NO. 26308

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

KITTY K. KAMAKA, Plaintiff-Appellant/Cross-Appellee,

vs.

GOODSILL ANDERSON QUINN & STIFEL, a Law Corporation, Defendant-Appellee/Cross-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 97-4007)

ORDER GRANTING DEFENDANT-APPELLEE/CROSS-APPELLANT GOODSILL ANDERSON QUINN & STIFEL'S "MOTION FOR CLARIFICATION" AND AMENDING THE JANUARY 24, 2008 OPINION OF THE COURT
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.; Circuit Judge Wong, in place of Acoba, J., recused)

Upon consideration of defendant-appellee/cross-appellant Goodsill Anderson Quinn & Stifel's "Motion for Clarification," brought pursuant to Hawai'i Rules of Appellate Procedure Rule 40 (2007), which we deem as a motion for reconsideration, the papers in support thereof, and the record herein,

IT IS HEREBY ORDERED that the motion is granted and the opinion of the court in the above-captioned matter, filed January 24, 2008, starting at page 29, is amended as follows (deleted text is stricken; new language is double-underscored):

> However, Goodsill, in moving to dismiss, argued that "an employee is barred by the exclusivity provision of [Hawaii's workers' compensation law, HRS §] 386-5 [(1993),] from asserting claims for negligence against his or her employer." HRS § 386-5, entitled "Exclusiveness or right to compensation; exception[,]" (bold emphasis omitted), provides in pertinent part:

> ~~**Exclusiveness of right to compensation; exception.**~~ The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury[fn18] suffered by the employee shall exclude all other liability of the employer to the employee . . . at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy **related thereto**, in which case a civil action may also be brought.
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> ~~(Bold emphasis in original.) (Underscored e~~Emphases added.) Based on a plain reading, HRS § 386-5 unambiguously provides that claims for infliction of emotional distress or invasion of privacy are not subject to the exclusivity provision when such claims arise from claims for sexual harassment or sexual assault, in which case a civil action may be brought. Inasmuch as Kamaka has alleged a claim for emotional distress that does **not** arise out of sexual harassment or sexual assault, such claim is, pursuant to HRS § 386-5, ~~not~~ barred. ~~Goodsill, however, further asserts that it "did not owe [Kamaka] a duty to investigate, much less investigate carefully, her fraudulent timekeeping prior to terminating her employment." See Bhakta v. County of Maui, 109 Hawai'i 198, 212, 124 P.3d 943, 956 (2005) (stating that "[d]uty is the first of the four well-established elements of a claim for relief founded on negligence").~~
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> Nevertheless, ~~On appeal,~~ Kamaka also contends on appeal that (1) Goodsill was not acting in its capacity as her employer when it investigated; therefore, the workers' compensation exclusivity rules did not apply and, (2) once an investigation is commenced, the at-will doctrine is inapplicable and an investigating employer owes a duty of care in the conduct of that investigation.

The Clerk of the Court is directed to incorporate the foregoing changes in the original opinion by removing pages 29 through 34 and replacing them with the pages attached hereto and take all necessary steps to notify the publishing agencies of these changes.

DATED: Honolulu, Hawai'i, February 14, 2008.

Lindalee K. (Cissy) Farm and Edmund K. Saffery (of Goodsill Anderson Quinn & Stifel), for defendant-appellee/cross-appellant, on the motion

HRS § 386-3 (1993) provides in relevant part:

> If an employee suffers personal injury either by accident arising out of and in the course of the employment . . . , the employee's employer . . . shall pay compensation to the employee . . . as hereinafter provided.
>
> Accident arising out of and in the course of the employment includes the wilful act of a third person directed against an employee because of the employee's employment.

However, Goodsill, in moving to dismiss, argued that "an employee is barred by the exclusivity provision of [Hawaii's workers' compensation law, HRS §] 386-5 [(1993),] from asserting claims for negligence against his or her employer." HRS § 386-5, entitled "Exclusiveness or right to compensation; exception[,]" (bold emphasis omitted), provides in pertinent part:

> The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury[18] suffered by the employee shall exclude all other liability of the employer to the employee . . . at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy **related thereto**, in which case a civil action may also be brought.

(Emphases added.) Based on a plain reading, HRS § 386-5 unambiguously provides that claims for infliction of emotional distress or invasion of privacy are not subject to the exclusivity provision when such claims arise from claims for sexual harassment or sexual assault, in which case a civil action may be brought. Inasmuch as Kamaka has alleged a claim for emotional distress that does not arise out of sexual harassment

[18] HRS § 386-1 (1993) defines "work injury" as a "personal injury suffered under the conditions specified in specified in section 186-3[,]" quoted supra.

or sexual assault, such claim is, pursuant to HRS § 386-5, barred.

Nevertheless, Kamaka also contends on appeal that (1) Goodsill was not acting in its capacity as her employer when it investigated; therefore, the workers' compensation exclusivity rules did not apply and, (2) once an investigation is commenced, the at-will doctrine is inapplicable and an investigating employer owes a duty of care in the conduct of that investigation. In support of her position, Kamaka urges this court to adopt the "dual persona" doctrine and points to a Massachusetts case that explains the doctrine:

> The dual persona theory provides that an employer may be regarded as a third party and thus be subject to suit, if the employer's liability to the injured employee derives from a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person. The relevant inquiry in a dual persona allegation is not whether a separate theory of liability could be argued against the same legal person, but rather whether the controversy involves a separate legal entity.

Barrett v. Rodgers, 562 N.E.2d 480, 482 (Mass. 1990) (citations omitted). In Barrett, an employee was injured when attacked by his employer's dog during the course of his employment. Id. After receiving workers' compensation benefits, the injured employee attempted to, despite the prohibitions in the Massachusetts workers' compensation laws, maintain a separate tort action against the employer as the owner of the dog, despite the prohibitions in the Massachusetts workers' compensation laws, by invoking the "dual persona" doctrine. Id. In declining to

adopt the doctrine, the Massachusetts Supreme Judicial Court held that the employee was not entitled to maintain the suit, reasoning that the employer was a single legal entity because his obligations as a dog owner were related to his obligations as an employer to provide a safe working environment. Id. at 482-83.

Kamaka theorizes that Goodsill had a "dual persona" -- a legal entity as her employer and a separate legal entity as attorneys. Because Goodsill was acting under its attorney-persona when it negligently investigated her and not as her employer, Kamaka submits that Goodsill is precluded from asserting the workers' compensation immunity defense. We disagree.

Similar to the employer in Barrett, Goodsill's obligations as attorneys were related to its obligations as a law firm to protect its clients from unscrupulous employees engaging in unethical billing practices. As Goodsill points out, "the [HRPC] expressly requires law firm partners to take such remedial actions in their capacity as 'employers' and 'supervisors' of associate attorneys. See HRPC [Rules] 5.1 [and 8.3(a) (2005)]."[19] Therefore, even if this court were to recognize and

[19] HRPC Rules 5.1 and 8.3(a) and commentary state:

> Rule 5.1. RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER.
> (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.
> (b) A lawyer having direct supervisory authority over

(continued...)

apply the "dual persona" doctrine, there was no "separate legal entity" conducting the investigation of Kamaka's billing practices.

Kamaka further argues that "Goodsill took the position that it was acting in its capacity (and claiming immunity) as lawyers and not as her employer. [Therefore, t]he 'dual persona'

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[19](...continued)
another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.
(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT: [1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

Rule 8.3. REPORTING PROFESSIONAL MISCONDUCT.
(a) A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

COMMENT: [1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

doctrine (as well as Rosa v. CWJ Contractors, Ltd. [(relating to judicial estoppel[20])]) precludes Goodsill's inconsistent defense of immunity [under HRS § 386-5] as [an] employer." Goodsill answers that, under the HRPC, its role as both attorneys and an employer was not inconsistent. We agree with Goodsill. The commentary to HRPC Rule 5.1, quoted supra note 19, specifically imposes the responsibilities of supervising attorneys to a "law firm organized as a professional corporation." A law firm, faced with allegations of fraudulent billing practices by one of its associates, has both a duty to the affected-client and related duties to the profession: (1) the client's account must be examined for any billing irregularities; (2) reasonable remedial action must be taken; and (3) pursuant to HRPC Rule 8.3(a), should this process raise "a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects," the law firm "shall inform the appropriate professional authority." Without an examination of the clients' accounts, which Kamaka alleges constituted the negligent

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[20] In a footnote to the reference to the Rosa case, Kamaka states her entire judicial estoppel argument as follows:

> "This [judicial estoppel] preclusion estops a party from assuming inconsistent positions in the course of the same judicial proceeding." Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 219, 664 P.2d 745, 752 [(1983)] (citations omitted).

Although Kamaka bears the burden of showing error in the trial court's decision, see Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995), she provides no analysis in support of her position that judicial estoppel precludes Goodsill from claiming immunity under HRS § 386-5. We, therefore, disregard her judicial estoppel argument.

investigation, billing irregularities, if any, cannot be corrected. By the same token, without an examination of the clients' accounts, the law firm cannot determine what appropriate remedial action, if any, is required under the HRPC. Therefore, Goodsill's duty as an employer was consistent with its duties as a law firm, i.e., as attorneys.

Kamaka also contends that, once an investigation is commenced, the at-will doctrine is inapplicable and an investigating employer owes a duty of care in the conduct of that investigation. Specifically, Kamaka argues:

> The at-will doctrine is inapplicable because[:] (1) once Goodsill began an investigation, the authorities hold Goodsill to a duty to use reasonable care in conducting its investigation; (2) Goodsill had a policy of probation; and (3) this case falls within the recognized public policy exception relating to violations of professional ethical rules [(citing, in a footnote, to Smith v. Chaney Brooks Realty, Inc., 10 Haw. App. 250, 256-58, 865 P.2d 170, 173-74 (1994))].
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> If Kamaka were at-will, once Goodsill went forward with its investigation, the law imposes a duty of care. [Hawaii]'s public policy on the conduct of lawyers is comprehended by the [HRPC]. Goodsill's termination of Kamaka was in conjunction with, and preceded by the intent, and for the purpose, [sic] of violating and abusing these rules. Goodsill obstructed Kamaka from being able to get evidence in her own defense. Its counsel, knowing that Goodsill was an adversary to Kamaka, failed to disclose his own capacity, or to advise her to obtain counsel. [HRPC] Rule 4.3. Its supervising partners failed to oversee [sic], rather, encouraged deceitful, overzealous efforts by associates to harass and intimidate Kamaka. It offered a narrow group of negative evidence procured through a biased process, while suppressing broad categories of favorable and exculpatory evidence. These ethical violations create an exception to the at-will rule.

(Citations to the record omitted.) With regard to Kamaka's bare citation to Smith, Goodsill notes that, although Kamaka "cites [to Smith], this case does not address the standard of care during an investigation into an employee's misconduct. This case