Intent is Irrelevant

The complaint alleges Greer’s position was eliminated through the passage of a budget legislation proposed by and/or voted for by Senator Baker. Because proposing or voting for legislation is formally legislative, Senator Baker engaged in a legislative act and thus entitled to absolute legislative immunity. *See, Bogan*, 523 U.S. at 55, 118 S.Ct. at 974. The inquiry into

⁷ Greer acknowledged his employer was the DOH and not Senator Baker (Tr. November 26, 2014 at p. 30, lines 14-17). Further, the circuit court correctly ruled Senator Baker cannot be liable for violations of the HWPB because she was not Greer’s employer. (Exhibit A, p. 2).

⁸ Greer did not suffer any loss in pay because he alleges he was “laterally” transferred into another position and the only savings to the State was the reduction in salary of the person he displaced.

Senator Baker's reason or motivation for performing the legislative act is irrelevant to the determination of legislative immunity. Id.

The circuit court, however, erroneously looked past Senator Baker's legislative act and considered her motives for proposing the legislation. At the hearing on the motion to dismiss, Greer's counsel asked the circuit court to inquire into Senator Baker's motivation in eliminating Greer's position – "why is the position eliminated?" (Exhibit D, p. 10-11; Tr. November 26, 2014 at pp. 26-27 (JEFS # 13)). Greer's counsel explained, "[t]here must have been a reason that, as part of the ways and means committee, [Senator Baker] eliminated the position. . . . She was trying to get our client. . . who went after her friend for stealing from the State." Id. Senator Baker's motive for eliminating Greer's position, according to Greer's counsel, was not for public good but was simply personal: "this isn't for public good. . . so I would suggest to the Court, respectfully, that this was just personal and she went after [Greer]. . ." (Exhibit D, p. 13, Tr. November 26, 2014 at p. 29 (JEFS # 13)). The circuit court then asked:

THE COURT: So you think the legislative immunity, to wit the Abercrombie case, was not intended to protect this type of alleged act?

MR. GREEN (Greer's Counsel): Impossible. Impossible. If it was intended – for someone to do their job, for someone to follow the law to make sure that the people – the people's funds are not stolen, and you have a senator who's supposed to be there to protect her constituents, to represent the State, and she fires the guy because he complained about director found somebody stealing?

THE COURT: Okay. In looking at the Abercrombie case, and that's the seminal case, the Court says, "We are of the opinion that when a legislator is asked to clarify a speech or a statement made by him in a forum of the legislature on the subject matter of legitimate legislative concerns," so you're saying with respect to the budget and the elimination, that was not something of a legitimate legislative concern?

MR. GREEN: Not only was it not, but we can't close our eyes to the fact that she fired the wrong person.

(Exhibit D, pp. 13-14; Tr. November 26, 2014 at pp. 29-30, (JEFS # 13)).

* * * *

MR. GREEN: She [Maui dentist/constituent] gets indicted, she gets off, and now there's hell to pay by Senator Baker for the director to go after her friend. Well, we'll take care of this guy. I mean, I'm a senator, I'm the head of the ways and means committee, so you know what, sorry, we have to eliminate this position. It's not you, Mr. Greer, we just have to eliminate the position for whatever her legitimate purpose was.

(Exhibit D, p. 16; Tr. November 26, 2014 at p. 32, (JEFS # 13)).

* * * *

MS. COOK (Senator Baker's Counsel): Your Honor, I just want to point out, what he just said really supports legislative immunity. He said – he attacked the reason. There's personal vendetta, this is wrong what she did to my client, all of that goes to the reason. They admitted the legislative act is the elimination of the position, which is quientessential –

THE COURT: Well, but in terms of elimination, if the elimination was not of a legitimate legislative concern, meaning it was for the purpose of removing this particular person ---

MS. COOK: Your Honor, that –

THE COURT: Budgetary concern.

MS. COOK: That is confusing motivation versus legitimate act. Elimination of a position in and of itself is a lawful budgetary legislative act. It's by the constitution. They have a right to – for purposes of budgeting, when they have to eliminate a position, that's fine, but if it goes to the issue of the reason behind why you eliminate a position, that goes to motivation. And we already said – and, Your Honor, we encourage the Court to read all of the cases that we've cited. Even the U.S. Supreme Court said that the claim of unworthy purpose does not destroy the privilege.

(Exhibit D, pp. 21-22; Tr. November 26, 2014 at pp. 37-38, (JEFS # 13)).

* * * *

THE COURT: But we're only looking at two positions.

MS. COOK: But [that's] irrelevant. If you eliminate a position through budget process, that is a sufficient legislative function, and it's – the motivation behind it is irrelevant . . .

THE COURT: Well, I think in the allegations themselves, I think there was only a minimal savings. . . . \$3,000 loss in salary, I think in paragraph 22. So was that a legitimate concern?

MS. COOK: . . . again I think the Court is not looking at the act itself. That's what you have to focus on: the legislative act. If the act is part of their duty, which in this case is, she's entitled to legislative immunity.

(Exhibit D, pp. 39-40; Tr. November 26, 2014 at pp. 39-40, (JEFS # 13)).

This discussion demonstrates that the circuit court misconstrued the holding in Abercrombie in reference to the terms "legitimate legislative concern." In Abercrombie, the Court was asked to decide whether statements made by a state senator in his Senate office during an interview by a newspaper reporter, relating to higher education and the amount of tax money being spent for that purpose, were an exercise of his legislative function and thus absolutely privileged from a libel and slander civil lawsuit. The Court answered affirmatively.

In the instant case, appellant's speech given to the assembled Senate was on a subject clearly of legitimate legislative concern, that is, in the exercise of his legislative function. The appellant's clarifying statements, though erroneous factually, dealt with a subject matter that was of legitimate legislative concern. We are of the opinion that when a legislator is asked to clarify a speech or a statement made by him in a forum of the legislature on a subject matter of legitimate legislative concern, a subsequent clarifying statement by the legislator, though not made in a forum of the legislature, not only fulfills his duty to keep the public informed, but serves the public interest. (citations omitted). We have no doubt that strong, fearless and responsible legislators and an informed public are necessary pillars of a viable democracy.

Abercrombie, 55 Haw. at 600. (Emphases added).

The Court used the terms "legitimate legislative concern" in reference to the **subject matter** of the senator's speech (i.e., higher education and the amount of tax money being spent for that purpose) and **not** the senator's intent or motive for making the speech. Id. In contrast, the circuit court applied these terms in order to inquire into Senator Baker's alleged motive in proposing the legislation (i.e., to retaliate against Greer) rather than the **subject matter** of the proposed legislation (i.e., elimination of positions through budget legislation). In speculating on Senator Baker's motives, the circuit court emphasized that only two positions were eliminated and the savings to the State was minimal, thus supporting Greer's argument Senator Baker must

have intended to target him when she proposed and/or voted for legislation eliminating his position under the guise of budgetary concern. (Exhibit D, pp. 12-13, 21-24; Tr. November 26, 2014 at pp. 28-29, 37-40, (JEFS # 13)). Consequently, in rejecting Senator Baker's legislative immunity the circuit court must have concluded that Senator Baker's unworthy motive, as alleged in the complaint, does not entitle her to absolute legislative immunity. This is clear error.

As discussed above, the U.S. Supreme Court in Bogan concluded the officials were entitled to legislative immunity, because elimination of positions, even if only one position was eliminated and officials were targeting the one employee, is a **quintessential legislative act** entitled to absolute legislative immunity.

Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. The privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.' *Tenney*, 341 U.S., at 377, 71 S.Ct., at 788 (internal quotation marks omitted). Furthermore, it simply is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Ibid.* We therefore held that the defendant in *Tenney* had acted in a legislative capacity even though he allegedly singled out the plaintiff for investigation in order 'to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights.' *Id.*, at 371, 71 S.Ct., at 785 (internal quotation marks omitted).

This leaves us with the question whether, stripped of all considerations of intent and motive, petitioners' actions were legislative. We have little trouble concluding that they were. Most evidently, petitioner Roderick's acts of voting for an ordinance were, in form, quintessentially legislative. Petitioner Bogan's introduction of a budget and signing into law an ordinance also were formally legislative, even though he was an executive official

Respondent, however, asks us to look beyond petitioners' formal actions to consider whether the ordinance was legislative in *substance*. We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office. And the city

council, in eliminating DHHS, certainly governed ‘in a field where legislators traditionally have power to act.’ *Tenney, supra*, at 379, 71 S.Ct., at 789. Thus, petitioners’ activities were undoubtedly legislative.

Bogan, 523 U.S. at 54-56. *See also* Drayton, 699 F. Supp. At 1157 (D. Md. 1988) (holding that plaintiff’s argument, there was no *bona fide* budgetary reason for the elimination of his job through budget resolution because the real motivation was race discrimination, “misses the point, which is that it is only the *process*, not the reason for it, that must be examined. If the former is legislative, as the creation and elimination of public jobs certainly are, then . . . the latter is not to be inquired into by the courts.”). *Id.* at 1157.

This Court should reach the same conclusion as the U.S. Supreme Court in Bogan. Inquiring into a legislator’s motive or intent in introducing, voting on, and passing legislation is a clear intrusion into matters which concern the political branch of the government, and thus barred by the doctrine of separation of powers. This doctrine is implicit in the structure of government created by the constitution. Biscoe v. Tanaka, 76 Haw. 380, 383, 878 P.2d 719, 722 (1994). It prohibits any branch from unduly interfering with the constitutional functions of the other branches. The Hawai’i Supreme Courts recognized the inappropriateness of judicial intrusions in legislative functions:

[W]e have taken the teachings of the Supreme Court to heart and adhered to the doctrine that the use of judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context. (citations omitted.) And, we have admonished our judges that even in the absence of constitutional restrictions, [they must] still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government. (citations omitted.)

* * * *

We have also followed the teachings of the Supreme Court where the “political questions” are concerned . . . [W]e have recognized the inappropriateness of judicial intrusion into matters which concern the political branch of government. (citations

omitted.) And we have observed that too often, courts in their zeal to safeguard their prerogatives overlook the pitfalls of their own trespass on legislative functions. (citations omitted.)

Yamasaki, 69 Haw. at 171-72, 737 P.2d 456-57.

Further, the public policy rationale for legislative immunity is the same as the common law judicial immunity, and the Hawai'i Supreme Court has interpreted judicial immunity broadly. "Judicial immunity is based on the overriding public policy that 'judges should be at liberty to exercise their functions with independence and without fear of consequences.'" Seibel v. Kemble, 63 Haw. 516, 523, 631 P.2d 173 (1981), *citing* Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967). The Pierson case, cited by the Hawai'i Supreme Court, held that judges are immune from liability for damages "for acts committed within their jurisdiction . . . even when the judge is accused of acting maliciously and corruptly." Id.

The same reasoning should apply to legislative immunity, which is at least as broad as common-law judicial immunity because it is in the Hawai'i Constitution. Thus, inquiring into Senator Baker's motive or intent in performing her legislative act is a clear trespass on legislative functions. But even if this Court were to do so, the claim of unworthy purpose does not destroy the privilege. Senator Baker is still entitled to legislative immunity even if she acted maliciously in performing her legislative function.

To allow the circuit court to dilute the legislative immunity based upon the circuit court's concern about motive or intent is to eviscerate an important constitutional provision.

IV. CONCLUSION

Senator Baker is entitled to absolute legislative immunity under Haw. Const. Art. II, § III, Section 7 of the Hawai'i Constitution. The order of the circuit court should be reversed as to Senator Baker and the claims against her dismissed.

DATED: Honolulu, Hawai'i, April 29, 2015.

/s/ Maria C. Cook
MARIA C. COOK
Deputy Attorney General

Attorney for Defendant-Appellant
ROSALYN H. BAKER

CAAP-15-0000034

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

ROSALYN H. BAKER, STATE OF
HAWAII, DOES 1-10,

Defendants-Appellants,

and

MARK H. K. GREER,

Plaintiff-Appellee.

ORIGINAL PROCEEDING
Civil No. 14-1-2004-09 RAN
(Other Non-Vehicle Tort)

APPEAL FROM THE:

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
ROSALYN H. BAKER'S MOTION TO
DISMISS COMPLAINT FILED ON
SEPTEMBER 23, 2014, WITH PREJUDICE,
IN LIEU OF ANSWER, FILED WITH THE
CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAII ON DECEMBER 24,
2014

CIRCUIT COURT OF THE FIRST CIRCUIT

JUDGE: HON. RHONDA A. NISHIMURA

STATEMENT OF RELATED CASES

Defendants-Appellant ROSALYN H. BAKER is unaware of any related cases presently
pending before the Intermediate Court of Appeals or the Hawai'i Supreme Court.

DATED: Honolulu, Hawai'i, April 29, 2015.

/s/ Maria C. Cook
MARIA C. COOK
Deputy Attorney General

Attorney for Defendant-Appellant
ROSALYN H. BAKER

RUSSELL A. SUZUKI 2084
Attorney General of Hawai'i

JAMES E. HALVORSON 5457
MARIA C. COOK 6836
Deputy Attorneys General
Department of the Attorney
General, State of Hawai'i
235 South Beretania Street, 15th Floor
Honolulu, Hawai'i 96813
Telephone: (808) 587-2900
Facsimile: (808) 587-2965

Attorneys for Defendant
ROSALYN H. BAKER

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2014 DEC 24 AM 8:32

F. OTAKE
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MARK H.K. GREER,
Plaintiff,

vs.

ROSALYN H. BAKER, STATE OF
HAWAII, DOES 1-10,
Defendants.

Civil No. 14-1-2004-09 RAN
(Other Non-Vehicle Tort)

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
ROSALYN H. BAKER'S MOTION TO
DISMISS COMPLAINT FILED ON
SEPTEMBER 23, 2014, WITH PREJUDICE,
IN LIEU OF ANSWER; AND ORDER
DENYING THE STATE OF HAWAII'S
~~SUBSTANTIVE~~ JOINDER TO
DEFENDANT ROSALYN H. BAKER'S
MOTION TO DISMISS COMPLAINT
FILED ON SEPTEMBER 23, 2014, FILED
ON OCTOBER 15, 2014

Hearing:

Date: November 26, 2014
Time: 8:30 a.m.
Judge: Hon. Rhonda A. Nishimura

No Trial Date Set

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT ROSALYN H. BAKER'S MOTION TO DISMISS COMPLAINT
FILED ON SEPTEMBER 23, 2014, WITH PREJUDICE, IN LIEU OF ANSWER;
AND ORDER DENYING THE STATE OF HAWAII'S ~~SUBSTANTIVE~~ JOINDER ^{psw}
TO DEFENDANT ROSALYN H. BAKER'S MOTION TO DISMISS
COMPLAINT FILED ON SEPTEMBER 23, 2014, FILED ON OCTOBER 15, 2014

The hearing on Defendant Rosalyn H. Baker's Motion to Dismiss Complaint Filed on September 23, 2014, With Prejudice, in Lieu of Answer, and the State of Hawaii's Joinder to Defendant Rosalyn H. Baker's Motion to Dismiss Complaint filed on September 23, 2014, filed on October 15, 2014, was held on November 26, 2014, before the Honorable Rhonda A. Nishimura, with Plaintiff being represented by Michael Jay Green, Esq. and Brian K. MacKintosh, Esq., and Defendant Rosalyn H. Baker being represented by Deputy Attorney General Maria C. Cook, and Defendant State of Hawai'i being represented by Deputy Attorney General Dana A. Barbata.

The Court, having reviewed the pleadings and considered the parties' respective written and oral arguments, hereby grants in part and denies in part Defendant Rosalyn Baker's ("Defendant Baker") motion to dismiss, and denies the State's ~~substantive~~ joinder as follows:

1. ~~The Court excludes the declaration attached to Plaintiff's memorandum in opposition to the motion, because a motion to dismiss tests the sufficiency of the allegation in the Complaint and the declaration is not integral to or explicitly relied upon in the Complaint.~~ ^{psw}

1. Defendant Baker's claim of legislative immunity is denied. ~~Defendant Baker is not protected by legislative immunity, because she allegedly eliminated Plaintiff's position in order to retaliate against Plaintiff for his whistleblower activities as opposed to budgetary reasons, insofar as the saving to the State was only \$3000.00.~~

3. Count I based on violation of HRS § 378-62, the Hawai'i Whistleblowers Protection Act ("HWPA"), is dismissed as against Defendant Baker because Defendant Baker was not Plaintiff's employer. Count I remains against the State.

4. Count II based on intentional infliction of emotional distress ("IIED") is not dismissed against either Defendant Baker and the State.

2. ~~As to the statute of limitations, the Court finds that paragraph 10 of the Complaint sufficiently alleges Plaintiff was terminated on January 31, 2013 despite its prior ruling excluding Plaintiff's declaration, and holds the two-year statute of limitations accrued from January 31, 2013.~~ Defendant Baker's claim that the statute of limitations is denied

b. ~~As to the argument about an underlying cognizable claim (i.e., HWPA), the Court finds that IIED, unlike negligent infliction of emotional distress ("NIED"), is a stand-alone claim which does not have to be predicated upon an underlying claim.~~

5. Count III based on NIED is dismissed as against Defendant Baker, but remains against the State. ~~Unlike IIED, NIED must be based on an underlying cognizable claim.~~

Plaintiff has alleged an underlying cognizable claim against the State in Count I, based on the

MC - Baker - Order Granting in Part Denying in Part Motion to Dismiss

Mark H.K. Greer v. Rosalyn H. Baker, State of Hawai'i: 14-1-2004-09 RAN; Circuit Court of the First Circuit: ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT ROSALYN H. BAKER'S MOTION TO DISMISS COMPLAINT FILED ON SEPTEMBER 23, 2014, WITH PREJUDICE, IN LIEU OF ANSWER; AND ORDER DENYING THE STATE OF HAWAII'S SUBSTANTIVE JOINDER TO DEFENDANT ROSALYN H. BAKER'S MOTION TO DISMISS COMPLAINT FILED ON SEPTEMBER 23, 2014, FILED ON OCTOBER 15, 2014

Exh A - 000003

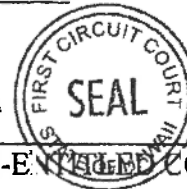
violation of the HWP. ~~However, Plaintiff failed to allege an underlying cognizable claim against Defendant Baker based on HWP, because Defendant Baker was not Plaintiff's employer and thus not subject to liability under the HWP.~~

IT IS HEREBY, ORDERED, ADJUDGED AND DECREED that Defendant Rosalyn H. Baker's Motion to Dismiss Complaint filed on September 23, 2014, with Prejudice, in Lieu of Answer, is hereby GRANTED IN PART AND DENIED IN PART, and the State of Hawai'i's Substantive Joinder is hereby DENIED, *as follows:*

DATED: Honolulu, Hawai'i, DEC 23 2014

RHONDA A. NISHIMURA

JUDGE OF THE ABOVE-ENTITLED COURT



APPROVED AS TO FORM:

MICHAEL JAY GREEN, ESQ.
BRIAN K. MACKINTOSH, ESQ.
Attorneys for Plaintiff
MARK H.K. GREER

DANA A. BARBATA
Deputy Attorney General

Attorney for Defendant
STATE OF HAWAII

* COUNT I: *Granted as to Defendant Baker. Denied as to Defendant State of Hawaii.*

COUNT II: *Denied as to Defendants Baker and the State of Hawaii*

COUNT III: *Granted as to Defendant Baker. Denied as to Defendant State of Hawaii.*

MC - Baker - Order Granting in Part Denying in Part Motion to Dismiss⁴

for Mark H.K. Greer v. Rosalyn H. Baker, State of Hawai'i; 14-1-2004-09 RAN; Circuit Court of the First Circuit: ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT ROSALYN H. BAKER'S MOTION TO DISMISS COMPLAINT FILED ON SEPTEMBER 23, 2014, WITH PREJUDICE, IN LIEU OF ANSWER; AND ORDER DENYING THE STATE OF HAWAII'S SUBSTANTIVE JOINDER TO DEFENDANT ROSALYN H. BAKER'S MOTION TO DISMISS COMPLAINT FILED ON SEPTEMBER 23, 2014, FILED ON OCTOBER 15, 2014

Exh A - 000004

maui
425 Queen st.

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2015 FEB 25 PM 2:52

LAW OFFICE OF MICHAEL JAY GREEN
MICHAEL JAY GREEN 4451
LAW OFFICE OF BRIAN K. MACKINTOSH
BRIAN K. MACKINTOSH 9525
Davies Pacific Center
841 Bishop Street, Suite 2201
Honolulu, HI 96813
Telephone: (808) 521-3336
Facsimile: (808) 566-0347
michaeljgreen@hawaii.rr.com
bmackphd@gmail.com

Attorneys for Plaintiff
Mark H. K. Greer

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MARK H. K. GREER,

Plaintiff,

vs.

ROSALYN H. BAKER, STATE OF
HAWAII, DOES 1-10,

Defendants.

CIVIL NO. 14-1-2004-09 RAN
(Other Non-Vehicle Tort)

ORDER DENYING DEFENDANT
ROSALYN H. BAKER'S MOTION FOR
LEAVE TO FILE INTERLOCUTORY
APPEAL AND FOR STAY PENDING
APPEAL, FILED ON JANUARY 5, 2015

Hearing

Date: January 13, 2015

Time: 10:00 a.m.

Judge: Hon. Rhonda A. Nishimura

No Trial Date Set

ORDER DENYING DEFENDANT ROSALYN H. BAKER'S MOTION FOR LEAVE TO
FILE INTERLOCUTORY APPEAL AND FOR STAY PENDING APPEAL,
FILED ON JANUARY 5, 2015

The hearing on Defendant Rosalyn H. Baker's Motion for Leave to File Interlocutory
Appeal and for Stay Pending Appeal, Filed on January 5, 2015 ("Motion for Leave"), was held

Exh B - 000001

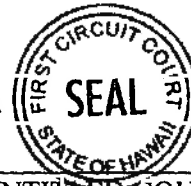
on January 13, 2015, before the Honorable Rhonda A. Nishimura, with Plaintiff being represented by Brian K. Mackintosh, Esq., and Defendant Rosalyn H. Baker being represented by Deputy Attorney General Maria C. Cook. Defendant State of Hawaii, represented by Attorney General Dana A. Barbata filed a statement of no position regarding the motion and was not in attendance.

The Court, having reviewed the pleadings and considered the parties' respective written and oral arguments, hereby finds that the movant Defendant Rosalyn H. Baker's Motion has not met the criteria for interlocutory appeal pursuant to HRS § 641(1)(b), ^{641-1(b)(2) IS/RAN} because the appeal will not result in the speedy termination of litigation for all parties.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Rosalyn H. Baker's Motion for Leave to File Interlocutory Appeal and for Stay Pending Appeal, Filed on January 5, 2015 is DENIED.


Dated: Honolulu, Hawaii, FEB 25 2015.

RHONDA A. NISHIMURA



JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:



RUSSELL A. SUZUKI
JAMES E. HALVORSON
MARIA C. COOK

Attorneys for Defendant
ROSALYN H. BAKER



CARON M. INAGAKI
DANA A. BARBATA

Attorneys for Defendant
STATE OF HAWAII

ORDER DENYING DEFENDANT ROSALYN H. BAKER'S MOTION FOR LEAVE TO
FILE INTERLOCUTORY APPEAL AND FOR STAY PENDING APPEAL, FILED ON
JANUARY 5, 2015, GREER VS. BAKER, ET AL., CIVIL NO. 14-1-2004-09 RAN

Exh B - 000002

RUSSELL A. SUZUKI 2084
Attorney General of Hawai'i

JAMES E. HALVORSON 5457
MARIA C. COOK 6836
Deputy Attorneys General
Department of the Attorney
General, State of Hawai'i
235 South Beretania Street, 15th Floor
Honolulu, Hawai'i 96813
Telephone: (808) 587-2900
Facsimile: (808) 587-2965

Attorneys for Defendant
ROSALYN H. BAKER

ED
1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2015 FEB 13 PM 1:34

N. MIYATA
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MARK H. K. GREER,
Plaintiff,

and

ROSALYN H. BAKER, STATE OF
HAWAII, DOES 1-10,

Defendants.

CIVIL NO. 14-1-2004-09 RAN
(Other Non-Vehicle Tort)

ORDER DENYING PLAINTIFF'S MOTION
FOR LEAVE TO FILE FIRST AMENDED
COMPLAINT, FILED JANUARY 9, 2015,
WITHOUT PREJUDICE

Non-Hearing Motion

No Trial Date Set

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED
COMPLAINT, FILED JANUARY 9, 2015, WITHOUT PREJUDICE

15/RAN
First
On January 9, 2015, Plaintiff Mark H. K. Greer filed his non-hearing Motion for Leave to
File Amended Complaint ("Motion"); on January 20, 2015, Defendant Rosalyn H. Baker filed her
Response to Plaintiff's Motion; and on January 6, 2015, Defendant State of Hawaii filed a
Statement of No Position.

The Court, having reviewed the pleadings and considered the parties' respective written
arguments, hereby denies the Motion, without prejudice.

Exh C - 000001


On January 20, 2015, Defendant Baker filed a Notice of Appeal from the Order Granting in Part and Denying in Part Defendant Rosalyn Baker's Motion to Dismiss Complaint Filed on September 23, 2014, with Prejudice in Lieu of Answer. The filing of the Notice of Appeal divests the trial court of jurisdiction over the appealed case. Jurisdiction over the appealed case is transferred from the trial court to the appellate court at the time the notice of appeal is filed. Consequently, this Court lacks jurisdiction over Plaintiff's Motion.

IT IS HEREBY, ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for ~~Leave to File Amended Complaint~~ ^{FIRST IS/RAN} is hereby DENIED without prejudice.

DATED: Honolulu, Hawai'i, _____.

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:



MICHAEL JAY GREEN, ESQ.
BRIAN K. MACKINTOSH, ESQ.
Attorney for Plaintiff
MARK H.K. GREER

DANA A. BARBATA
Deputy Attorney General
Attorney for Defendant
STATE OF HAWAII

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT, FILED JANUARY 9, 2015, WITHOUT PREJUDICE; Mark H.K. Greer vs. Rosalyn H. Baker; Civil No. 14-1-2004-09 RAN

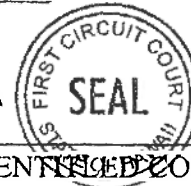
On January 20, 2015, Defendant Baker filed a Notice of Appeal from the Order Granting in Part and Denying in Part Defendant Rosalyn Baker's Motion to Dismiss Complaint Filed on September 23, 2014, with Prejudice in Lieu of Answer. The filing of the Notice of Appeal divests the trial court of jurisdiction over the appealed case. Jurisdiction over the appealed case is transferred from the trial court to the appellate court at the time the notice of appeal is filed. Consequently, this Court lacks jurisdiction over Plaintiff's Motion.

IT IS HEREBY, ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Leave to File Amended Complaint, is hereby DENIED without prejudice.

DATED: Honolulu, Hawai'i, FEB 13 2015

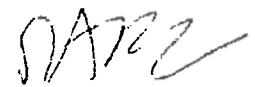
RHONDA A. NISHIMURA

JUDGE OF THE ABOVE-ENTITLED COURT



APPROVED AS TO FORM:

MICHAEL JAY GREEN, ESQ.
BRIAN K. MACKINTOSH, ESQ.
Attorney for Plaintiff
MARK H.K. GREER



DANA A. BARBATA
Deputy Attorney General
Attorney for Defendant
STATE OF HAWAII

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT, FILED JANUARY 9, 2015, WITHOUT PREJUDICE; Mark H.K. Greer vs. Rosalyn H. Baker; Civil No. 14-1-2004-09 RAN

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ORIGINAL

MARK H.K. GREER,

Plaintiff,

vs.

ROSALYN H. BAKER,
STATE OF HAWAII, and
DOES 1-10,

Defendants.

CC. NO. 14-1-2004

TRANSCRIPT OF PROCEEDINGS

had before the HONORABLE RHONDA NISHIMURA, Judge Presiding, Tenth Division, on Wednesday, November 26, 2014; 1) Defendant Rosalyn H. Baker's Motion to Dismiss Complaint Filed on September 23, 2014 With Prejudice in Lieu of Answer; 2) Defendant State of Hawaii's Joinder to Defendant Rosalyn H. Baker's Motion to Dismiss Complaint Filed on September 23, 2014.

APPEARANCES:

MICHAEL J. GREEN ESQ. For Plaintiff
BRIAN K. MACKINTOSH, ESQ.

MARIA C. COOK, ESQ. For Rosalyn Baker

DANA A. BARBATA, ESQ. For State of Hawaii

REPORTED BY:

MILANI BALLESTEROS, RMR, CRR, CSR #407
Official Court Reporter
Circuit Court of the First Circuit
State of Hawaii

OFFICIAL COURT REPORTER
STATE OF HAWAII

Exh D - 000001

1 WEDNESDAY, NOVEMBER 26, 2014 8:31 A.M.

2 --ooOoo--

3 THE CLERK: Calling Calendar No. 2, Civil
4 No. 14-1-2004, Mark H.K. Greer versus Rosalyn H.
5 Baker for, 1, Defendant's Motion to Dismiss Complaint
6 Filed on September 23rd, 2014 With Prejudice in Lieu
7 of Answer; and, 2, Defendant State of Hawaii's
8 Joinder to Defendant Rosalyn H. Baker's Motion to
9 Dismiss Complaint Filed on September 23rd, 2014.

10 Appearances, please.

11 MR. GREEN: Your Honor, good morning.
12 Michael Green with Brian Mackintosh for Plaintiff.
13 Good morning to you.

14 THE COURT: Good morning.

15 MS. COOK: Good morning, Your Honor. Deputy
16 Attorney General Maria Cook representing Defendant
17 Rosalyn Baker.

18 MS. BARBATA: Good morning, Your Honor.
19 Dana Barbata, also deputy attorney general
20 representing the State of Hawaii.

21 THE COURT: Motion to dismiss.

22 MS. COOK: Yes, Your Honor.

23 THE COURT: Now, first of all, is it
24 converted to a summary judgment motion --

25 MS. COOK: Your Honor --

1 remaining claims, Count 2 and 3. One is legislative
2 immunity. Number 2 is failure to provide an
3 underlying cognizable claim for IIED and NIED.
4 Number 3 is the waiver, Your Honor, which is another
5 strong one, because they never addressed my argument
6 regarding the underlying claim. Number 4 is the
7 statute of limitations. And number 5 is failure to
8 state a claim based on the facts on the outrageous
9 conduct and the NIED under negligent act.

10 THE COURT: Now, to put it into context, we
11 have three counts here, correct?

12 MS. COOK: Yes, Your Honor.

13 THE COURT: Chapter 1 -- I mean Count 1,
14 Chapter 378, whistle blower.

15 MS. COOK: Yes.

16 THE COURT: Count 2, IIED.

17 MS. COOK: Correct.

18 THE COURT: Count 3, NIED.

19 MS. COOK: Correct. Your Honor, the
20 legislative immunity goes to all of the claims, and
21 that's the number one argument we said. The
22 legislative immunity in the State of Hawaii is not
23 just based on common law, it is based on the Hawaii
24 Constitution, which is, in fact, broader than the
25 U.S. Constitution.

1 It is an article, as we cited in our
2 memorandum in support of the motion, Article III,
3 Section 7, that says, "No member of the legislature
4 shall be held to answer before any other tribunal for
5 any statement made or action taken in the exercise of
6 the member's legislative functions."

7 THE COURT: *Abercrombie versus McClung* is --

8 MS. COOK: Yes.

9 THE COURT: -- the seminal case.

10 MS. COOK: Correct, Your Honor. And the
11 very reason for this is the separation of powers.
12 You know, you don't want legislators to come before
13 the Court and the Court be the judge of their action,
14 because it is the legislature itself, under Article
15 III, Section 12, "Each house shall be the judge for
16 misconduct or neglect of duty of any member and has
17 the power to punish the member."

18 And you have, Your Honor, the quintessential
19 case, the seminal case, the U.S. Supreme Court,
20 *Tenney*, which I cited in my reply memorandum. In the
21 *Tenney* case, Your Honor, I have indicated the Court
22 said, the U.S. Supreme Court said, "The claim of
23 unworthy purpose does not destroy the privilege. In
24 times of political passion, dishonest or vindictive
25 motive are readily attributed to legislative conduct

1 and is readily believed. Courts are not the place
2 for such controversies."

3 Now, this is exactly what they're bringing
4 before the Court. There are two acts against Senator
5 Baker. Number one is a 2008 act that allegedly
6 eliminated Plaintiff's position, but it didn't happen
7 because they allegedly eliminated the wrong position.
8 Then in 2011 there's an allegation that Senator Baker
9 finally succeeded in eliminating Plaintiff's
10 position, resulting in his layoff from the
11 administrator position in January of 2012, and
12 subsequently to he's transferred to another position,
13 which is the programs manager position.

14 So, Your Honor, the legislature is the one
15 that creates position and they eliminate position.
16 Forget about the 2008, because they're claiming
17 nothing happened there. It's the 2012 elimination of
18 the position.

19 But, Your Honor, what's clear here is that
20 the complaint also alleges that in August of 2011,
21 Plaintiff was already told that his position will be
22 eliminated, and so presumably the elimination of the
23 position through the Budget Act occurred prior to
24 August 2011, but nonetheless the act -- Plaintiff
25 alleges in the complaint that he was eventually laid

1 off and terminated from the administrator position as
2 of January of 2012.

3 THE COURT: So we're looking to test the
4 allegations in looking at paragraphs 18, 19, and 20
5 in terms of, number 1, the August 24, 2011
6 announcement and the actual layoff on January 13,
7 2012?

8 MS. COOK: Correct, Your Honor.

9 Now, the fact that Senator Baker had a
10 personal vendetta because her intent was to retaliate
11 against the Plaintiff for the alleged whistle
12 blowing, that is irrelevant.

13 THE COURT: In terms of the motive.

14 MS. COOK: In terms of the motive it's
15 irrelevant. Your Honor, it could be discriminatory,
16 it could be because Senator Baker does not like the
17 person for -- because he's gay, lesbian, black,
18 white, whatever the reason is.

19 THE COURT: You're saying it doesn't matter?

20 MS. COOK: It doesn't matter.

21 THE COURT: Why?

22 MS. COOK: Your Honor, because this is what
23 the court already said in the U.S. Supreme Court
24 decision in *Tenney*, that it's irrelevant. The claim
25 of unworthy purpose does not destroy the privilege

1 because they're entitled to legislative immunity.
2 It's the premise under separation of powers. It's
3 not the Court to make that decision, it is for the
4 legislators. Under Article III in this case, Section
5 12, they have the power to punish their own members
6 for any misconduct. It's not before the Court,
7 that's why you see -- hardly see any senators being
8 brought to court in this case, in any court. So
9 irrelevant as to whether she had personal vendetta,
10 whether it's true or not. And even assuming facts
11 most favorable to Plaintiff in this case that she had
12 personal vendetta, that is not the standard.

13 THE COURT: So in looking at the *Abercrombie*
14 *versus McClung* case, it looked at the comments noted
15 in the constitutional convention, and in the final
16 comments, the court in the *Abercrombie* case says, "We
17 are of the further opinion that, although appellant's
18 clarifying statements were erroneous and, assuming
19 arguendo they were even slanderous --"

20 MS. COOK: Correct.

21 THE COURT: "-- the statements were made by
22 the appellant in the exercise of his legislative
23 function and are absolutely privileged." So in that
24 case, even if it was erroneous, slanderous, doesn't
25 matter.

1 MS. COOK: Yes, Your Honor. And we have
2 cited to numerous cases here, Your Honor. Even if
3 it's discriminatory, even if it's -- whatever the
4 intent was, it's irrelevant. The act here of Senator
5 Baker was to eliminate the position through the
6 budget process. Even if she colluded -- and they
7 used the word "collusion" as if it means -- collusion
8 means essentially the employment or institution of an
9 unlawful or lawful act to achieve an unlawful
10 purpose. In this case, the elimination of the
11 position through the budget process, which is a
12 lawful act, to achieve an unlawful purpose, which is
13 personal vendetta, it doesn't matter, Your Honor.
14 Senator Baker is entitled to legislative immunity in
15 this case.

16 THE COURT: Okay. Let's move on.

17 MS. COOK: Your Honor --

18 MR. GREEN: Can I answer these one at a
19 time? I'll never remember what she said, Your Honor.

20 THE COURT: Too bad.

21 MR. GREEN: Okay. I'll try to remember
22 then.

23 MS. COOK: Thank you, Your Honor.

24 The second one is the IIED and NIED. And I
25 understand Your Honor's --

1 already conceded she's not liable.

2 THE COURT: In other words, there's no
3 counts in the complaint to which a duty arises. The
4 only cause of action is the whistle blower, other
5 than the stand-alone IIED.

6 MS. COOK: Correct, Your Honor, but we
7 allege also that even the stand-alone IIED is subject
8 to that legislative immunity, subject to that --
9 not -- there's no underlying --

10 THE COURT: So, in other words, for the
11 IIED, it's still subject to legislative immunity, the
12 statute of limitations, not outrageous.

13 MS. COOK: Yes, Your Honor, and no
14 underlying legal cause of action.

15 THE COURT: Okay. State.

16 MS. COOK: Thank you.

17 MS. BARBATA: I have nothing to add to that,
18 Your Honor. Join in those positions.

19 THE COURT: All right. Mr. Green, did you
20 remember all of that?

21 MR. GREEN: I don't remember why I'm here.

22 (Laughter.) Yeah, I remember.

23 You know, this argument kinda turns this
24 case on its head. Outrageous conduct? I don't think
25 the Court can decide that based on the pleadings. We

1 just filed this. This is a new case.

2 But let's just go a little bit historically
3 about what happened here. Ray Charles and Stevie
4 Wonder can see what Roz Baker was doing. Outrageous
5 conduct? We have a director who's offended by a
6 doctor stealing money from the State, billing the
7 State for work she never did, hundreds and thousands
8 of dollars. Gets her husband, I believe, to give her
9 a \$120,000 salary, a nonprofit -- from a nonprofit,
10 and they're not a nonprofit.

11 And what does Baker do about the whistle
12 blower, the director who doesn't like people
13 stealing? The grand jury in Maui saw fit to find
14 probable cause and indicted that doctor. My client
15 testifies. And what does Senator Baker do about
16 this, someone who's supposed to enforce the law?
17 There's nothing she did to my client that rises to
18 the level of protected legislative activity. That's
19 not what the law is. She can say anything she wants
20 on the senate floor, but that's not what she did
21 here.

22 Who would believe that, and they argue
23 that's part of her legislative duty, would eliminate
24 a position -- I mean, why is the position eliminated?
25 It couldn't possibly be, according to them, that it

1 was because she was after my client. There must have
2 been a reason that, as part of the ways and means
3 committee, she eliminated the position. So the
4 person is fired and, whoops, it was the wrong person.
5 She was trying to get our client; she fired Dr. Hu.
6 Excuse me, Doc, I'm trying to get someone else, I'm
7 trying to go after someone else that actually went
8 after my friend for stealing from the State, excuse
9 me. There's a -- there's clearly collusion. We
10 haven't seen an email, we haven't had a chance to do
11 discovery between this Roz Baker, this State
12 representative, this senator, and the State of
13 Hawaii. We haven't had a chance to do any of this.
14 For them to say that this is a legislative function?
15 So after they reinstate the doctor, they, by
16 mistake, thought it was Greer she was getting rid of,
17 then she finally gets rid of Greer and his secretary,
18 the only two positions she got rid of. And then he
19 moves laterally. But this is a continuing tort. She
20 continues to get him to the point he resigned. It
21 was a constructive resignation. It was a
22 constructive termination. We have the right to show
23 that. We haven't had a chance.
24 I think the paragraph I pointed out to you
25 at least gets us to the point of there's something

1 before the Court to try to prove. To say that this
2 was a legislative function flies in the face of
3 reason. There's enough that's alleged in this
4 complaint as to what she did to this director to get
5 rid of him and cause him to have to resign over the
6 years, only because the guy was trying to protect the
7 State. I mean, the intent would be to amend this
8 complaint to a conspiracy between the two. I mean,
9 there's certain -- and we talk about collusion. I
10 mean, it's in there, it's not like we're pulling it
11 out of the air.

12 The negligent claim has to do in this case
13 with interference -- tortious interference with the
14 ability to have a job.

15 THE COURT: Not pled.

16 MR. GREEN: Well, but, I mean, what I'm
17 saying is it's -- this is -- there was -- I think if
18 you look at this complaint and the things that are
19 before the Court at this point, before we've had a
20 chance to do anything other than file what we have
21 and not know what's out there, there's enough for
22 this to stand.

23 For them to complain that Roz Baker should
24 be out because she was just acting as a senator,
25 that's not what the cases say. She singled out one

1 person. This isn't for the public good or any
2 allegation of that. So I would suggest to the Court,
3 respectfully, that this was just personal and she
4 went after him, and even then, as I said, made a
5 mistake and got rid of the wrong person, and that
6 person got rehired.

7 THE COURT: So you think the legislative
8 immunity, to wit the Abercrombie case, was not
9 intended to protect this type of alleged act?

10 MR. GREEN: Impossible. Impossible. If it
11 was intended -- for someone to do their job, for
12 someone to follow the law to make sure that the
13 people -- the people's funds are not stolen, and you
14 have a senator who's supposed to be there to protect
15 her constituents, to represent the State, and she
16 fires this guy because he complained about the
17 director found somebody stealing?

18 THE COURT: Okay. In looking at the
19 Abercrombie case, and that's the seminal case, the
20 Court says, "We are of the opinion that when a
21 legislator is asked to clarify a speech or a
22 statement made by him in a forum of the legislature
23 on the subject matter of legitimate legislative
24 concerns," so you're saying with respect to the
25 budget and the elimination, that was not something of

1 a legitimate legislative concern?

2 MR. GREEN: Not only was it not, but we
3 can't close our eyes to the fact that she fired the
4 wrong person first.

5 THE COURT: Dr. Hu.

6 MR. GREEN: Yeah. I mean, what was the
7 reason to get -- you can't assume it was directed at
8 the person, to get rid of the person, it has to be
9 the position. 'Cause she thought it was Greer.
10 Sorry, Dr. Hu, I wasn't after you. They cite to --
11 when we talk about merits of legislative immunity,
12 they talk about does the act apply to a few
13 individuals or the public at large? Not this.

14 THE COURT: Now, with respect to the whistle
15 blower, Count 1, you do concede that Dr. -- that
16 Senator Baker was not the employer of your client.

17 MR. GREEN: Not. But she was in collusion
18 with the State. She becomes a co-conspirator with
19 the State. We just filed this. We don't have
20 anything yet as far as discovery, nothing.

21 THE COURT: So there's a possible futuristic
22 act to amend?

23 MR. GREEN: Yeah. Your Honor, let me just
24 say this: absolutely, if you would permit it.

25 But let me just say this: You know, I've

1 been in this for more years than I care to remember,
2 and you've been a judge for probably as long.

3 THE COURT: Eighteen, 18 years or so.

4 MR. GREEN: That's a long time. So when
5 we -- I think about other jurisdictions where they
6 open up court and they say come forward and you will
7 be heard, where people have the right to come forward
8 to a court and seek justice. That's what this is all
9 about. That's what we've worked for our whole lives.
10 Everyone who's argued at this table or has been at
11 this table, myself, my young colleague here, and
12 yourself, all we're supposed to be concerned with is
13 justice. We argue our case, we hope that justice
14 will be done, and if it's not somehow, and we object,
15 we go to a higher court to ask for help.

16 This is so factually simple, this case. Her
17 conduct makes you want to puke, pardon my expression.
18 You got a director whose job is to oversee monies
19 that are claimed against the State for medical
20 services by this dentist, and she's ripping off the
21 State. How do you bill for a patient you never even
22 saw? Well, it happens a lot, until somebody steps in
23 and puts you in jail.

24 What that jury was thinking about on Maui, I
25 got no idea, but we're not talking about reasonable

1 doubt, we're talking about preponderance, and the
2 grand jury found that there was, there was probable
3 cause. She gets indicted, she gets off, and now
4 there's hell to pay by Senator Baker for the director
5 to go after her friend. Well, we'll take care of
6 this guy. I mean, I'm a senator, I'm the head of the
7 ways and means committee, so you know what, sorry, we
8 have to eliminate this position. It's not you,
9 Mr. Greer, we just have to eliminate the position for
10 whatever her legislative purpose was.

11 THE COURT: And with respect to the statute
12 of limitation, you're saying that --

13 MR. GREEN: Ongoing.

14 THE COURT: -- it's ongoing tort such that
15 the January 20-- no, sorry, the letter of resignation
16 on...

17 MR. GREEN: 2013, January 17th.

18 THE COURT: Raises an issue.

19 MR. GREEN: Was -- what did the conduct
20 cause him, the continued conduct, the oppressive
21 conduct of this senator in collusion with the State
22 cause him to have to resign, to be constructively
23 discharged? I mean, it's pled, it's there, but what
24 I'm saying is -- and I don't want to have to rehash
25 this, but -- so Dr. Hu gets fired, whoops, as I said,

1 I didn't mean to fire you, I need to get this
2 director who complains about people stealing from the
3 State.

4 THE COURT: How do you survive the NIED?

5 MR. GREEN: Well, I mean, it's interference
6 with his job.

7 THE COURT: No, no, in terms of what's been
8 pled right now in the complaint.

9 MR. GREEN: I think there's enough there to
10 do that. I mean, and like I said, if it's -- it's a
11 brand-new complaint. We haven't -- I mean, they
12 haven't even filed an answer yet. So, I mean, for
13 the -- to give us some time to do some discovery,
14 'cause, I mean, I have -- obviously I have concerns
15 about the statute. If the Court doesn't find it's a
16 continuing course of conduct and the torts survive
17 that, there's certainly -- I think the State's in no
18 matter what. But, I mean, this is --

19 THE COURT: In other words, you're saying
20 that there's enough in the complaint itself to allege
21 an ongoing tort --

22 MR. GREEN: That's right.

23 THE COURT: - such that the statute of
24 limitations could conceivably --

25 MR. GREEN: Be tolled.

1 THE COURT: -- be the latter date?

2 MR. GREEN: Absolutely. That's why we put
3 it in that paragraph.

4 THE COURT: Well, the -- in terms of the --
5 I'm still concerned about the NIED, 'cause we know
6 it's a derivative. It's derivative from a particular
7 negligence claim --

8 MR. GREEN: Well, but --

9 THE COURT: -- which I don't see as being
10 pled in the complaint.

11 MR. GREEN: The tort to me in this case
12 deals with the interference with his ability to earn
13 a living, to interfere with his job and to do what he
14 does, and whether that was an intended act -- well, I
15 think it clearly was intentional in mind, but it may,
16 in fact, be negligent.

17 Hold on, the young mind is giving me
18 something. Well, it's the conspiracy, actually.

19 THE COURT: But it has not been pled.

20 MR. GREEN: Well, I mean, we talk about
21 collusion, so I think that that may be enough, but as
22 I said, they haven't even answered. They just give
23 us an opportunity to do some discovery in the case,
24 and we'll try to get something that -- that's perhaps
25 a little bit more firm before the Court.

1 THE COURT: Usually in terms of additional
2 time to do discovery, it's by way of a 56(f) in terms
3 of a motion for summary judgment.

4 MR. GREEN: I understand that.

5 THE COURT: We're looking at a 12(b)(6) --

6 MR. GREEN: I understand that.

7 THE COURT: -- situation here.

8 MR. GREEN: Well, we -- I mean, obviously we
9 need leave to amend. I mean, Your Honor, it's -- at
10 least if you're so set in your belief about the
11 negligence being pled, I think the rest of the stuff
12 against Senator Baker is regarding whether this was a
13 legislative purpose. You know, when you talk about
14 this is outrageous conduct, respectfully how does a
15 court determine whether it's outrageous conduct?

16 THE COURT: Well, in certain cases, you
17 know, there's case law that says that for an IIED,
18 outrageousness can be determined as a matter of law.
19 I think in the employment context, if I'm not
20 mistaken, for a wrongful discharge, there's a
21 particular case that spoke to that. So whether or
22 not it rises to the level, I don't know. It might be
23 gray.

24 MR. GREEN: Well, I can take gray this
25 morning.

1 THE COURT: Whether or not it's susceptible
2 to as a matter of law.

3 MR. GREEN: Yeah. Well, you know, it's --

4 THE COURT: But that's usually --

5 MR. GREEN: There's a case --

6 THE COURT: That's usually in the wrongful
7 discharge case, I think.

8 MR. GREEN: Yeah. There's a supreme court
9 case, and I argued this sometime ago, regarding a
10 medical malpractice case, and we filed it three years
11 after the defendants alleged we knew or should've
12 known. And we had a lulling issue, and the supreme
13 court said that when you're talking about statute of
14 limitations issues and there's a defense raised as to
15 either it could be lulling, it could be the fact that
16 the conduct was continuing, it's generally a fact
17 issue as opposed to something being subject --

18 THE COURT: That's not susceptible to a --

19 MR. GREEN: A legal rule --

20 THE COURT: -- motion to dismiss.

21 MR. GREEN: Yes, yes.

22 But, at any rate, I've tried to answer what
23 the arguments she made, but to talk -- for a lawyer
24 to say this was an outrageous conduct, some jury
25 would come jump over and string her up. If people

1 knew what she actually did, and I hope someday they
2 will, this isn't what we elect people to do, to
3 destroy someone's life because they were trying to
4 protect the law, protect the people and the State
5 from someone stealing from them, that's not what her
6 job is to do. You want to go after my friend for
7 stealing, just look the other way, and if you want
8 to -- if you want to testify in front of a jury in
9 Maui that you caught her stealing hundreds of
10 thousands of dollars, you know what, I'm going to
11 destroy your life. She did, she got 'em.

12 THE COURT: Okay.

13 MS. COOK: Your Honor, may I --

14 THE COURT: Brief reply, 'cause I see the
15 gallery's getting filled with the next case.

16 MS. COOK: Your Honor, I just want to point
17 out, what he just said really supports legislative
18 immunity. He said -- he attacked the reason.
19 There's personal vendetta, this is wrong what she did
20 to my client, all of that goes to the reason. They
21 admitted the legislative act is the elimination of
22 the position, which is a quintessential --

23 THE COURT: Well, but in terms of
24 elimination, if the elimination was not of a
25 legitimate legislative concern, meaning it was for

1 the purpose of removing this particular person --

2 MS. COOK: Your Honor, that --

3 THE COURT: Budgetary concern.

4 MS. COOK: That is confusing motivation
5 versus legitimate act. Elimination of a position in
6 and of itself is a lawful budgetary legislative act.
7 It's by the constitution. They have a right to --
8 for purposes of budgeting, when they have to
9 eliminate a position, that's fine, but if it goes to
10 the issue of the reason behind why you eliminate a
11 position, that goes to the motivation.

12 And we already said -- and, Your Honor, we
13 encourage the Court to read all of the cases that
14 we've cited. Even the U.S. Supreme Court said that
15 the claim of unworthy purpose does not destroy the
16 privilege.

17 THE COURT: Well, in looking at the
18 Abercrombie case --

19 MS. COOK: Yes.

20 THE COURT: -- in terms of what was the
21 underlying -- this was Senator McClung in his
22 capacity as president of the Senate of Hawaii, opened
23 the Sixth Legislature with a speech to the senate in
24 which he expressed concern about the quality of
25 education in Hawaii. He directed his comments

1 towards higher education in relation to the amount of
2 tax money being spent for that purpose.

3 MS. COOK: Yeah, so --

4 THE COURT: So in terms of a legitimate
5 legislative concern. So in looking at the nature or
6 the context of Senator McClung's speech in terms
7 of -- even assuming arguendo that the facts or the
8 statements were erroneous, even if the statements
9 were possibly slanderous, they're saying in that
10 context it's protected by legislative immunity, the
11 speech and debate clause. So do we have a similar
12 factually analogous situation here?

13 MS. COOK: Your Honor, I've argued the
14 legis-- elimination of a position and I've cited to
15 numerous cases here.

16 THE COURT: But we're only looking at two
17 positions.

18 MS. COOK: But irrelevant. If you eliminate
19 a position through the budget process, that is a
20 sufficient legislative function, and it's -- the
21 motivation behind it is irrelevant for purposes of
22 the courts to decide.

23 And they make a big deal about --

24 THE COURT: Well, I think in the allegations
25 themselves, I think there was only a minimal savings.

1 MR. GREEN: 800 bucks.

2 THE COURT: 800 -- I think in looking at the
3 allegations themselves...

4 MS. COOK: Yeah, I -- I got the --

5 THE COURT: \$3,000 loss in salary, I think
6 in paragraph 22. So was that a legitimate concern?

7 MS. COOK: Well, Your Honor, again, you
8 know, they eliminate the position. The person
9 that -- the person that terminates is the employer,
10 or the entity that terminates is the employer. They
11 eliminate the position. If the savings is that -- I
12 don't believe that \$800 per month is -- would be
13 insufficient, but then again I think the Court is not
14 looking at the act itself. That's what you have to
15 focus on: the legislative act. If the act is part
16 of their duty, which in this case is, she's entitled
17 to legislative immunity.

18 But, Your Honor, they make --

19 THE COURT: Wrap it up.

20 MS. COOK: -- make a big deal about this is
21 pre-discovery. They haven't filed anything, of
22 course, but they conceded Senator Baker is not the
23 employer.

24 THE COURT: No, we know that.

25 MS. COOK: You still have the State. We're

CAAP-15-0000034

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

ROSALYN H. BAKER, STATE OF
HAWAII, DOES 1-10,

Defendants-Appellants,

and

MARK H. K. GREER,

Plaintiff-Appellee.

ORIGINAL PROCEEDING
Civil No. 14-1-2004-09 RAN
(Other Non-Vehicle Tort)

APPEAL FROM THE:

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
ROSALYN H. BAKER'S MOTION TO
DISMISS COMPLAINT FILED ON
SEPTEMBER 23, 2014, WITH PREJUDICE,
IN LIEU OF ANSWER, FILED WITH THE
CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAII ON DECEMBER 24,
2014

CIRCUIT COURT OF THE FIRST CIRCUIT
JUDGE: HON. RHONDA A. NISHIMURA

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2015, a copy of DEFENDANT-APPELLANT
ROSALYN H. BAKER'S OPENING BRIEF was duly served via electronically through the
Court's Judiciary Electronic Filing and Service System (JEFS) or personal electronic upon the
following at their last known addresses as indicated below:

BRIAN K. MACKINTOSH, ESQ.
MICHAEL J. GREEN, ESQ.
bmackphd@gmail.com
edna@michaeljaygreen.com
Attorneys for Plaintiff
MARK H. K. GREER
(via JEFS)

CARON M. INAGAKI
DANA A. BARBATA
Caron.M.Inagaki@hawaii.gov
Dana.A.Barbata@hawaii.gov
Attorneys for Defendant
STATE OF HAWAII
(Via electronic mail)

DATED: Honolulu, Hawaii, April 29, 2015.

/s/ Maria C. Cook
MARIA C. COOK
Deputy Attorney General