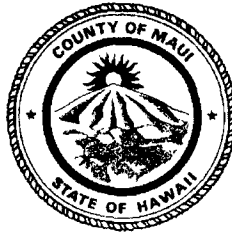


ALAN M. ARAKAWA
Mayor



PATRICK K. WONG
Corporation Counsel

EDWARD S. KUSHI
First Deputy

LYDIA A. TODA
Risk Management Officer
Tel. No. (808) 270-7535
Fax No. (808) 270-1761

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808) 270-7740
FACSIMILE: (808) 270-7152

May 6, 2016

MEMO TO: Donald S. Guzman, Chair
Committee of the Whole

FROM: Brian A. Bilberry
Deputy Corporation Counsel

SUBJECT: Litigation Matter – (STATUS AND SETTLEMENT AUTHORIZATION:
DUKIE J. RACADIO V. COUNTY OF MAUI, et al.; CIVIL 14-1-0451(2))
(COW-1(26))

OFFICE OF THE
CORPORATION COUNSEL
COUNTY OF MAUI

RECEIVED

Our Department respectfully requests the opportunity to discuss with the Committee the litigation of the above-referenced case, update on the status of the evidence identified by the Department of Corporation Counsel as to liability to date, and a supplemental settlement demand received from the Plaintiff on April 11, 2016. Plaintiff has brought a discrimination claim, following termination from employment with the Maui Police Department owing to a disqualifying medical condition. We would like this matter heard at the next available committee meeting, and in any event prior to the further mediation anticipated with Judge Joel E. August (ret.), tentatively scheduled for late-May and/or early-June 2016. Trial of the case is currently set to commence August 15, 2016, but is pending a possible continuance by agreement of the parties.

A copy of the Complaint is attached. Also attached hereto is a proposed Resolution Authorizing Settlement of *Dukie Racadio v. County of Maui, et al.*, Civil No. 14-1-0451(2).

It is anticipated that an executive session may be necessary to discuss questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and the Committee.

Should you have any questions or concerns, please do not hesitate to contact me. Thank you for your anticipated assistance in this matter.

Attachments

Resolution

No. _____

AUTHORIZING SETTLEMENT OF
DUKIE RACADIO v. COUNTY OF MAUI, ET AL.,
CIVIL NO. 14-1-0451(2)

WHEREAS, Plaintiff Dukie Racadio filed a lawsuit in the Second Circuit Court of the State of Hawaii, Civil No. 14-1-0451(2), against the County of Maui on August 1, 2014, asserting a discrimination claim, following termination from employment with the Maui Police Department owing to a disqualifying medical condition; and

WHEREAS, by Resolution 16-2, the Council previously authorized settlement of the case; and

WHEREAS, the County of Maui, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, seeks to reach a resolution of this case by way of a negotiated settlement or Offer of Judgment; and

WHEREAS, the Department of the Corporation Counsel has requested authority to settle this case under terms set forth and discussed in an executive meeting before the Committee of the Whole; and

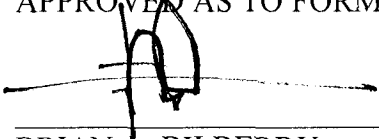
WHEREAS, having reviewed the facts and circumstances regarding this case and being advised of attempts to reach resolution of this case by way of a negotiated settlement or Offer of Judgment by the Department of the Corporation Counsel, the Council wishes to discuss the terms

of settlement; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That it hereby approves settlement of this case under the terms set forth in an executive meeting before the Committee of the Whole; and
2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and
3. That it hereby authorizes the Director of Finance of the County of Maui to satisfy said settlement of this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and
4. That certified copies of this resolution be transmitted to the Mayor, the Director of Finance, the Chief of Police, and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY:



BRIAN A. BILBERRY
Deputy Corporation Counsel
County of Maui

Served on HML 8/14/14 3:25pm

LAW OFFICE OF MATSON KELLEY
A Limited Liability Company

MATSON KELLEY 8129
Wailuku Executive Center
24 N. Church Street, Suite 202
Wailuku, Hawaii 96793
Telephone: (808) 244-4994
Facsimile: (808) 948-7344
E-mail: mkelley@matsonkelleylaw.com

FILED

2014 AUG -1 PM 3: 32

D. MORIOKA, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

and

LAW OFFICE OF JON S. JACOBS
A Limited Liability Law Company

JON S. JACOBS 8000
Executive Centre
1088 Bishop Street, PH 1
Honolulu, Hawaii 96813
Telephone: (808) 371-3557
Facsimile: (855) 764-3545
E-mail: jon@jonsjacobs.com

RECEIVED
CORPORATION COUNSEL
2014 AUG 14 PM 3: 38

Attorneys for Plaintiff
DUKIE J. RACADIO

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

DUKIE J. RACADIO
Plaintiff,


vs.

COUNTY OF MAUI; GARY YABUTA;
JOHN DOES 1-10; JANE DOES 1-10; DOE
CORPORATIONS 1-10; DOE
PARTNERSHIPS 1-10; DOE ENTITIES 1-10,
Defendants.

CIVIL NO. 14-1-0451 (2)
(OTHER CIVIL ACTION)

COMPLAINT; DEMAND FOR TRIAL BY
JURY; SUMMONS

I hereby certify that this is a full, true and
correct copy of the Original.


Clerk, Second Circuit Court

COMPLAINT

COMES NOW Plaintiff DUKIE J. RACADIO, by and through his counsel,
The Law Office of Matson Kelley and The Law Office of Jon S. Jacobs, and for his claims for
relief against the above-named Defendants, hereby alleges and avers as follows:

INTRODUCTION

1. This is an action for damages against Defendants for disability
discrimination in violation of § 378-2 of the Hawaii Revised Statutes.

JURISDICTION AND VENUE

2. The Court has personal jurisdiction over Defendants pursuant to Haw.
Rev. Stat. § 634-35, as the tortious acts and/or omissions alleged herein occurred in the State of
Hawaii.

3. The Court has subject matter jurisdiction pursuant to Haw. Rev. Stat.
§ 603-21.5.

4. Venue is proper pursuant to Haw. Rev. Stat. § 603-36, as all of the
tortious acts and/or omissions alleged herein occurred within the County of Maui, State of
Hawaii.

5. The total amount of damages incurred by or on behalf of Plaintiff,
due to the tortious acts and/or omissions described herein, is in excess of the minimum
jurisdictional requirements of the Circuit Court.

PARTIES

6. Plaintiff DUKIE J. RACADIO ("Plaintiff") is and was at all relevant
times herein a resident of the County of Maui, State of Hawaii, and met the statutory definition
of an "employee."

7. Defendant COUNTY OF MAUI (“the County”) is and was at all relevant times herein a duly organized municipal corporation organized and existing under the laws of the State of Hawaii, and the Maui Police Department (“MPD”) is a public agency and/or department of the County, and met the definition of “employer.”

8. Defendant GARY YABUTA (“Defendant Yabuta” or “Chief Yabuta”) is and was at all relevant times herein a resident of the County and employed by MPD as its Chief of Police, with managerial and supervisory authority. Defendant Yabuta is sued herein both in his individual and official capacities.

9. Defendants JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10, are persons, corporations, partnerships, or entities (hereinafter collectively “Doe Defendants”) sued under fictitious names for the reason that their true names and identities are presently unknown except that they are connected in some manner and/or were responsible for the actions of Defendants alleged herein. Plaintiff prays for leave to amend this Complaint to insert the true names, identities, capacities, activities and/or responsibilities of Doe Defendants when they are ascertained.

10. All Defendants will be collectively referred to as “Defendants.”

PROCEDURAL REQUIREMENTS

11. Plaintiff has fulfilled all conditions precedent to the filing of this lawsuit.

12. On or about February 10, 2014, Plaintiff timely filed a complaint alleging disability discrimination with the Hawaii Civil Rights Commission (“HCRC”), FEPA No. M-17980.

13. On or about February of 2014, Plaintiff timely filed a complaint alleging disability discrimination with the Equal Employment Opportunity Commission (“EEOC”), Charge No. 37B-2014-00031.

14. The EEOC provided a Notice of Right to Sue letter on Plaintiff’s claims on June 4, 2014.

15. The HCRC provided a Notice of Right to Sue letter on Plaintiff’s claims on May 22, 2014.

16. On August 1, 2014, Plaintiff sent a Notice of Claim to the County of Maui, pursuant to Haw. Rev. Stat. § 46-72.

FACTUAL BACKGROUND

17. The County’s Equal Employment Opportunity/Affirmative Action Policy Statement prohibits employment discrimination on the basis of disability, pursuant to Chapter 378 of the Hawaii Revised Statutes.

18. The County represents to the public that all individuals have equal access to all County employment.

19. Plaintiff is 38 years old and served as a MPD police officer from 2000 to 2013, during which time he received several promotions and countless commendations, and has never had a written reprimand or suspension.

20. On or about August 30, 2004, while on patrol duty, Plaintiff was involved in a motor vehicle accident caused when he lost consciousness and struck a fire hydrant. The day after the accident, an MRI scan of Plaintiff’s brain revealed a large arteriovenous malformation (“AVM”) involving the right temporoparietal region of his brain (a congenital condition), which likely caused a seizure. Plaintiff was prescribed Dilantin, an anti-

convulsant used to control and treat epileptic seizures. No adverse employment action was taken by the County or Chief Yabuta.

21. On or about November of 2004, Plaintiff underwent brain surgery with removal of the AVM, subsequent to which he has been maintained on Dilantin.

22. On or about 2005 or 2006, Plaintiff had a seizure associated with a subtherapeutic level of Dilantin. No adverse employment action was taken by the County or Chief Yabuta.

23. On or about 2008 or 2009, Plaintiff had a seizure associated with a subtherapeutic level of Dilantin. No adverse employment action was taken by the County or Chief Yabuta.

24. On or about February 19, 2013, while exercising at 24 Hour Fitness in Kahalui, Maui, Plaintiff had a seizure associated with a subtherapeutic level of Dilantin.

25. On or about March 25, 2013, Plaintiff was evaluated by Loren Drenfeld, M.D., a neurologist, at the request of the County's third-party administrator for workers' compensation claims.

26. On or about April 11, 2013, in a medical report, Stuart Pang, M.D., Plaintiff's treating neurologist, opined that Plaintiff was capable of "safe driving" starting June 20, 2013, and that his driving ability should be reevaluated by the Division of Motor Vehicles ("DMV") only every eight years. Dr. Pang also noted that Plaintiff did not have any neurological impairment and that he expected Plaintiff to be free of seizures in the future. Dr. Pang further noted that Plaintiff was taking the full dose of Dilantin.

27. On or about April 15, 2013, Plaintiff was notified by the County's DMV that his driver's license was being suspended pursuant to Haw. Rev. Stat. § 286-119.

28. On or about April 24, 2013, Dr. Direnfeld provided his report of the County's requested medical evaluation of Plaintiff. He diagnosed Plaintiff with (1) a seizure disorder, and (2) status post-right frontoparietal craniotomy and AVM removal in November 2004. Dr. Direnfeld attributed Plaintiff's February 19, 2013 seizure to a subtherapeutic level of Dilantin. Dr. Direnfeld further opined that Plaintiff was intact neurologically and his outlook "symptomatically and functionally is good" as long as he reliably takes Dilantin; that once Plaintiff has been consistently found to demonstrate a therapeutic level of Dilantin, "it is likely he can return to full-time, full-duty work including driving on and off the job"; that the only treatment required is compliance with Dilantin.

29. On or about June 6, 2013, in a supplemental report, Dr. Direnfeld stated that, if properly medicated, Plaintiff is able to perform all of the job duties of a uniformed police officer to include driving a motor vehicle and using issued equipment, including a firearm, taser, baton, pepper spray, and handcuffs. Dr. Direnfeld recommended monitoring Plaintiff's Dilantin level at least every six months.

30. On or about July 3, 2013, Plaintiff submitted a report to the County, care of Chief Yabuta, updating the status of his Hawaii driver's license. Plaintiff did not receive any response to his communication from the County or Chief Yabuta.

31. On or about July 8, 2013, Plaintiff received a letter stating that he qualified to be eligible for promotion to Police Sergeant/Detective based upon his examination scores. Plaintiff scored "83" and he was informed that based upon his score, he was in the top five percent of the applicants and eligible for interview.

32. On or about July 9, 2013, in a letter, Dr. Direnfeld confirmed his participation in a teleconference with the County's attorneys, Moana Lutey and Patrick Wong, in

which Dr. Direnfeld informed them that if Plaintiff continued to comply with the treatment regimen, and maintained a therapeutic level of Dilantin, the likelihood of Plaintiff having a seizure was “significantly reduced” based upon his prior seizures all being associated with a subtherapeutic level of Dilantin. Dr. Direnfeld also noted that all of Plaintiff’s seizures had been associated with a subtherapeutic level of Dilantin.

33. On or about July 10, 2013, Plaintiff was informed that, despite Dr. Direnfeld’s and Dr. Pang’s opinions, he could no longer be employed as a police officer.

34. On or about August 30, 2013, in a letter, Dr. Pang stated that he saw Plaintiff for a follow-up examination on July 22, 2013; that Plaintiff remained seizure free and compliant with his Dilantin; that Plaintiff could perform his duties as “Police Officer III Vehicle Homicide Unit Traffic Section (PO-09)”; that having a seizure disorder did not preclude Plaintiff from working; and, that under Hawaii law, Plaintiff could resume driving after being seizure free for six months.

35. On or about September 11, 2013, Plaintiff was notified by Chief Yabuta that, due to his seizure disorder, he was no longer qualified to be a police officer, but was being provided with an opportunity to choose employment as an “Emergency Services Dispatcher I”, or other “vacant positions” within the County. Plaintiff was informed that the vacant positions were not being promised and should not be construed as an offer of employment. Plaintiff was given a deadline of September 17, 2013, to decide whether he wanted to pursue such employment options.

36. On or about September 13, 2013, Plaintiff requested an extension of time to decide whether to pursue alternative employment options within the County.

37. On or about September 19, 2013, the financial impact of Plaintiff

taking a “voluntary demotion” from his position as “Police Officer III” to the offered position of “Emergency Services Dispatcher I” was explained to him.

38. The salary for an “Emergency Services Dispatcher I” was significantly less than the income Plaintiff received as a police officer and would not provide Plaintiff with the same opportunity for promotions, salary increases and retirement pay.

39. On or about September 25, 2013, Plaintiff was informed that he was on the certified list (No. 2013-44) of police officers eligible for promotion to “Police Sergeant/Detective” dated September 4, 2013. However, he was further informed that he was not being considered for such promotion due to his seizure disorder.

40. On or about September 25, 2013, Plaintiff was provided with a list of vacant positions within the County, as of September 23, 2013. Plaintiff was given thirty (30) days from the date of notice to respond.

41. On or about October 22, 2013, Plaintiff requested additional information on four (4) vacant positions with other departments within the County, as of September 23, 2013.

42. On or about November 4, 2013, Plaintiff provided notice to Chief Yabuta that his Hawaii driver’s license was restored without any restrictions, and he was able to resume driving.

43. On or about October of 2014, Plaintiff provided a memorandum to Chief Yabuta discussing the availability of “biometric technology” as an option to allow Plaintiff to carry a firearm while on duty as a police officer and requested an accommodation. Plaintiff did not receive a response to his request for an accommodation.

44. On or about December 3, 2013, Chief Yabuta terminated Plaintiff’s

employment with MPD stating that Plaintiff was “no longer medically qualified to continue as a Police Officer.” Chief Yabuta further stated that he concluded that Plaintiff wanted to remain a police officer; that Plaintiff was not interested in seeking other employment within the County; that the County had concluded its efforts to provide Plaintiff with reasonable accommodations; and, that as of close of business on December 31, 2013, Plaintiff’s employment as a police officer with MPD would be terminated.

45. On or about December 18, 2013, in response to Chief Yabuta’s December 3, 2013 notice of termination, Plaintiff’s pre-termination hearing was held.

46. On or about December 20, 2013, Chief Yabuta affirmed his prior decision to terminate Plaintiff’s employment as a police officer with MPD, effective December 31, 2013, due to Plaintiff’s seizure disorder.

47. On or about December 31, 2013, Plaintiff’s employment as a police officer with MPD was terminated due to his seizure disorder.

48. On or about May 22, 2014, the HCRC issued a right to sue letter providing Plaintiff with the right to file a private lawsuit against the County in the State Circuit Court within ninety (90) days after receipt of this notice.

49. At the time that Plaintiff was terminated by the County, Plaintiff was assigned to investigate motor vehicle accidents, which primarily involved operating a motor vehicle issued by the County, investigating accidents and preparing reports.

50. On or about June 2, 2014, Plaintiff was hired by the County to work in the Planning Department’s Zoning Administration & Enforcement Division. Plaintiff’s job duties require Plaintiff to operate a motor vehicle issued by the County, investigate complaints and

prepare reports for the County.

51. Plaintiff was assigned a County vehicle and operates said vehicle for work purposes. The Managing Director issued a letter authorizing Plaintiff to operate the County vehicle.

52. On or about June 4, 2014, the EEOC issued a Right to Sue Letter to Plaintiff providing Plaintiff with the right to file a lawsuit in federal or state court within ninety (90) days of the receipt of the letter.

53. On or about July 5, 2014, Plaintiff applied with Securitas to work as a law enforcement officer at the Kahului Airport. Plaintiff has completed all requirements to be hired, with the exception of the background check. Plaintiff has been informed that once Securitas receives the background check clearance, he will commence work for Securitas. Based upon his employment with Securitas, Plaintiff's duties include operating a motor vehicle, carrying a firearm and enforcing the law.

COUNT I

(Disability Discrimination in Violation of § 378-2 of the Hawaii Revised Statutes)

54. Plaintiff realleges and incorporates by reference the allegations in the above paragraphs, as if restated herein in their entirety.

55. The practices and policies described above are part of a pattern and practice of disability discrimination utilized by the Defendants and constitute a violation of § 378-2 of the Hawaii Revised Statutes in that Defendants discriminated against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employee, employee compensation, job training, and other terms, conditions, and privileges of employment and such acts were interdictions of that statute against hiring, limiting, classifying, segregating, or discharging employees on the basis of disability.

56. The aforementioned acts and/or conduct of Defendants entitle Plaintiff to damages as provided by law. As a direct and proximate result of said unlawful employment practices Plaintiff has suffered extreme mental anguish, outrage, depression, great humiliation, severe anxiety about his future and his ability to support himself, as well as painful embarrassment among his relatives and friends, damage to his good reputation, disruption of his personal life, loss of enjoyment of the ordinary pleasures of everyday life, loss of income, loss of retirement benefits, and other special and general damages in an amount which meets the minimal jurisdictional limits of this Court.

57. Plaintiff has sustained damages due to Defendants' aforementioned acts and/or conduct in an amount to be shown at trial.

COUNT II
(Intentional Infliction of Emotional Distress)

58. Plaintiff realleges and incorporates by reference the allegations in the above paragraphs, as if restated herein in their entirety.

59. Defendants' treatment of Plaintiff, as aforesaid, constitutes extreme and outrageous behavior which exceeds all bounds usually tolerated by decent society. Defendants' actions and omissions were done with malice and/or with the intent to cause, and/or with the knowledge that it would cause, severe mental distress to Plaintiff.

60. As a direct and proximate result of Defendants' wrongful, unlawful, and illegal acts and/or omissions, Plaintiff suffered and continues to suffer emotional and/or mental distress, thereby entitling him to relief related thereto in an amount to be proven at trial.

COUNT III
(Punitive Damages Against Defendant Yabuta, Individually)


61. Plaintiff realleges and incorporates by reference the allegations in the above paragraphs, as if restated herein in their entirety.

62. Defendant Yabuta's treatment of Plaintiff, as aforesaid, constitutes extreme and outrageous behavior which exceeds all bounds usually tolerated by decent society. In committing the above acts and omissions, Defendant Yabuta acted wantonly and/or oppressively and/or with such malice as implies a spirit of mischief or criminal indifference to civil obligations and/or there has been some willful misconduct that demonstrates that entire want of care which would raise the presumption of a conscious indifference to consequences, justifying an award of punitive or exemplary damages in an amount to be proven at trial.

WHEREFORE, Plaintiff prays that judgment be entered in his favor against all Defendants, jointly and severally, as follows:

- A. For general damages, in an amount to be proven at trial;
- B. For special damages, in an amount to be proven at trial;
- C. For punitive damages, in an amount to be proven at trial;
- D. For reimbursement of attorneys' fees and costs;
- E. For prejudgment and post-judgment interest; and
- F. For such further relief as the Court deems appropriate, just and equitable under the circumstances.

DATED: Honolulu, Hawaii, August 1, 2014.



MATSON F. KELLEY
JON S. JACOBS
Attorneys for Plaintiff
DUKIE J. RACADIO

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

DUKIE J. RACADIO

Plaintiff,

vs.

COUNTY OF MAUI; GARY YABUTA;
JOHN DOES 1-10; JANE DOES 1-10; DOE
CORPORATIONS 1-10; DOE
PARTNERSHIPS 1-10; DOE ENTITIES 1-10,

Defendants.

) CIVIL NO.
) (OTHER CIVIL ACTION)

) **DEMAND FOR TRIAL BY JURY**

DEMAND FOR TRIAL BY JURY

Comes now Plaintiff, by and through his undersigned attorneys, and hereby demands trial by jury on all issues.

Dated at Wailuku, Maui, Hawai'i, August 1, 2014.



MATSON KELLEY
JON S. JACOBS
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

DUKIE J. RACADIO

Plaintiff,

vs.

COUNTY OF MAUI; GARY YABUTA;
JOHN DOES 1-10; JANE DOES 1-10; DOE
CORPORATIONS 1-10; DOE
PARTNERSHIPS 1-10; DOE ENTITIES 1-10,

Defendants.

) CIVIL NO.
) (OTHER CIVIL ACTION)

) **SUMMONS**

SUMMONS

To the Named Defendant:

You are hereby summoned and required file with the court and serve upon the Law Office of Matson Kelley, whose address is 24 N. Church Street, Suite 202, Wailuku, Maui, Hawaii 96793, an answer to the Complaint which is attached. This action must be taken within 20 days after service of this summons upon you, exclusive of the day of service.

If you fail to make your answer within the twenty day time limit, judgment by default will be taken against you for the relief demanded in the complaint.

If you fail to obey this summons this may result in an entry of default and default judgment.

Pursuant to Rule 4(b) of the Hawaii Rules of Civil Procedure, this summons shall not be delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the District or Circuit courts permits, in writing on the summons, personal delivery during those hours.

DATED: Wailuku, Maui, Hawaii AUG - 1 2014.

/sgd/ D. MORIOKA (seal)

CLERK OF THE ABOVE-ENTITLED COURT