No. SCWC-14-0001135

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, INC., Respondent-Appellant-Appellee-Cross-Appellee, SCOTT T. MURAKAMI, et al., Appellees-Appellees-Cross-Appellants, and TAMMY L. JOSUE, Complainant-Appellee-Appellant-Cross-Appellee.	ON WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII Circuit Court of the First Circuit Civ. No. 13-1-1817-06 (Agency Appeal) Hon. Rhonda A. Nishimura (1) ORDER REVERSING DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII'S DECISION AND ORDER DATED JUNE 5, 2013, filed on August 19, 2014; (2) FINAL JUDGMENT, filed on August 28, 2014

BRIEF AMICUS CURIAE OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

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BRIEF AMICUS CURIAE OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

Amicus Curiae the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) submits the following Amicus Curiae Brief in support of the Respondent BCI Coca-Cola Bottling Co. of Los Angeles, Inc. (BCI).

IDENTITY AND INTEREST OF AMICUS

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

This case and the issue presented is of great practical importance to Hawaii's small businesses and NFIB's members. Amicus filed a brief in the Intermediate Court of Appeals and sought leave to file an amicus brief in the Circuit Court (but that court rendered its judgment in favor of BCI before it ruled on the motion). Managing leave of absence issues is already extremely complicated for small businesses operating without in-house legal counsel or human resource specialists. As a practical matter, small business owners need the flexibility to hire new employees when they have lost essential personnel for an extended and indefinite timeframe.

SUMMARY OF ARGUMENT

The question presented is whether in Haw. Rev. Stat. § 378-32(a)(2), the legislature intended to require employers to hold open a long-absent injured worker's position indefinitely, or whether by prohibiting adverse actions by the employer "*solely* because the employee has suffered a work injury," it meant to preserve employers' flexibility to hire a replacement as may be needed to address pressing business demands. The ICA correctly understood that the plain language of the statute preserves the prerogative of an employer to make necessary business

decisions about staffing needs, so long as the employer does not "suspend, discharge, or discriminate" an employee *only* because the employee is injured. *Id*. (quoted in ICA Op. at 6). The circuit court concluded—and the ICA affirmed—that BCI did not discharge Petitioner solely because of her injury. BCI needed to fill the position with someone who could handle its continued workload because Petitioner's long absence was causing strain on two other employees who had been forced to work longer hours to cover these duties; consequently the position was no longer open when Petitioner finally informed BCI she was ready to work. In short, legitimate business concerns caused BCI to fill the spot permanently, and thus, Petitioner's injury was not the sole reason for discharge. Certainly, but for Petitioner's injury, there was no need to fill her position. *See* Cert. App. at 7 ("Stated otherwise, *but for* that injury, there was no need to fill her position."). However, "but for" causation is not the standard established by the statute's use of the term "solely." That statutory term means that an employee's injury may be *part* of the reason for the employer's actions, but it cannot be the *only* reason. Here, it was not.

The ICA's reading of the plain statutory text makes sense because it protects injured employees from adverse actions *only* on account of their injury, but also appreciates the practical realities that employers face when an essential position is left vacant during a prolonged and indefinite absence. The interpretation advocated by Petitioner effectively deletes the term "solely" from the statute, and would read it as conferring an entitlement for permanent employment, regardless of how greatly the position's mounting workload may strain the employer. This would create extreme practical difficulties for small businesses with limited resources.

The ICA's conclusion is also consistent with how other state and federal courts apply similar anti-discrimination statutes, which are construed as requiring only reasonable accommodations—*i.e.*, so as to avoid imposing undue, and potentially ruinous, burdens on small employers. Hawaii's employers should not be required to create a position that does not already exist for which there is no business necessity, or to maintain an injured employee's job for an extended and indefinite time when pressing business needs demand that the position be filled (now) with someone who can get the work done.[1] Petitioner's strained reading of the statute places small business employers in an impossible situation.

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[1] "Time is money, and our members need to be able to [fill vacant positions quickly] ... They need to send somebody in there to hang the drywall tomorrow." Tammy La Gorce, *As 'Ban the*

(footnote continued on next page)

ARGUMENT

I. The Statute's Plain Language Allows Employers To Address Staffing Needs, And Does Not Require Them to Accommodate Indefinite Absences

The plain text of Haw. Rev. Stat. § 378-32(a)(2) provides that an employer may not "suspend, discharge, or discriminate against" an employee "[s]olely because the employee has suffered a work injury… [] unless the employee is no longer capable of performing the employee's work… and the employer has no other available work which the employee is capable of performing." Haw. Rev. Stat. § 378-32(a)(2).

Thus, when an employee suffers a work-related injury, the plain meaning of the statute is that the employer is permitted to take action if the injury is not the only reason for doing so. In other words, if there is some other legitimate business reason supporting the employer's actions, then it does not matter if the employees' injury was *also* a cause. Here, it became clear to BCI that it was burdening two other employees with additional work for an indefinite time, and it needed someone to fill the position permanently. Thus, the ICA correctly concluded Petitioner's injury was not the "sole" reason for discharge. ICA Op. at 6. The statute also requires the employer to offer the employee other "available" work if the employee can handle it, a requirement which does not save Petitioner's argument because the record is clear that there was no such available position. *See id*. ("and the employer has no other available work which the employee is capable of performing"). In sum, the statute imposes a duty on employers to try (if reasonably feasible) to get an injured employee back to work, preferably in the same position they held prior to the injury (if possible). This effectively adopts the reasonable accommodation standard entailed in the Americans with Disabilities Act and similar anti-discrimination statutes.

By contrast, Petitioner advocates for a sweeping and unprecedented new rule: an employer must hold open a position for an injured employee indefinitely, even if the business and fellow employees are being unfairly burdened by her long absence and have no understanding of when she may return, if ever. *See* Cert. App. at 6. Petitioner argues she was "temporarily" disabled, and thus BCI could not have a legitimate business reason for filling her position, regardless of pressing burdens. That amounts to a rule that if an employee is injured, an

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Box' Spreads, Private Employers Still Have Questions, N.Y. Times (Nov. 22, 2017), https://www.nytimes.com/2017/11/22/business/small-business-criminal-record.html (last visited Feb. 12, 2019) (discussing state-based restrictions on the hiring process, and quoting Elizabeth Milito, Senior Executive Counsel at NFIB Legal Center).

employer is obligated to hold open her position unless and until such time as the employee believes she is "capable of performing." But the statute imposes no duty on an employer to preserve a position indefinitely merely because an employee has taken a leave of absence due to injury. The statute requires only that an employer must provide an employee with a position if she is capable of performing the work—provided the position is still available.[2]

The common law employment at will doctrine, under which businesses may choose to end the employer-employee relationship for any reason not explicitly prohibited by public policy, informs the ICA's correct reading of the statute. *See Shoppe v. Gucci Am. Inc.*, 94 Haw. 368, 383, 14 P.3d 1049, 1064 (2000). Here the statute sets out an exception to the common law rule by prohibiting discharge "solely" on account of a workplace injury. But this exception should be limited to the terms that the legislature established, and should not be broadened to impose additional open-ended burdens on employers, which the legislature did not expressly include. *See, e.g.*, *Encino Motorcars LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (emphasizing that employment statutes should be construed strictly in accordance with the statutory text, and affirming that the "limitations expressed in statutory terms" reflects a legislative "compromise") (internal citations omitted). Such a radical departure from the common law employment at will baseline principle cannot be lightly inferred. *See Burns Int'l Sec. Servs., Inc. v. Dep't of Transp.*, 66 Haw. 607, 611, 671 P.2d 446, 449 (1983) (emphasizing that "statutes which are in derogation of common law must be strictly construed," and that they should not be construed as abrogating the common law in the absence of "express [legislative] intent."); *see also Parnar v. Americana Hotels Inc.*, 65 Haw. 370, 380, 652 P.2d 625, 631 (1982) (warning courts to "proceed cautiously if called upon to declare [a] public policy [exception to the 'at will' doctrine] absent some prior legislative or judicial expression [that is sufficiently clear] on that subject.").

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[2] Whether an employee is "no longer capable of performing the work" must be measured by present circumstances, not those in the indefinite future. If the legislature had intended to guarantee an employee an entitlement to maintain a position indefinitely—despite the fact that at present she is "no longer capable of performing" the job—it would have used language more clearly indicating that very sweeping intent. *See Lales v. Wholesale Motors Co.*, SCWC-28516 WL 560829 (Haw. Feb. 13, 2014) (rejecting an inference that state law imposes burdens beyond those required by federal law, and observing that when the Legislature wishes to impose additional requirements it knows how to make that intention clear); *see e.g.*, *Heatherly v. Hilton Hawaiian Vill. Joint Venture*, 78 Haw. 351, 356, 893 P.2d 779, 784 (1995) ("We observe that our state legislature knows how to draft broader definitions" when the legislature intends to give a broader effect than the law would otherwise presume.).

II. It Is Impractical To Require Employers To Hold Open Positions Indefinitely

BCI replaced Petitioner after accommodating her eleven-month absence. This was entirely reasonable approach under the circumstances, as both the circuit court and the ICA confirmed, because other employees were forced to cover her workload, which was then straining her department.[3] Throughout that time, Petitioner was unable to say whether she could return to work anytime soon—or if she would ever return. Still, BCI demonstrated a willingness to accommodate her as long as it reasonably could. In the end, after nearly a year of trying to maintain normal operations with a full-time position left vacant—and others covering her workload—BCI was compelled to find a permanent replacement.

Small businesses face this sort of dilemma all the time. In some cases, the employee may express an intent to return, but is waiting on a medical release.[4] But all too often the employee has left with only ambiguous signals as to whether they intend to return, or without any indication one way or another. In any case, a prolonged and indefinite absence leaves small employers in a lurch—straining their daily operations and complicating their prospective plans.

A prolonged absence, for even a single employee, is all the more burdensome for a company operating with a small team and small budget. As NFIB explains in its online guidance to small business owners nationally: "[a] company might manage without an absent employee for a short time, [but] the longer the absence—or the more frequent intermittent absences become—the more problematic the issue." Nat'l Fed'n Indep. Bus., *Terminating an Employee on Medical Leave? Tread Carefully* (May 21, 2018).[5] What is more, managing leave of absence

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[3] "Between her injury on May 29, 2009 and April of 2010, BCI had two other supervisors cover for Josue's absence by learning her position and arriving to work two hours earlier than normal to perform her job in addition to their own duties." ICA Op. at 13.

[4] In some situations, a doctor cannot give an immediate release because they must see how well (or whether) an injury will heal. But, in other cases a medical release may be delayed because the employee fails to work proactively with their doctor. Amicus does not suggest that this was the case here. But in resolving these issues, the Court should be cognizant of the wide range of scenarios that may prolong an indefinite leave of absence, keeping in mind the practical difficulties small business owners face when trying to manage an extended leave of absence.

[5] https://www.nfib.com/content/legal-compliance/labor/terminating-an-employee-on-medical-leave-tread-carefully/ (last visited Feb. 8, 2019).

requests is among the most complicated of issues that small business owners must deal with, often without the benefit of a human resource professional. NFIB's online guidance notes that employers must ensure compliance with the Americans with Disabilities Act, the Family Medical Leave Act, state family leave laws, workers compensation laws, employer PTO policies, and other regulatory regimes. Sorting through this morass, NFIB concludes:

> Individuals unable to return to work after the expiration of legally required or employer-offered leave may be terminated. But an employer must make sure that other forms of leave and/or statutory protections do not apply. In addition, the employer must evaluate whether an employee who requests leave because of his or her own serious health condition is not entitled to a reasonable accommodation…, which would allow the employee to perform the essential functions of his or her job.

Id.

Petitioner's misconstruction of Haw. Rev. Stat. § 378-32(a)(2)'s text would complicate this regulatory thicket even further. She asks this Court to conclude that BCI should have preserved her position indefinitely.[6] But this would impose tremendous strain on employers far in excess of anything required by FMLA, the ADA, or any other anti-discrimination statute where leave of absence requirements are spelled out more explicitly.[7] For that matter,

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[6] Petitioner's Application for Writ of Certiorari asserts that an employer must hold a position open however long a disability continues. App. at 9. Petitioner relies on Haw. Rev. Stat. § 386-31(b), which "provides that when 'a work injury causes total disability not determined to be permanent in character, the employer, for the duration of the disability… shall pay the employee' the proscribed benefits." *Zhang*, No. SCWC-11-0001106, 2016 WL 4182511, at *12. But the *Zhang* case demonstrates just how long (and indefinite) a total temporary disability may be. In that case, a workers compensation claimant "received temporary total disability benefits totaling $226,869.84 for the period of June 25, 1994 to May 5, 2004, but was denied additional benefits from May 5, 2004 to September 18, 2009." *Id*. at *11. This Court then ruled in 2016 that "the ICA and LIRAB [] erred as a matter of law in denying Zhang's temporary total disability benefits after May 5, 2004…" *Id*. at *12. *See also Bocalbos v. Kapiolani Med. Ctr. for Women & Children*, 89 Haw. 436, 437–38, 974 P.2d 1026, 1027–28 (1999) (claimant was temporarily disabled after a workplace injury in August, 1986; however, the Board still said that it was "premature" to determine whether the claimant qualified for permanent disability as of September, 1992).

[7] The FMLA guarantees twelve weeks of job-protected leave. *See* U.S. Dept. of Labor, *Need Time? Employee's Guide to the Family Medical Leave Act*, https://www.dol.gov/whd/fmla/employeeguide.pdf (last visited Feb. 8, 2019). And while some states may extend FMLA-like protections for a further defined period, Amicus is aware of no jurisdiction guaranteeing employees a right to an indefinite and on-going leave of absence,

(footnote continued on next page)

Petitioner's proffered interpretation would lead to absurd results because it would place small businesses in an impossible position in many cases. *See Morgan v. Planning, Dep't, City of Kauai*, 104 Haw. 173, 185-86, 86 P.3d 982, 994-95 (2004) (emphasizing that statutory language should be construed with the presumption that the legislature intended a "rational, sensible and practical interpretation…").

The common law doctrine of employment at will creates a presumption that employers and employees retain the right to part ways for any reason not expressly prohibited by contract or enacted law. *See Shoppe*, 94 Haw. at 383, 14 P.3d at 1064. The rule ensures that employers retain flexibility to exercise business judgement and to execute efficient operations and therein promotes societal efficiencies. *See Parnar*, 65 Haw. at 374, 652 P.2d at 627-28 (observing that the common law rule developed as an outgrowth of the law of contract and recognition of the value of promoting "economic growth" with flexible employment rules). Indeed, when employers are allowed the flexibility necessary to exercise business judgement, businesses can deliver products and services to consumers at lower costs and with optimal results. These efficiencies ultimately encourage economic growth and greater societal wealth.

Of course, federal and state law impose various duties upon employers to provide reasonable accommodations for employees with disabilities, or—in some circumstances—for other conditions developed in the course of employment. *See e.g.*, Americans With Disabilities Act, 42 U.S.C. §§ 12201-12213 (2019). These statutory rules reflect our societal judgment that disabled individuals should be given certain allowances, so as to enable them to remain active in the workforce to the extent reasonably practical. *See* Haw. Rev. Stat. 378-32(a)(2) (requiring employers to offer an employee suffering a work injury "other available work which the employee is capable of performing" if the employee is unable to perform his or her original functions). But these statutorily imposed duties are generally interpreted in light of the background principle that the law should seek to encourage socially constructive and efficient results. *See Parnar*, 65 Haw. at 380, 652 P.2d at 631 (insisting that public policy limitations should be narrowly construed to ensure employers retain "sufficient latitude to maintain profitable and efficient business operations…").

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except as may be required to provide a "reasonable accommodation" under the ADA and other such anti-discrimination laws at the state level.

For example, courts throughout the country interpret the ADA, and similar state-based statutory regimes protecting injured workers, in light of the reality that legislatures seek to balance remedial goals with our societal interests in preserving flexibility for employers. *French v. Hawaii Pizza Hut, Inc.*, 105 Haw. 462, 467, 99 P.3d 1046, 1051 (2004) (observing that Hawaii's statutes "prohibiting discrimination based on disability are textually similar to the Americans with Disabilities Act" and applying the same standard); *Phillips v. City of New York*, 66 A.D.3d 170, 176, 884 N.Y.S.2d 369, 373 (2009) (interpreting New York's Human Rights Law); *see also Encino Motorcars LLC*, 138 S. Ct. at 1142 (repudiating the supposed canon that remedial statutes should be construed against employers). These cases reasonably presume that the legislature intends only a limited departure from the common law rule—an approach that avoids imposing undue hardships on employers. *See Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 452, 403 P.3d 214, 229 (2017) (affirming the presumption against implied abrogation of common law). Indeed, it would be patently irrational to require an employer to give more than a reasonable accommodation.[8]

This Court should keep in mind the particularly precarious position of small business employers who have fewer resources available to accommodate a request for extended and indefinite leave. The typical NFIB member has only ten employees. If one of their employees is out for any significant length of time that necessarily results in business disruptions. It also results in added costs. Not only must they pay-out any accrued paid time off to the absent employee, but they must often pay overtime to other employees who must work longer to cover for the absent employee. In addition, they must continue paying for health insurance coverage, workers compensation insurance, unemployment insurance, and other employee benefits throughout the leave of absence.[9]

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[8] A requirement to provide more than a reasonable accommodation would impose an objectively unreasonable duty on the employer. The legislature could not have intended such an irrational rule. *See Morgan*, 104 Haw. at 185, 86 P.3d at 994-95.

[9] The cost of workers compensation insurance remains a very high concern to the small business community—ranking No. 13 out of 75 potential problems and priorities. Likewise, unemployment insurance costs rank No. 26 out of 75. NFIB Research Foundation, *Small Business Problems & Priorities* (Aug. 2016), https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf (last visited Feb. 8, 2019).

They may also need to pay higher costs to find temporary labor. For example, a company contracted to do renovations will be in a bind if its only licensed electrician is out on indefinite leave. One option may be to hire an additional employee; however, that comes with a lot of red tape and associated costs, including competitive hourly wages, unemployment and workers compensation coverage, and coverage for the same benefits extended to the absentee employee.[10] Another option is to work with an independent contractor—and to pay a premium for their work. But whether and when a business can safely utilize labor from an independent contractor is a notoriously thorny issue.[11]

Additionally, intangible factors come into play when an essential employee is out for an extended and indefinite timeframe. As was the case here, other employees may be required to cover the duties of an absentee employee, which may add stress and contribute to morale problems in the workplace. Moreover, overburdened employees are more prone to make mistakes, including on the job injuries. Where overburdened, an employee may also produce lower quality work and or prove less productive over time. Further, overburdened employees are more likely to look for work, and accept employment, elsewhere—which may further strain an already difficult situation for the employer. This is especially true for employees who are now tasked with handling assignments for which they lack expertise or critical skills.

Petitioner assumes that employers will simply hire short-term employees as a stop-gap measure. But even setting aside the costs outlined so far, this presents further difficulties.[12]

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[10] *See Managing the Regulatory Thicket: Cumulative Burdens of State and Local Regulation*, Regulatory Transparency Project, Federalist Society, https://regproject.org/paper/managing-the-regulatory-thicket/ (last visited Feb. 13, 2019) (providing an over of the many regulatory issues employers face in hiring new employees).

[11] NFIB Small Business Legal Center attorneys frequently talk with small business owners who have been charged with misclassifying employees as "independent contractors." The risk of misclassification is especially high where a company seeks labor to cover duties that employees would otherwise be handling. *See Guide to Dealing with Independent Contractors*, Nat. Fed. of Ind. Bus., https://www.nfib.com/Portals/0/PDF/AllUsers/legal/guides/independent-contractors-guide-nfib.pdf (last visited Feb. 13, 2019).

[12] Taken to its logical conclusion, Petitioner's interpretation would lead to further absurd results where a temporary "stop-gap" employee is injured on the job. In that scenario Petitioner's theory would mandate the employer must guarantee a job in perpetuity for *both* the original employee and the stop-gap employee because both suffered workplace injuries. The legislature could not have intended such a result.

Beyond the added costs associated with finding a *qualified and motivated* short-term employee, employers may find it difficult to recruit top talent when the job comes with a contingent expiration date. And once the employer dismisses a "stop-gap employee," he or she will then qualify for unemployment insurance benefits, which means increased unemployment insurance rates going forward for the business. Lastly, the employer inevitably faces the prospect (at least the possibility) of a legal action when terminating a "stop-gap employee." That is always a possibility with any termination and is one of the reasons small business owners are often hesitant to dismiss underperforming employees. Unfortunately, even where there is no merit, it is easy to make an allegation, but often very costly for a business to mount a defense. *See Testimony of Elizabeth Milito, "Litigation Abuses,"* House of Representatives, Committee on the Judiciary Subcommittee on the Constitution, March 13, 2013.

Small business employers face increased pressure to fill a vacancy the longer an employee remains on leave and it is often impractical to rely upon short-term employees or independent contractors. At some point legitimate business concern simply demand that the position be filled. And it is patently unreasonable to expect an employer to preserve a vacant position without an assurance that the employee is capable of resuming his or her duties in the relatively near future.

CONCLUSION

This Court should affirm the judgment of the Intermediate Court of Appeals, and the Circuit Court.

DATED: Honolulu, Hawaii, March 7, 2019.

Respectfully submitted.

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