



**SUBJECT TO RULE 408 OF THE FEDERAL RULES OF EVIDENCE
AND THE HAWAII RULES OF EVIDENCE**

April 12, 2019

Via U.S. Postal Mail &
Email (jtr@frlawhi.com)

Joseph T. Rosenbaum, Esq.
Fujiwara & Rosenbaum, LLLC
1100 Alakea Street, Floor 20, Suite B
Honolulu, HI 96813

Re: Mr. Scott Goold

Dear Joe:

Hawaiian Electric Company, Inc. ("Hawaiian Electric" or the "Company") is in receipt of your letter, dated March 25, 2019, which requests that the Company reconsider its rescission of the conditional offer of employment to (also known as Mr. Scott Goold) due to his confirmed positive drug test. Thank you for the additional time to consider and respond to your request.

At the outset, we do not agree with the conclusion that Hawaiian Electric violated the disability discrimination law. Such conclusion is based on substantial factual and legal errors contained in the commentary of your letter, which need to be corrected before any meaningful settlement discussion can take place.

Hawaiian Electric has a strong commitment to maintaining a non-discriminatory working environment. Hawaiian Electric also has a vital interest in ensuring a safe working environment for all employees, including the prevention of possible accidents and injuries resulting from the potential misuse of alcohol and drugs. The unlawful or improper presence or use of drugs or alcohol in the workplace presents a danger to everyone.

In this respect, Hawaiian Electric maintains a drug-free workplace policy and requires all applicants to whom Hawaiian Electric has given a conditional offer of employment to submit to a pre-employment drug test and receive a negative result as a condition of employment. Any applicant who received a confirmed positive drug test result will be ineligible for employment with Hawaiian Electric. Consistent with Hawaiian Electric's established process, Mr. Goold was offered the position of Database Analyst, conditioned upon his negative drug test. Mr. Goold, however, did not pass his drug test. Upon receiving the confirmed positive test and consistent with the express terms of Mr. Goold's conditional offer, Hawaiian Electric rescinded the conditional offer of employment to Mr. Goold.

We questioned the validity of Mr. Goold's assertion that he informed the Company's HR Service Center Representative, Ms. Elizabeth Deer, of his disability and his use of cannabis for his disability prior to his drug test.¹ Ms. Deer's responsibility in the pre-employment process was to schedule a date and time for the drug screen and communicate such appointment to the applicant. Indeed, even if, assuming *arguendo*, that Mr. Goold did tell Ms. Deer of his asserted disability, Mr. Goold admitted that Ms. Deer

¹ We further questioned the accuracy of Mr. Goold's summary of his conversation with Ms. Shana Bucu, the Company's HR Business Partner, and the events that transpired. However, for purposes of this letter, we do not deem it necessary to delve into the particulars of the factual errors.

did not inform “her superiors, including Ms. Bucu,” the Company’s HR Business Partner, of his medical use of cannabis. In this respect, Hawaiian Electric could not have been motivated to rescind Mr. Goold’s job offer because of his “disability and related medical issues” or his use of cannabis for medicinal purpose, as Mr. Goold so claimed. It is undisputed that Hawaiian Electric was not aware of Mr. Goold’s asserted disability and related medical issues at any time before the decision to rescind was made. Rather, as discussed above, Mr. Goold received a positive drug test and, in accordance with the Company drug-free workplace policy and as consistently enforced with all applicants testing positive, Mr. Goold was no longer eligible to work at Hawaiian Electric.

Mr. Goold, therefore, was not discriminated against because of his asserted disability. The Hawaii Supreme Court has declared that, because the Hawaii statute and Hawaii Administrative Rules (“HAR”) prohibiting discrimination based on disability are textually similar to the Americans with Disabilities Act (“ADA”), it adopted the analysis for establishing *prima facie* case of disability discrimination under Hawaii Revised Statutes (“HRS”) § 378-2 that was established in Sutton v. United Air Lines, Inc., 527 U.S. 417 (1999). French v. Hawaii Pizza Hut, Inc., 105 Hawaii 462, 467, 99 P.3d 1046, 1051 (2004). Specifically, to establish a *prima facie* case of disability discrimination,

a plaintiff has the burden of establishing that: (1) he or she is an individual with a “disability” within the meaning of the statute; (2) he or she is otherwise qualified to perform the essential duties of his or her job with or without reasonable accommodation; and (3) he or she suffered an adverse employment decision **because of his or her disability.**

Id. (citation omitted) (emphasis added). There must be a causal link between Mr. Goold’s asserted disability and the adverse employment action, *i.e.*, the rescission of the offer of employment. There is no such link in this case and Mr. Goold cannot prove otherwise. Mr. Goold cannot deny that Hawaiian Electric withdrew its offer because he tested positive for cannabis, which reflected his use of cannabis. Mr. Goold will not be able to demonstrate that his employment offer was rescinded because of his asserted disability, which was never disclosed to Hawaiian Electric.

Moreover, Hawaiian Electric is not legally obligated to engage in the interactive process, even if Mr. Goold informed the Company of his qualified status as a medical cannabis user. As discussed above, Hawaii courts have determined that, because of the textual similarity between the ADA and Hawaii statutes and HAR prohibiting disability discrimination, they look “to the federal courts’ interpretation of the ADA for guidance.” Suzuki v. State, 119 Hawaii 288, 297-98, 196 P.3d 290, 299-300 (App. 2008); French, 105 Hawaii at 476, 99 P.3d at 1051. Like the ADA, the HAR relating to disability discrimination, promulgated to implement HRS Chapter 378, provides that the protection of the discrimination statute does not apply to persons who are currently engaged in the illegal use of drugs. HAR § 12-46-19. The federal Controlled Substances Act prohibits the possession of marijuana without regard to whether it is used for medicinal purposes. It follows that interpreting Hawaii disability discrimination law consistent with the ADA, Hawaii disability discrimination law also does not apply to persons who are currently engaged in the use of medical marijuana. Indeed, nothing in Part IX of HRS Chapter 329 (Medical Use of Cannabis), which you conveniently did not mention in your letter, requires an accommodation for the medical use of cannabis or limit the range of allowable private employment actions. The legislature could have very well provided employment protection for qualified medical cannabis users, just as it carved out protection against prosecution involving cannabis and searches and seizures pertaining to the misapplication of the medical use of cannabis. HRS § 329-125. It did not. Other courts have found that their similar state medical marijuana laws do not regulate private employment action. See Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir. 2012) (Michigan Medical

Marihuana Act (MMMA) did not restrict private employer's ability to discipline employee for medical marijuana use, and thus, could not support wrongful discharge claim – its law only afforded defense against criminal prosecution and did not expressly refer to employment); Roe v. TeleTech Customer Care Mgmt., LLC, 216 P.3d 1055 (Wash. App. 2009) (“[I]t is unlikely that voters intended to create such a sweeping change to current employment practices [under the Medical Use of Marijuana Act].”); Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008) (“Nothing in the text or history of the Compassionate Use Act [California's medical marijuana law] suggests the voters intended the measure to address the respective rights and duties of employers and employees.”). Hawaiian Electric, therefore, was under no legal obligation to make an exception to its drug-free workplace policy for Mr. Goold, regardless of his medical cannabis prescription.

Based on the foregoing, we are unconvinced that Mr. Goold will be able to prevail on his discrimination claims against Hawaiian Electric.

However, this letter is made in the spirit of compromise and settlement. Nothing in this letter is intended to be an admission of any fact or other matter and is made pursuant to Rule 408 HRE and FRE.

Hawaiian Electric is willing to re-offer Mr. Goold the position of Database Analyst, under the same terms and conditions as discussed in his offer letter, dated February 11, 2019, provided that Mr. Goold agrees to the following additional terms and conditions:

1. Per his request and before he can commence work with the Company, Mr. Goold will be provided the opportunity to obtain an alternative medication so that he is no longer using cannabis.
2. Mr. Goold must re-take and pass a drug test prior to his first day of work with the Company. This drug test shall include but not be limited to testing for cannabis and its components. Mr. Goold will be allowed not more than ninety (90) calendar days to provide a negative drug test result from the execution of this agreement. During this 90-day period, Mr. Goold is required to provide a drug test result every thirty (30) calendar days from the execution of this agreement showing that the amount of cannabis and its components are decreasing with each test. Testing shall be administered at a Company approved facility and the cost of the tests shall be at Mr. Goold's expense. Failure to provide the negative drug test or a result of the drug test showing the decreasing of cannabis and its components within the prescribed time period will result in permanent rescission of the offer of employment.
3. For a period of twelve (12) months from his first day of work with the Company, Mr. Goold will be subject up to four (4) unannounced drug tests, at any date and time (during Mr. Goold's regular work hours) determined in the Company's sole discretion. A positive test result will be grounds for immediate termination of employment, notwithstanding the violation disciplines set forth in the Company's Substance Abuse Policies and Procedures and regardless in any change in laws relating to the use of medically prescribed marijuana unless such law is expressly made retrospective to existing contracts previously executed.
4. Mr. Goold, his heirs, assigns and personal representatives (the “Releasing Parties”) agree to forever release, without any condition, any and all claims, whether known or unknown, from the beginning of time to the date of this Agreement, that they may have against Hawaiian Electric, its officers, directors, agents, employees, representatives, insurers, including any parent, subsidiaries and affiliated entities and all of their respective heirs and/or assigns (the “Released

Parties"). This includes but shall not be limited to any and all claims asserted and/or alluded to in communications with Hawaiian Electric (including your letter dated March 25, 2019) and any and all claims under any state, federal or local law arising out of and/or related to Mr. Goold's offer of employment and rescission of such offer.

5. Should Mr. Goold be terminated from employment as of result of his positive test or a breach of this Agreement, Mr. Goold shall not reapply to Hawaiian Electric for employment and shall not, individually and/or with any other person(s) and/or entity(ies) and/or in any way, file and/or otherwise commence, join, assist, prosecute, encourage, cause or permit any lawsuits, actions, claims, demands, and/or other proceeding against the Released Parties arising out of, involving and/or related to events, occurrences, and/or transactions predating the date of his termination from employment.
6. The Released Parties do not admit any wrongdoing and specifically deny any wrongdoing.
7. Mr. Goold also will not disclose, orally or in writing, directly or indirectly, the terms of settlement with Hawaiian Electric or the terms of this Agreement. Mr. Goold may make such disclosure to his attorneys and/or as required by any court subpoena or court order. In the event of a breach under the terms of this provision, such a breach shall be considered a material breach for which Mr. Goold agrees there is no adequate remedy at law and Hawaiian Electric shall be entitled to terminate Mr. Goold's employment and may seek temporary and permanent injunctive relief together with damages and recovery of its attorneys' fees and costs.
8. As an employee of the Company, Mr. Goold agrees to perform his work and responsibilities in a satisfactory manner and abide by all policies and procedures of the Company, as adopted and revised by the Company from time to time, including but not limited to the Corporate Code of Conduct, Substance Abuse Policies and Procedures, and Social Media Policy.
9. Nothing in this Agreement may be used to justify interfering with Mr. Goold's protected rights (e.g., to file a charge or to participate in an investigation or proceeding conducted by any federal, state or local governmental agency); however, the Releasing Parties agree to waive and shall waive any remedy that may be awarded and the amounts paid herein shall be considered an advance on any awards.
10. Nothing in this Agreement is intended or should it be considered as an employment contract for a definite or indefinite period of time. Mr. Goold understands that the offer of employment is for at-will employment.
11. This Agreement contains the entire understanding of the parties hereto, and fully supersedes any and all prior agreements or understandings pertaining to the subject matter of this Agreement. In the event any provision of this Agreement is found to be unlawful, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement and the court/arbitrator may revise the offending provision and enforce the remaining provisions, that it deems valid.
12. This Agreement is entered into and shall be governed by, enforced in, and interpreted under the laws of the State of Hawaii. In the event of a dispute or breach of any of the terms of this letter, the parties agree to arbitrate any such disagreement in Honolulu, Hawaii, pursuant to the

existing arbitration rules and procedures of Dispute Prevention and Resolution, Inc. ("DPR"). The parties agree to use the Arbitrator selection procedures set forth by DPR, and as provided for by the Federal Arbitration Act.

13. This Agreement may be executed in two or more counterparts, or by e-mail/facsimile, and any set of counterparts, which is collectively executed by all the parties, shall be sufficient proof of the Agreement.
14. Once this Agreement is fully executed and accepted, the parties agree that the terms of the Agreement are enforceable and that each party will be responsible for paying its own attorneys' fees and costs.

The above offer will expire unless accepted in writing and received by our office on or before **Monday, April 22, 2019 at 4:00 p.m. HST.**

Thank you for your prompt attention to this matter. We look forward to hearing from you soon.

Sincerely,



Thao T. Tran
Sr. Associate General Counsel

UNDERSTOOD AND AGREED:

APPROVED AS TO FORM:

JEFFREY SCOTT GOOLD
(also known as SCOTT GOOLD)

JOSEPH T. ROSENBAUM, ESQ.

Date:

Date:

UNDERSTOOD AND AGREED:

HAWAIIAN ELECTRIC COMPANY, INC.

By: Susan Li
Its: Sr. Vice President, General Counsel, Chief Compliance
& Administrative Officer & Corporate Secretary

Date: