

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

October 20, 2019

Constance Hee Lau
President and CEO, Hawaiian Electric Industries, Inc.
1001 Bishop St., Ste 2900
Honolulu, Hawai'i 96813

Alan M. Oshima
Chairman, President and CEO, Hawaiian Electric Company, Inc.
1001 Bishop St., Ste 2900
Honolulu, Hawai'i 96813

RE: Settlement Offer [EXPIRES 5:00pm HST October 22, 2019]

'imi pono ~ to strive to be righteous



Corporate Code of Conduct

November 20, 2017*

Dear Employees, Officers and Directors of the HEI Companies,

Mahalo for your hard work and devotion to building a company of which we can all be proud. The reputation of the HEI companies and their traditions of excellence are a direct reflection and result of your commitment to our company's core values and your integrity and efforts on the job and in the community.

- d. Reporting to work under the influence of alcohol or drugs, drinking alcoholic beverages (other than as permitted at functions or events approved by your respective Company President), possession or the unprescribed use or distribution of any controlled substance or illegal drug, or any other illegal act which occurs on work premises (including any non-Company site where you are performing work on behalf of the Company) or during your work hours (including meal breaks or rest periods) or which interferes with work performance.*

Background

Hawaiian Electric companies [herein The Companies] for their corporate benefit hired Mr. Scott Goold August 13, 2018. They observed Mr. Goold closely for some six months. The Companies did not ask; Mr. Goold did not tell when initially hired — but Mr. Goold was a legal Medical Cannabis patient registered both in Hawai'i and New Mexico.

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

Hawaiian Electric (HECO) encouraged Mr. Goold's continued employment by extending his initial contract indefinitely in December 2018. HECO encouraged Mr. Goold to permanently reside on O'ahu and relocate his wife, AnnMarie, who had a "perfect management position" in a mainland dental practice.

On February 11, 2019, HECO offered Mr. Goold an internal position contingent he pass both a background review and pre-employment drug screen. HECO did not disclose to Mr. Goold they had an alleged prohibition on Medical Cannabis. Mr. Goold claims he "passed" the drug screen based on HEI corporate policy (section d above).

On February 14, 2019, Mr. Goold disclosed his mobility disability and legal Medical Cannabis authorization to HECO HR Rep Liz Deer. Mr. Goold claims Ms. Deer told him he would "be fine."

On February 19, 2019, Michael M. Kusaka, MD, notified HECO Mr. Goold had a positive finding on their cannabis screen and informed the company Mr. Goold had disclosed to Straub clinic staff he had a legal "Marijuana Certificate." [Appendix 2]

On February 20, 2019, HECO informed Mr. Goold he had successfully passed the conditional steps to internal employment and his official start date would be February 25, 2019.

On February 25, 2019, HECO HR Director Shana Bucu rescinded the internal offer and terminated Mr. Goold's employment with The Companies due to his use of Medical Cannabis. Mr. Goold expressed he had "no knowledge" of a corporate restriction on Medical Cannabis and pointed out HEI policy allows "legal" medications. State of Hawai'i legalized Medical Cannabis in 2000.

On February 27, 2019, HECO HR Director Shana Bucu denied Mr. Goold's request to re-apply for the position. The Companies refused to speak with Mr. Goold directly after this date, although Mr. Goold made dozens of attempts to open discussion and negotiation.

Legal Issues

A. Noffsinger v. SSC Niantic Operating Company, LLC¹

Court held federal law is focused on preventing use of drugs in the workplace, not use of any drugs outside the workplace, much less the use of medical cannabis. [Appendix 1]

Federal Drug-Free Workplace Act (DFWA) does not require drug testing and does not regulate employees who use illegal drugs outside of work while off-duty. Hiring an employee who uses medical cannabis outside of work while off-duty does not defraud the federal government under False Claims Act.

Federal law requires federal contractors make a "good faith effort" to maintain a drug-free workplace, but does not require "zero-tolerance" drug-testing policy.

In corporate letter April 12, 2019 regarding Mr. Goold, attorneys for The Companies state the corporation has a "vital interest" in ensuring safe working environment for all employees.

¹ Noffsinger v. SSC Niantic Operating Co. LLC , 273 F.Supp.3d 326 D. Conn. 2017

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

This is confusing, as The Companies did not demonstrate a *vital* commitment to a “zero tolerance” drug-free workplace during Mr. Goold’s more than six-month tenure as a contract employee. The Companies do not drug screen contractors. Mr. Goold worked in-office next to internal, permanent employees. The Companies limited and restricted Mr. Goold’s ability to work from home or outside the office, although they did not require a drug screen as a contract employee.

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.


B. The Companies Falsely Claim “Not Aware” in April 12, 2019 Letter

“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 medical 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.” [Page 2, paragraph 1, emphasis mine]

Drug screen clinic physician, Dr. Kusaka, notified The Companies February 19th of Mr. Goold’s “Marijuana Certificate.” [Appendix 2]

On February 19, 2019, I reviewed results of a positive urine drug screen with Jeffrey Goold. I am reporting this as positive for Marijuana (THC) Metabolites. He states he has a Marijuana Certificate.

If I may be of further assistance, please feel free to contact me.


Michael M. Kusaka, MD

C. Mr. Joseph A. Ernst Employment Law Seminar 2018

In Mr. Ernst’s presentation on “Opioids, Medical Marijuana & Rx Drugs in the Workplace” from Tuesday, August 14, 2018, the labor law expert warned business leaders about neglecting to engage in due diligence to update and modify their Medical Cannabis corporate policy. Hawaiian Electric failed to heed their attorney’s legal advice.

What should a Hawai’i Employer do?

- Ensure you have an updated written drug testing policy.
- Extra care is needed if you must comply with DOT regulations
- Include express provision dealing with medical marijuana
- Treat everyone the same

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

- Don't make exceptions for some employees and not others
- Make sure to do confirmatory testing
- Make sure you use a licensed lab to test

=> The Companies did not provide written drug testing policy. Did not express provision dealing with medical cannabis. Did not treat everyone the same (contractors not tested) and thus made exceptions for some employees.

What should you do when someone tests positive and claims use of medical marijuana?

Take appropriate and consistent disciplinary action up to and including termination and hope for the best; or

- Request further information
- Do they have a valid card?
- If no, take action.

- If yes, consider advising that medical marijuana is still illegal under federal law. Request that they change their treatment to no longer include marijuana/use another medication. Explain that they are subject to retest. Document.
- If they agree, give an opportunity to change medication and retest.

=> The Companies did not follow policy process, as recommended by their own attorney.

D. Mr. Ernst Review of Lambdin

Hawai'i — What about Lambdin v. Marriott Resorts Hospitality Corp. (2017)?

- Lambdin claimed he was protected because he was using “medical” marijuana.
- Court disagreed. It noted at time of the test, Lambdin did not have a valid medical marijuana card.

=> Marriott had excellent, well-crafted drug-free workplace policy, which Lambdin signed. The Companies do not. Mr. Goold had legal, authorized Medical Cannabis authorization. Mr. Lambdin did not.

E. Non-Safety Sensitive Employees

Mr. Goold, as an IT professional, sits in a backroom at a desktop computer away from the general public. He does not operate heavy equipment, work with dangerous chemicals or drive a corporate vehicle. He is therefore undisputed to be classified a “non-safety-sensitive” employee. The federal government distinguishes between safety and non-safety sensitive employees. The federal government (DOT) is clear they prohibit **safety-sensitive employees** from using Medical Cannabis.

We have had several inquiries about whether the DOJ advice to Federal prosecutors² regarding pursuing criminal cases will have an impact upon the Department of Transportation's longstanding regulation about the use of marijuana by **safety-sensitive transportation employees** – pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft

² <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>

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

maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others.

We want to make it perfectly clear that the DOJ guidelines will have no bearing on the Department of Transportation's regulated drug testing program. We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors.

In the REPORT TO THE THIRTIETH LEGISLATURE STATE OF HAWAII 2019, PURSUANT TO ACT 116, H.B. 2729, H.D. 2, S.D. 2, C.D. 1 RELATING TO CANNABIS FOR MEDICAL USE, including HCRC Executive Director, Mr. William Hoshijo, summarized:

Exempt work classes from Medical Cannabis Protection included, but were not limited to:

- Safety-sensitive positions such as transportation workers, heavy equipment operators, first responders, etc.;
- Jobs where the employer would be at risk of losing monetary or licensing- related benefits due to federal laws or regulations, such as federal contractors or licensees, etc.; and
- Other industries where having a qualifying medical cannabis patient as an employee would increase the risk of liability, negligence, or exposure to an employer or the employee.

None of these exemptions apply to Mr. Goold's position with The Companies. In addition, the majority of the group agreed protection for registered, qualifying patients should be objective, not subjective, i.e., based on impairment and not solely on a positive cannabis drug test.

The Companies observed Mr. Goold closely for some six months. None of these seasoned professionals considered Mr. Goold to be impaired or intoxicated. A simple urine test would not provide such evidence — although HR Director Shana Buco verbally accused Mr. Goold of this, which is slander. Mr. Goold volunteered to take a DOT blood test. The Companies refused his offer.

F. Opioid Epidemic Is Game Changer

Mr. Goold, as a former Workers' Compensation policy researcher, is uniquely trained in opioid addiction prevention and pain management issues. [Appendix 3 & 4]

Mr. Ernst provided somewhat outdated information (below) and the epidemic is far worse today. The State of Hawai'i sued the Sackler family and Purdue Pharma this year for their role in the state's opioid epidemic.

In 2010, more than 38,000 people died of drug overdoses (NOTE: over 50,000 opioid OD deaths most recent year)

- 13% Heroin – down from 20% in 1999
- 17% Cocaine – down from 39% in 1999
- 70% opioids – up from 41% in 1999

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

G. Summary

Mr. Ernst provided an excellent review and summary:

1. What about the HCRC?

- Hawai'i employment law is unaffected by the creation of a dispensary system and protections granted in other contexts.
- Accordingly, it should be unlikely that the HCRC would pursue a disability claim based on medical marijuana use.

2. Will that stop the HCRC?

- Who knows?
- There are no cases currently pending in state court to explore the issue
- There is always a risk that an employee may disclose a qualified disability when they provide information about their medical marijuana use. That DOES create a possible claim.

3. Cases Against Employee

- Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, Oregon (2010)
- Swaw v. Safeway, Inc., Oregon, (2015)
- Coats v. Dish Network LLC, Colorado (2015)

4. Cases For Employee

a. Massachusetts – employee has right to use medical marijuana, and her employer must engage in the interactive process prior to terminating for a positive drug test result or face a disability discrimination lawsuit.

- Barbuto v. Advantage Sales and Marketing, LLC (2017)

b. Connecticut – court dismissed federal law argument. Said that federal law's prohibition does not address employment or prohibit employment. Therefore, no federal preemption of state medical marijuana law protecting users.

- Noffsinger v. SSC Niantic Operating Company, LLC (2017)

5. Do you have to test for marijuana?

- That depends.
- Are you subject to any DOT regulations or related federal guidelines? If yes, then you must test.
- If you are not subject to any DOT regulations or related federal guidelines, you do not have to test for marijuana.

6. What should you do if you don't test for marijuana?

- Don't test for marijuana!
- You cannot selectively decide to enforce a "no marijuana" rule when it suits your fancy.
- If you change your mind, you should revise the policy in writing and notify all employees.

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

7. Opioid Epidemic Changes Public Perception about Medical Cannabis

Opioid abuse leads to health and safety issues in the workplace. Been found to profoundly increase:

- Workers' compensation costs
- Number of painkillers per claim increasing
- Accordingly the cost of painkillers per claim increasing
- 3 of 4 claims longer than 7 days with no surgery took
- Employees prescribed even one painkiller had 3x the total cost
- Length of employee disability
- Work time lost

The government has increasing interest in seeking alternatives to opioid prescription medication.

H. Settlement Offer

Lambdin v. Marriott is Hawaii's precedent setting case. Marriott had well-crafted drug free workplace policy; The Companies did not with Mr. Goold. Although Employee Lambdin had medical cannabis authorization at one time, he was not legal DOH Medical Cannabis patients at the time of incident.

Mr. Goold had legal Medical Cannabis authorizations in states of Hawai'i and New Mexico at time of his termination. As Mr. Ernst pointed out, this is a dynamic and quickly changing legal landscape, trends appear to be moving in Mr. Goold's direction.

The Companies DID NOT test contract employees. The Companies policy is inconsistent and irrational. The Companies have significant legal exposure in this matter.

Mr. Goold is a "non-safety-sensitive" employee. This new classification of Medical Cannabis patient has not been specifically reviewed or tested in state case law.

Mr. Goold is a certified Community Addictions Recovery Specialist focused on reducing the opioid epidemic. Due to medical limitations, Mr. Goold was offered opioids or cannabis for his long term pain management. Highly trained as to dangers of opioids, Mr. Goold selected Medical Cannabis.

The Companies observed Mr. Goold for some six months. They approved of his permanence and offered Mr. Goold permanent internal employment with HECO.

Terminating Mr. Goold for "failing" a pre-employment drug screen creates a permanent, fatal mark on Mr. Goold's excellent employment record. This obstructs future employment opportunities. The termination embarrassed Mr. Goold, as well as embarrassed Mr. Goold's contractor, EdgeRock Technologies. The termination diminished Mr. Goold's reputation with his contractor.

As such, Mr. Goold has a realistic chance to prevail at trial. To avoid a lengthy and costly legal battle, Mr. Goold extends the following Settlement Offer, which **expires 5:00pm HST, Tuesday, October 22, 2019.**

- The Companies will compensate Mr. Goold per his employment terms as an EdgeRock Technologies contractor through October 18, 2019 from February 26, 2019.

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

- The Companies will officially list Mr. Goold's employment period as beginning August 13, 2018 and ending October 18, 2019.
- The Companies will authorize Mr. Goold's supervisor, Lori Yafuso, [or others] to inform Mr. Goold's prospective employers of his official employment period [8.13.18-10.18.19]; permit Ms. Yafuso [or others] to state Mr. Goold's reason for leaving was "end of project," that Mr. Goold's performance was excellent, and that Mr. Goold is eligible for rehire.
- The Companies agree Mr. Goold is eligible for rehire with any of HEI companies, specifically HECO, MECO, HELCO and ASB or any other not listed.
- As such, Mr. Goold and his family release The Companies, all individuals and employees of The Companies, from this matter — per your language.

Thank you for your time,

\s\ Scott Goold \s\
Scott Goold



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

APPENDIX 1: Noffsinger v. SSC Niantic Operating Co., LLC, d/b/a Bride Brook Nursing & Rehab. Ctr., 273 F.Supp.3d 326 (D. Conn. Aug. 8, 2017).

Bride Brook argued federal Drug-Free Workplace Act (DFWA) barred it from hiring Noffsinger because that law prohibits federal contractors from allowing employees to use illegal drugs. Marijuana is illegal under federal law. The court rejected Bride Brook's argument, noting DFWA does not require drug testing and does not regulate employees who use illegal drugs outside of work while off-duty.

The court rejected Bride Brook's argument hiring Noffsinger would violate the False Claims Act. It held hiring an employee who uses medical marijuana outside of work while off-duty would not defraud the federal government.³

The court held SSC violated the Connecticut law when it rescinded a job offer to Katelin Noffsinger after she failed a pre-employment drug test due to her use of medical marijuana.

Ms. Noffsinger accepted SSC's job offer, but the offer was contingent on her passing a drug test. Before she took the drug test, Ms. Noffsinger disclosed that she suffered from PTSD, and that she was a registered participant in Connecticut's medical marijuana program to treat it.

She informed SSC she used medical marijuana in the evenings, not during working hours. She even showed SSC a copy of her registration certificate required by the law and an empty pill container that showed the name and dosage information of her marijuana pills.

Unsurprisingly, her drug screen was positive for marijuana, and SSC rescinded her job offer. Ms. Noffsinger sued for violation of the Connecticut law, and SSC removed the case to federal court.

SSC asserted the positive drug test disqualified Ms. Noffsinger for the job because SSC, a federal contractor, adopted a drug testing policy that followed the federal law and "medical marijuana is not an approved prescription" under the drug-testing program.

In its defense, SSC emphasized that, as a federal contractor, it was required to follow the federal Drug Free Workplace Act, and that the federal act preempted the Connecticut state law.

The court rejected this argument, noting that the federal law requires federal contractors to make a "good faith effort" to maintain a drug-free workplace, but does not require a zero-tolerance drug-testing policy such as SSC's policy.

Instead, the court held the federal law is focused on preventing use of drugs in the workplace, not use of any drugs outside of the workplace, much less the use of medical marijuana.

SSC also argued the Connecticut law only protects against discrimination based on a person's "status" as a medical marijuana user, not their actual "use" of the drug.

³ <https://www.jacksonlewis.com/publication/refusing-hire-medical-marijuana-user-violates-state-law-connecticut-court-holds>

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

Given that SSC did not rescind Ms. Noffsinger's job offer when she disclosed her "status" as a participant in the medical marijuana program (only after she failed their standard pre-employment drug test), SSC argued it did not base the decision on her status.

The court said this argument "made no sense," and would frustrate the purpose of the state law's anti-discrimination provision — to protect people who use medical marijuana from adverse action by their employers.

FOR MORE, SEE:

<https://www.employmentlawinsights.com/2018/10/weeding-out-a-job-candidate-literally-connecticut-court-weighs-in-on-medical-marijuana-laws-and-drug-tests/>

<https://casetext.com/case/noffsinger-v-ssc-niantic-operating-co-2>

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

APPENDIX 2: Straub Occupational Health Services Notification

Straub

Occupational Health Services

800 South King St. 3rd Floor. | Honolulu, Hawaii 96813 | Phone No. (808) 529-4949 | Fax No. (808) 529-4950

February 19, 2019

Hawaiian Electric Co., Inc.
Ms. Hope Tanonaka – CP7
P.O. Box 2750
Honolulu, HI 96840-0001

RE: Jeffrey Goold
SSN: 0302
SPECIMEN ID NO: 799319
COLLECTION DATE: 02-14-2019

Dear Ms. Tanonaka:

On February 19, 2019, I reviewed results of a positive urine drug screen with Jeffrey Goold. I am reporting this as positive for Marijuana (THC) Metabolites. He states he has a Marijuana Certificate.

If I may be of further assistance, please feel free to contact me.


Michael M. Kusaka, MD

MMK: ds

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

APPENDIX 3: CARS Certification June 24, 2011

University of New Mexico School of Medicine Health Sciences Center Project ECHO



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

APPENDIX 4: Continuing Education Certification Buprenorphine Training

University of New Mexico School of Medicine Health Sciences Center Project ECHO. Mr Goold holds numerous others. Available on request.

