



## **WRITTEN TESTIMONY OF THE DEPARTMENT OF THE ATTORNEY GENERAL TWENTY-EIGHTH LEGISLATURE, 2015**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 0896, H.D. 1, S.D. 1, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

**BEFORE THE:**

SENATE COMMITTEE ON WAYS AND MEANS

**DATE:** Monday, March 30, 2015

**TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Room 211

**TESTIFIER(S):** WRITTEN TESTIMONY ONLY, for more information contact  
Caron M. Inagaki, Deputy Attorney General, at 586-1300

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Chair Tokuda and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to seek an appropriation to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

The bill contains twenty-nine (29) claims that total \$3,019,875.92. Twenty-six claims are general fund appropriation requests that total \$2,851,336.59 and three (3) claims are appropriation requests from departmental funds that total \$168,539.33. Attachment A provides a brief description of each claim in the bill.

The Department has had a longstanding policy of advising agencies as to how to avoid claims such as those in this bill. The Department has also complied with section 37-77.5, Hawaii Revised Statutes, which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

We respectfully request passage of this bill as is; however, the Department anticipates settling additional claims prior to the meeting of the Conference Committee. If that is the case, the Department will seek to amend the bill at that time.

Thank you for the opportunity to submit this written testimony.

## ATTACHMENT “A”

### DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES:

**American Civil Liberties Union of Hawaii and  
Pamela G. Lichty v. Dean H. Seki  
Civil No. 14-00150 JMS-RLP, USDC**

**\$ 12,401.00 (General Fund)  
Settlement**

The ACLU of Hawaii filed suit in federal court against the Department of Accounting and General Services (DAGS) Comptroller alleging that DAGS’ administrative rules and procedures adversely affected the public’s right to conduct expressive activities on DAGS’ facilities. The parties agreed to settle the case with DAGS amending its administrative rules and procedures to clarify that expressive activities are permitted on DAGS’ facilities. DAGS also agreed to pay the ACLU \$12,401 for attorneys’ fees and costs in connection with the lawsuit.

### DEPARTMENT OF THE ATTORNEY GENERAL:

**Fotoudis v. City and County of Honolulu, et al.  
Civil No. 14-00333, USDC**

**\$ 7,250.00 (General Fund)  
Settlement**

The Plaintiff is a permanent resident alien who was not allowed by the Honolulu Police Department (HPD) to apply for a permit to acquire a firearm. In denying Plaintiff the opportunity to apply, HPD was following section 134-2(d), Hawaii Revised Statutes, which allows only U.S. citizens to apply for permits to acquire firearms. The Plaintiff challenged the constitutionality of the statute. The federal court judge ruled that the statute violated the Plaintiff’s rights under the Second and Fourteenth Amendments to the U.S. Constitution, and that his attorney was entitled to an award of attorney’s fees as the prevailing party. The State settled the attorney’s fees for \$7,250.00. Also, following the court’s ruling, HPD has agreed to allow permanent resident aliens to apply for permits to acquire a firearm. The Department has two bills to amend section 134-2(d), H.B. No. 902, Relating to Firearms and S.B. No. 1071, Relating to Firearms.

### DEPARTMENT OF EDUCATION:

**Fukuda v. Department of Education, et al.  
Civil No. 12-1-200507, First Circuit**

**\$ 80,000.00 (General Fund)  
Settlement**

In 2011, Plaintiff, an employee of the Department of Education, was terminated for a violation of the department’s workplace violence policy. Shortly after his termination the United Public Workers filed a grievance on his behalf challenging the discharge. In 2013, after a thorough evidentiary proceeding, Plaintiff’s termination was reversed by an arbitrator who reinstated him back into his position. Plaintiff filed this action asserting that he was wrongfully terminated.

**Kahiapo, et al. v. State of Hawaii, et al.  
Civil No. 11-1-2685-11, First Circuit**

**\$ 30,000.00 (General Fund)  
Settlement**

Plaintiff was a special education student at Kailua High School. To counteract his self-stimulating behaviors from autism, he was regularly required to exercise on a treadmill and

perform other physical exercises. In an attempt to counteract his extreme behaviors, he was required to perform several physical exercises in addition to his normal routine. These exercises increased in intensity, number, and variety, caused him to faint from hypoglycemia and dehydration. The school health aide was not summoned for assistance. When his mother came to pick him up from school, an ambulance was called and he was taken to Castle Medical Center. The student had a shunt put in his head. Plaintiffs allege that this incident and the student's medical treatment caused the student and his parents' emotional trauma.

**Lee-Vith, et al. v. Department of Education, et al.**  
**Civil No. 12-1-2443-09, First Circuit**

**\$ 13,500.00 (General Fund)**  
**Settlement**

Plaintiffs were employed by the Department of Education ("DOE") at Mililani High School ("MHS") during School Year ("SY") 2011-2012. Plaintiffs were employed as casual hires by the DOE and worked in the MHS cafeteria on an as-needed basis. Plaintiffs allege they were retaliated against when they were not employed as casual hires at MHS for SY 2012-2013, after they brought complaints (alcohol consumption on and off school premises, and falsification of payroll for a substitute employee) to the MHS administration and the DOE administration about their supervisor, the MHS cafeteria manager.

As casual hires, Plaintiffs were not guaranteed employment for the following SY but were usually provided with a "reasonable assurance of employment" form notifying them they were in the "substitute" pool of cafeteria workers for MHS. Plaintiffs claim they were not verbally informed or provided a "reasonable assurance of employment" form for SY 2012-2013 after complaining about the cafeteria manager.

Plaintiffs filed a Complaint against the DOE alleging the following: (1) violation of the Hawaii Whistleblower Protection Act ("HWPA"), section 378-62, Hawaii Revised Statutes; (2) Unjust Enrichment; (3) Breach of Contract; (4) Intentional Interference with Economic Advantage; (5) Retaliation in Violation of Public Policy in the Workplace; and (6) Intentional Infliction of Emotional Distress. All claims except the HWPA and Retaliation in Violation of Public Policy claims were dismissed by the Court.

**Nishi v. Board of Education, et al.**  
**Civil No. 14-1-1295-06, First Circuit**

**\$325,000.00 (General Fund)**  
**Settlement**

This case involves an agency appeal from the Board of Education's ("BOE") decision to reinstate Appellant Nishi ("Nishi") to his former position as Personnel Regional Officer ("PRO") for the Department of Education ("DOE") on Hawaii Island. Nishi was discharged from his position by the DOE on December 1, 2008. Nishi contested the discharge through the DOE's internal grievance process (applicable to excluded management) and a hearings officer was appointed by the DOE. Nishi claims the hearings officer granted his appeal, reinstated him, and issued a decision, but the DOE never received the decision. However, that hearings officer was then replaced (as she was no longer employed by the DOE) by a second hearings officer, who upheld the discharge. The BOE, as the final step in the internal process, upheld the DOE's discharge.

In late November 2010, Nishi filed an agency appeal with the Circuit Court pursuant to section 91-14, Hawaii Revised Statutes. The Court granted the appeal, reversed the discharge and ordered Nishi reinstated with back pay and benefits. The DOE appealed the decision to the

Intermediate Court of Appeals (“ICA”) and in May 2013, the ICA vacated the Court’s judgment, remanding the case to the Circuit Court with instructions that the case be remanded to the BOE.

On May 8, 2014, after remand by the Circuit Court, the BOE reversed the DOE’s decision to discharge Nishi and reinstated him. However, the BOE’s decision did not address the issue of back pay. On June 4, 2014, Nishi filed an agency appeal (Civil No. 14-1-1295-06) to the Circuit Court appealing the BOE’s decision to reinstate him without any compensation, including back pay or other benefits. The agency appeal is currently being held in abeyance pending the parties attempt to settle the case.

**OFFICE OF THE GOVERNOR:**

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| <b>Oahu Publications, Inc., dba The Honolulu Advertiser v. Abercrombie, SCWC-13-0000127, CAAP-13-0000127, Civil No. 11-1-1871-08, First Circuit</b> | <b>\$ 45,000.00 (General Fund)<br/>Settlement</b> |
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The appropriation is sought to resolve all remaining claims for fees and costs asserted by the Star-Advertiser incurred in connection with its suit to require the Governor to disclose the names of all nominees included in the list received from the Judicial Selection Commission after he appoints one of the nominees to fill a judicial vacancy.

Fees previously awarded to the Star-Advertiser’s counsel by the circuit court and affirmed by the Intermediate Court of Appeals were paid by an appropriation in Act 80, Session Laws of Hawaii 2014. However, claims for more than \$55,900.00 along with the additional costs of resolving them, were still outstanding. Payment of the \$45,000 is sought to settle these outstanding differences to obviate having to incur additional costs to resolve them in the courts. There is no dispute that the Star-Advertiser is entitled to recover its reasonable fees and costs; how much that amounts to would be litigated if the request for appropriation is rejected.

**HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND:**

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|-----------------------------------------------------------------|---------------------------------------------------|
| <b>In the Matter of Dr. Morton Cotlar<br/>Case No. 2014-001</b> | <b>\$ 30,589.00 (General Fund)<br/>Settlement</b> |
|-----------------------------------------------------------------|---------------------------------------------------|

Dr. Morton Cotlar (“Petitioner”) is a retired University of Hawai’i professor who requested to enroll his domestic partner in Hawaii Employer-Union Health Benefits Trust Fund (EUTF) coverage. Upon review of Petitioner’s file, EUTF informed him that his domestic partner was ineligible for EUTF coverage because Petitioner had a wife currently enrolled in EUTF’s plans. Petitioner responded that his wife passed away in 1996 and that he had notified EUTF of this fact. EUTF then sent Petitioner a letter demanding repayment of Medicare Part B reimbursements that were wrongly paid to Petitioner’s deceased wife. When Petitioner refused to pay EUTF the amount claimed, EUTF canceled Petitioner’s coverage entirely and stopped Medicare Part B reimbursements made to him. Petitioner appealed EUTF’s decision to the EUTF Board of Trustees, which sent the appeal to DCCA’s Office of Administrative Hearings. The Senior Hearings Officer scheduled an administrative hearing, but the parties reached a settlement before the hearing was held.

## DEPARTMENT OF HEALTH:

**Daligcon, et al. v. State of Hawaii, et al.**  
**Civil No. 12-1-1269-05, First Circuit**

**\$ 96,701.54** *(General Fund)*  
**Settlement**

Four developmentally disabled adult women claim they were raped in Plaintiffs' care home. All four women were removed from the care home. Plaintiffs claim that the removal of the four women was premature and improper. The case proceeded to trial, and the trial judge ruled against the State and awarded damages of \$71,660.69 plus attorneys' fees and costs. Judgment has not been entered. The settlement of \$96,701.54 represents damages plus costs.

**Rodriguez v. Onaka, et al.**  
**Civil No. 13-1-2207-08, First Circuit**

**\$ 5,728.85** *(General Fund)*  
**Judgment**

Plaintiff sought to have her birth certificate amended to reflect her correct biological father. Based on information not previously available to it, the Department of Health amended the birth certificate. Plaintiff then withdrew her pending motion for summary judgment and instead filed a claim for her fees and costs, which the court granted.

## DEPARTMENT OF HUMAN SERVICES:

**Alexander, et al. v. State of Hawaii, et al.**  
**Civil No. 11-1-0795-04, First Circuit**

**\$350,000.00** *(General Fund)*  
**Settlement**

This class action lawsuit for injunctive relief and damages was filed by the three named Plaintiffs who are residents of Mayor Wright Homes alleging breach of lease and breach of the implied warranty of habitability by Defendants, the Hawaii Public Housing Authority and its Executive Director. Plaintiffs' Motion for Class Certification on behalf of all residents of Mayor Wright Homes was denied by the Court, but was renewed after considerable discovery and settlement negotiations. Plaintiffs' initial complaints involved the physical condition of the premises, including the dwelling units, an inadequate supply of hot water, vermin infestation, water leaks from dilapidated plumbing and the generally deteriorated conditions of the 60-year-old buildings. An additional complaint focused on security at the project. During the pendency of the lawsuit, one of the Plaintiffs was evicted from housing for unrelated reasons. With the assistance of a mediator and the assigned settlement judge, settlement was reached on behalf of the remaining individual Plaintiffs on behalf of a class of residents in the total sum of \$350,000 inclusive of attorney's fees. Additionally the HPHA committed to continuing its ongoing project of renovating individual units until all are completed, certified to need no repairs, or the Mayor Wright Project is redeveloped.

**Costales v. Rosete, et al.**  
**Civil No. 07-1-2360-12, First Circuit**

**\$462,594.00** *(General Fund)*  
**Settlement**

The Plaintiff is a former ward who was housed at the Hawaii Youth Correctional Facility. She alleged that she was sexually assaulted by one of the guards in 2002. She brought suit against the guard, the facility administrators, and the State. This case was tried in 2009 and the jury awarded Plaintiff \$1,500,000. Appeals were taken to the ICA and to the Supreme Court. The appellate courts remanded for a new trial, limited to the allocation of fault and damages amongst

the Defendants. The claims against the facility administrators and the State were recently settled for \$462,594.00. The guard is proceeding pro se.

**Polm, et al. v. Department of Human Services, et al.**  
**Civil No. 11-1-0548-03, First Circuit**

**\$ 135,469.79** (General Fund)  
**Judgment**

A man killed his fourteen-month-old son in September 2009 during a period in which the family was under “family supervision” by the Department of Human Services. The case proceeded to trial, and the judge concluded that a Department of Human Services employee did not properly monitor the family.

#### **DEPARTMENT OF LAND AND NATURAL RESOURCES:**

**Tort Claim of Lisa M. Shamis**

**\$ 45,000.00** (General Fund)  
**Settlement**

Claimant was struck on the back of her head by a dead branch that snapped off a tree at the Manuka State Park on Hawaii Island. The tree branch was about 15 feet long, and weighed about 150 pounds. Claimant sustained a burst fracture at the T2 and T8 levels of her thoracic spine, a left comminuted scapula fracture and a sternum fracture. Claimant also sustained a degloving, 18 cm (approximately 7-inch) laceration to the back of her head. According to an orthopedic surgeon hired as a consultant by the State, the fractures to Claimant’s thoracic spine, scapula and sternum, were “high energy fractures,” caused by a forceful blow to her head. The burst fracture at T2 and T8 was caused by an excessive vertical force that shattered the vertebrae into fragments. Fortunately, the fragments at T2 and T8 did not impinge upon her spinal cord.

#### **DEPARTMENT OF PUBLIC SAFETY:**

**Lessary v. State of Hawaii, et al.**  
**Civil No. 12-1-1897-07, First Circuit**

**\$ 50,000.00** (General Fund)  
**Settlement**

Plaintiff, individually and as personal representative of the estate of decedent Renee Lessary, sued the State of Hawaii Department of Public Safety and Glenn Morrison, M.D., for the wrongful death of his wife. From July 26, 2010, to July 28, 2010, Renee Lessary was being held at OCCC as a pretrial inmate on a misdemeanor charge. She had a known history of past methamphetamine drug use and severe hypertension. She went into hypertensive crisis, followed by cardiopulmonary arrest and death. An autopsy revealed Ms. Lessary died as a result of a ruptured dissecting aortic aneurysm. Plaintiff alleged Ms. Lessary’s condition should have been identified with a thorough physical examination and monitoring, and failure to do so caused her death. After an arbitration hearing through the Court Annexed Arbitration Program, Plaintiff requested a trial de novo. The parties reached a settlement before trial.

**Rosen Bien Galvan & Grunfeld, LLP, v. Department of**  
**Public Safety, et al., Civil No. 13-1-1078-04, First Circuit**

**\$ 25,598.78** (General Fund)  
**Settlement**

This is a UIPA lawsuit alleging that the Department of Public Safety (“PSD”) failed to disclose records under the UIPA. Plaintiff is a mainland law firm representing the families of two deceased Hawaii inmates in lawsuits filed in federal district court (Hawaii) against the State of Hawaii and its vendor, Corrections Corporation of America. Plaintiff made a UIPA request in

September 2012, but did not receive what it considered to be a satisfactory response from PSD. Plaintiff filed a UIPA lawsuit in the First Circuit Court on April 11, 2013. The court established a schedule for PSD to disclose the requested documents, most of which were in storage, in and among many other boxes. Compliance ultimately involved overtime by various PSD employees. After PSD, with the assistance of the Department of the Attorney General, complied with the disclosure schedule to the satisfaction of Plaintiff, the attorneys' fees and costs were negotiated pursuant to section 92F-15(d), Hawaii Revised Statutes ("HRS"), which provides for the recovery of attorneys' fees and all other expenses reasonably incurred in litigation to enforce disclosure of government records under chapter 92F, HRS. In light of the First Circuit Court awarding attorneys' hourly rates based upon the years of experience of the attorneys in *Kaleikini v. Yoshioka*, 129 Hawaii 454, 473 (2013), this is a reasonable negotiated amount.

**Slingluff v. State of Hawaii, et al.**  
**Civil No. 06-1-1654-09, First Circuit**

**\$1,036,395.94** (*General Fund*)  
**Judgment**

Plaintiff is a former inmate who was housed at Halawa Correctional Facility. He developed an infection in his scrotum which the trial court found was not timely diagnosed or treated by the prison medical staff. Plaintiff's infected scrotum was surgically removed, and he underwent several reconstructive surgeries. The infection and surgeries rendered Plaintiff infertile. Judgment was entered in favor of Plaintiff in the amount of \$983,395.29 plus interest. The Intermediate Court of Appeals affirmed and awarded Plaintiff \$183.30 in costs.

**Waiolama, et al. v. State of Hawaii, et al.**  
**Civil No. 09-1-0679-03, First Circuit**

**\$ 69,094.33** (*General Fund*)  
**Judgment**

Plaintiff was driving his vehicle westbound (Pali bound) on Kalanianaʻole Highway. As he was approaching the Women's Community Correctional Center (WCCC) on his right, a WCCC groundskeeper was approaching the WCCC in a state-owned pickup truck from the opposite direction (Waimanalo bound). The groundskeeper attempted to turn left into the WCCC driveway, and Plaintiff's vehicle collided broadside into the passenger side of the state-owned pickup truck. The trial court found that the plaintiff was negligent in traveling at an excessive rate of speed, striking the 5,000 pound pickup at between 50 and 55 miles per hour, propelling the pickup airborne onto and then over a guardrail, and causing it to roll a full 360 degrees. Consequently, the court found Plaintiff 25 percent comparatively negligent. The court found the state driver 75 percent negligent for failing to keep a proper lookout. The trial court awarded Plaintiff damages totaling \$89,250. Plaintiff's damages, when reduced by Plaintiff's comparative negligence, were \$66,937.65 plus interest.

#### **MISCELLANEOUS CLAIMS:**

**Eager v. State of Hawaii, et al.**  
**Civil No. 12-1-1408-05, First Circuit**

**\$ 2,804.56** (*Department*  
*Appropriation*)

This claim is part of a legislative claim from 2013. A portion of the settlement amount was for payment of the Department of Human Services lien. The lien check in the amount of \$2,804.56 was lost and could not be reissued because the legislative funds had lapsed.

**GE Capital Info Technology SOL** **\$ 3,248.47** *(General Fund)*

Claimant requests reissuance of an outdated check that was lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

**GTE Communication Systems Corp.** **\$ 3,421.56** *(General Fund)*

Claimant requests reissuance of an outdated check that was lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

**Raedrina A. Kealoha** **\$ 51.12** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

**Kellogg Sales Company** **\$ 2,660.59** *(General Fund)*

Claimant requests reissuance of an outdated check that was lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

**Korean Airlines Co., Ltd.** **\$ 2,177.50** *(General Fund)*

Claimant requests reissuance of an outdated check that was lost. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

**Lehman Brothers Inc.** **\$ 14,906.96** *(General Fund)*

Claimant requests reissuance of an outdated check that was lost or misplaced. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

**Thomas K. Nagano** **\$ 199.80** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

**Mark Tamashiro** **\$ 4,347.36** *(General Fund)*

Claimant requests reissuance of an outdated check that was misplaced. The check when found was outdated and could no longer be cashed. The legislative claim was filed with the Attorney

General within six years from the date on which the claim for payment matured, within the period specified by section 37-77, Hawaii Revised Statutes.

**DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:**

**Higa v. State of Hawaii, et al.**  
**Civil No. 14-1-0751 ECN, First Circuit**

**\$ 72,000.00** *(Department*  
**Settlement** *Appropriation)*

Plaintiff, a 61-year-old-woman, fell into a pothole on a darkened pedestrian pathway along Kamehameha Highway in Mililani. Lighting may have been compromised by the overgrown trees from adjoining properties. As a result of the accident, Plaintiff dislocated her right shoulder and fractured her right humerus. As of Plaintiff's last medical appointment in 2014 with an orthopedist, she is suspected of also having a torn right rotator cuff. Plaintiff is attempting conservative rehabilitation therapy in the hope of avoiding future surgery. Plaintiff was working at Zippy's on the night of the incident but finds her return to physical labor difficult. Plaintiff has incurred \$20,000 in medical expenses and \$6,384 in lost wages. Future medical expenses, including physical therapy, are anticipated.

**DEPARTMENT OF TRANSPORTATION, HARBORS DIVISION:**

**Barnard v. State of Hawaii, et al.**  
**Civil No. 12-1-2924-11, First Circuit**

**\$ 93,734.77** *(Department*  
**Settlement** *Appropriation)*

Plaintiff was riding a bicycle on Ilalo Street and Forest Avenue near Honolulu Harbor. The space between a drainage grate and the roadway caused the front tire of the bicycle to fall below grade. The tire lodged in a drainage grate, and the Plaintiff pitched over her handle bars and fell to the ground. She suffered a head injury and fractured her jaw requiring inpatient surgical repair and six days of hospitalization. This case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded \$108,035.15 to the Plaintiff. However, he also found the Plaintiff 20 percent at fault. The case later settled for \$93,734.77.