Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

ROBERT H. THOMAS 4610-0
rht@hawaiilawyer.com
CHRISTOPHER J.I. LEONG 9662-0
cjil@hawaiilawyer.com
1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
Telephone: (808) 531-8031
www.hawaiilawyer.com

Attorneys for Movant-Amicus Curiae
NFIB Small Business Legal Center

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In the Matter of BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, INC., Respondent-Appellant, DWIGHT TAKAMINE in his official capacity as the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; and DEPARTMENT OF LABOR, STATE OF HAWAII, Appellees, and TAMMY L. JOSUE, Complainant-Appellee.	Civ. No. 13-1-1817-06 (Agency Appeal) MOTION OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER FOR LEAVE TO FILE AMICUS CURIAE BRIEF; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF ROBERT H. THOMAS; EXHIBIT "A" (PROPOSED AMICUS CURIAE BRIEF); NOTICE OF HEARING MOTION and CERTIFICATE OF SERVICE Date: Aug. 6, 2014 Time: 9:30 am Judge: Hon. Rhonda Nishimura

MOTION OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Hawaii Rules of Civil Procedure 7 and 72(f), Circuit Court Rules 3 and 7, and Hawaii Rules of Appellate Procedure 28(g), the National Federation of Independent Business Small Business Legal Center respectfully moves this court for leave to file an amicus curiae brief in support of Respondent-Appellant, BCI Coca-Cola Bottling Co. of Los Angeles, Inc. in the above-captioned action. The proposed amicus brief is attached as Exhibit "A."

This motion is supported by the attached Memorandum in Support, the Declaration of Robert H. Thomas, Exhibit "A," and the records and files in this case.

DATED: Honolulu, Hawaii, July 2, 2014.

DAMON KEY LEONG KUPCHAK HASTERT

ROBERT H. THOMAS
CHRISTOPHER J.I. LEONG

Attorneys for Movant-Amicus Curiae
NFIB Small Business Legal Center

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In the Matter of BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, INC., Respondent-Appellant, DWIGHT TAKAMINE in his official capacity as the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; and DEPARTMENT OF LABOR, STATE OF HAWAII, Appellees, and TAMMY L. JOSUE, Complainant-Appellee.	Civ. No. 13-1-1817-06 (Agency Appeal) MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

Movant-Amicus Curiae National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") respectfully asks this court for leave to participate in this case as a friend of the court by filing a brief amicus curiae in support of the Respondent-Appellant, BCI Coca-Cola Bottling Co. of Los Angeles, Inc. in the above-captioned action. The proposed amicus brief of NFIB Legal Center is attached as Exhibit "A."

I. IDENTITY AND INTEREST OF AMICUS

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small business in the nation's courts through representation on issues of public interest affecting small business. The National Federation of Independent Business (NFIB) is the nation's leading small

business association, representing members in Washington, D.C. and all 50 states. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide—including over 1,000 in Hawaii. NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employees 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

II. REASONS FOR GRANTING THE MOTION

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact the small business community. NFIB Legal Center seeks to file in this case because it raises an issue of great practical concern for the small business community. As explained in the proposed brief, small employers will be put in a catch-22 situation if the court should endorse the rule that the Complainant-Appellee advances in this action.

The proposed amicus puts the issue in context. Specifically the proposed brief explains the real world implications of the rule endorsed below, and the magnitude of the burden it will impose on Hawaii's business community. NFIB Legal Center is concerned that the burden will be especially hard on smaller entities. Given that the Complainant-Appellee readily acknowledges that this case raises an issue of first impression, NFIB Legal Center submits that its outside perspective is especially valuable here.

NFIB Legal Center contacted the parties to this proceeding, informing them of its intent to file this motion and the proposed amicus curiae brief, and requesting consent. Counsel for Appellant, BCI Coca-Cola Bottling Co. of Los Angeles, Inc. has consented in writing. Counsel for Respondent, Tammy Josue, has withheld consent. Counsel for the Department of Labor and Industrial Relations has likewise withheld consent. Nonetheless, NFIB Legal Center submits that the proposed

amicus will bring a valuable outside perspective and that this Court should exercise its inherent discretion to allow the proposed brief.

Accordingly, NFIB Legal Center respectfully urges this Court to grant this motion, and grant it leave to file the attached amicus curiae brief.

DATED: Honolulu, Hawaii, July 2, 2014.

DAMON KEY LEONG KUPCHAK HASTERT

ROBERT H. THOMAS
CHRISTOPHER J.I. LEONG

Attorneys for Movant-Amicus Curiae
NFIB Small Business Legal Center

Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

ROBERT H. THOMAS 4610-0
rht@hawaiilawyer.com
CHRISTOPHER J.I. LEONG 9662-0
cjil@hawaiilawyer.com
1003 Bishop Street, Suite 1600
Honolulu, Hawaii 96813
Telephone: (808) 531-8031
www.hawaiilawyer.com

Attorneys for Amicus Curiae
NFIB Small Business Legal Center

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In the Matter of BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, INC., Respondent-Appellant, DWIGHT TAKAMINE in his official capacity as the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; and DEPARTMENT OF LABOR, STATE OF HAWAII, Appellees, and TAMMY L. JOSUE, Complainant-Appellee.	Civ. No. 13-1-1817-06 (Agency Appeal) **[PROPOSED]** AMICUS CURIAE BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT-APPELLANT

244879

EXHIBIT "A"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

[PROPOSED] AMICUS CURIAE BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT-APPELLANT

Amicus Curiae National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") submits the following Amicus Curiae Brief in support of the Respondent-Appellant, BCI Coca-Cola Bottling Co. of Los Angeles, Inc.

I. IDENTITY AND INTEREST OF AMICUS

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small business in the nation's courts through representation on issues of public interest affecting small business. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C. and all 50 states. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide—including over 1,000 in Hawaii. NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employees 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

II. QUESTION PRESENTED

Does an employer in Hawaii have a legal obligation to preserve an employee's position indefinitely where the employee has taken an extended leave of absence without affirming an intent—and his or her capacity—to return to work?

III. STATEMENT OF CASE

Amicus NFIB Legal Center adopts the statement of case and facts set forth in Respondent-Appellant's opening brief. For the purpose of this brief we reiterate only the following:

1. Respondent-Appellant, BCI Coca-Cola Bottling Co. of Los Angeles ("BCI") allowed the Complainant-Appellee, Tammy L. Josue ("Josue") to take an extended leave of absence following a work injury.

2. Josue failed to communicate her intentions as to whether she would be returning to work anytime soon—if ever. For almost a full year BCI waited, but was eventually compelled to fill Josue's position. By the time Josue indicated her intention of returning to work, the company had already hired someone else—relocating him from the mainland.

IV. INTRODUCTION

The Court should reject Josue's interpretation of Haw. Rev. Stat. § 378-32 because it stands in conflict with the plain language of the statute. Though the Department of Labor and Industrial Relations ("DLIR") has chosen to endorse Josue's interpretation of the law, amicus NFIB Legal Center submits that DLIR failed to consider the extreme practical difficulties that its rule would impose on business. Small businesses will be placed in an impossible situation if required to preserve an employee's position indefinitely under Haw. Rev. Stat. § 378-32.

V. ARGUMENT

A. Josue's Interpretation Defies the Plain Language of the Statute

Josue argues that BCI violated Haw. Rev. Stat. § 378-32 in "fail[ing] to return Complainant to her position when [s]he was capable of performing [the work]." Answering Br. of Complainant-Appellee, Civ. No. 13-1-1817-06, at 13 (Jun. 17, 2014). But the statute imposes no duty upon an employer to preserve a position indefinitely when an employee has taken a leave of absence. The statute requires only that an employer must provide an employee with a position if she is capable of performing the work—provided the position is still available. It says nothing about requiring an employer to return an employee to the same position.

Haw. Rev. Stat. § 378-32 provides, in summary, that an employer may not discriminate against an employee "[s]olely because the employee has suffered a work injury... [], unless the employee is no longer capable of performing the employee's work... and the employer has no other available work which the

employee is capable of performing." The plain implication is that the employer is permitted to remove an employee from his or her position, if the employee is unable to perform the job—but that the employer must be sure to offer the employee other "available" work if the employee can handle it. If the Legislature had intended to guarantee an employee an entitlement to maintain a position indefinitely—despite the fact he or she is "no longer capable of performing" the job at present—the Legislature would have employed language more clearly indicating its intent. *See Lales v. Wholesale Motors Co.*, SCWC-28516, 2014 WL 560829 (Haw. Feb. 13, 2014) (rejecting an inference that state law imposes burdens beyond those required by federal law, and observing that when the legislature wishes to impose additional requirements it knows how to make that intention clear); *see e.g., Heatherly v. Hilton Hawaiian Vill. Joint Venture*, 78 Haw. 351, 356, 893 P.2d 779, 784 (1995) ("We observe that our state legislature knows how to draft broader definitions" when the legislature intends to give a broader definition than the law would otherwise presume). To be sure, such a radical departure from the common law employment at will doctrine cannot be inferred lightly. *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 380, 652 P.2d 625, 631 (1982) (warning courts to "proceed cautiously if called upon to declare [a] public policy [exception to the 'at will' doctrine] absent some prior legislative or judicial expression on the subject.").

B. Employers Should Only be Required to Make Reasonable Accommodations

In this case, BCI replaced Josue after allowing her an eleven month leave of absence. Under the circumstances, this was only reasonable. During this time, she was apparently unable (or unwilling) to say whether she could return to work anytime soon—or if she would ever be able to do so. In any event, BCI demonstrated a willingness to work with Josue as long as it could. But, after nearly a year of trying to maintain normal operations with a full-time position left vacant, the company felt compelled to find a replacement.

Yet Josue maintains that BCI should have preserved her position indefinitely—as if Haw. Rev. Stat. § 378-32 creates an entitlement to occupy a

position in perpetuity. This would be an absurd result imposing tremendous strain on employers and would place small businesses in an impossible position.

The common law doctrine of 'employment at will' creates a presumption that employers and employees retain the right to part ways for any reason not expressly prohibited by enacted law. *See Shoppe v. Gucci Am., Inc.*, 94 Haw. 368, 383, 14 P.3d 1049, 1064 (2000). The rule ensures that employers retain flexibility to exercise business judgment and to execute efficient operations. The common law thus promotes societal efficiencies. *See Parnar*, 65 Haw. at 374, 652 P.2d at 627-28 (observing that the common law rule developed as an outgrowth of the law of contract and recognition of the value of promoting "economic growth" with flexible employment rules). Indeed, in allowing employers flexibility, the 'at will' doctrine encourages efficient markets, which benefits employer, employees and consumers alike. To be sure, when employers are allowed the flexibility necessary to exercise business judgment, businesses can deliver products and services to consumers at lower costs. And these efficiencies ultimately encourage economic growth and greater societal wealth.

Of course, federal and state laws impose various statutory duties upon employers to provide reasonable accommodations for employees with disabilities, or—in some circumstances—for conditions developed in the course of employment. *See e.g.,* Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12201-12213 (2012). These statutory rules reflect our societal judgment that disabled individuals should be given certain allowances, so as to enable them to remain active in the workforce to the extent reasonably practical. *See* Haw. Rev. Stat. § 378-32 (requiring employers to offer an employee suffering from a work injury "other available work which the employee is capable of performing" if the employee is unable to perform his or her original functions) (emphasis added). But these statutorily imposed duties are generally interpreted in light of the background principle that the law should seek to encourage socially constructive and efficient results. *See Parnar*, 65 Haw. at 380, 652 P.2d at 631 (insisting that public policy limitations should be narrowly

construed to ensure employers retain "sufficient latitude to maintain profitable and efficient business operations...").

For example, courts throughout the country interpret the ADA, and similar state-based statutory regimes protecting workers with conditions that might arise during the course of employment, in light of the reality that social goals must be balanced against our societal interest in preserving flexibility for employers. *French v. Hawaii Pizza Hut, Inc.*, 105 Haw. 462, 467, 99 P.3d 1046, 1051 (2004) (observing that Hawaii's statutes "prohibiting discrimination based on disability are textually similar to the Americans With Disabilities Act" and applying the same standard); *see also Scotch v. Art Ins. Of California-Orange Cnty*, 173 Cal. App. 4th 986, 1002-03, 93 Cal. Rptr. 3d 338, 352 (2009) (interpreting California's Fair Employment and Housing Act); *Phillips v. City of New York*, 66 A.D.3d 170, 176, 884 N.Y.S.2d 369, 373 (2009) (interpreting New York's Human Rights Law). These cases reasonably presume that the Legislature intends only a limited departure from the common law rule—an approach that avoids imposing undue hardships on employers. Indeed, it would be patently irrational to require an employer to give more than a reasonable accommodation. But that is what Josue is asking the Court to do here.

While small businesses generally will have fewer employees requesting leaves of absence, they will also have fewer resources to accommodate those who do request leave. Additional expenses during leave, such as paid time off for the absent employee, overtime pay for current employees covering for the absent employee, and costs to hire temporary employees, can be especially destructive to small businesses, like the typical NFIB member who employs less than 10 employees.

Intangible factors can also be more concerning for small businesses – especially the effect on the business's culture. In small businesses dealing with absences, other employees are generally forced to work overtime, in areas outside their skillset, to cover for absent employees. These factors can result in significant losses in productivity, lower quality work, decreased morale, and over-burdened and over-stressed employees.

Josue assumes that employers will simply hire an employee for the short-term (a "stopgap employee"). But this presents its own difficulties. For one, employers may find it difficult to recruit top talent when the job comes with a contingent expiration date. Second, once the employer dismisses the "stopgap employee," he or she will then qualify for unemployment insurance benefits; this results in further financial strain for the business, as its unemployment insurance rates will rise. Further, the employer inevitably faces the prospect (at least the possibility) of a wrongful termination suit when terminating the "stopgap employee." Sadly the reality is that a lawsuit need not have merit to inflict major financial costs on a business. *See* Testimony of Elizabeth Milito, "Litigation Abuses", House of Representatives Committee on the Judiciary Subcommittee on the Constitution, March 13, 2013.

For these reasons small employers are placed in a difficult position when an employee takes an indefinite leave of absence. And the longer the absence continues, the more pressure the employer will face to fill the vacancy. At some point legitimate business concerns simply demand that the position be filled. As such, it is patently unreasonable to expect an employer to preserve a vacant position without an assurance that the employee is capable of resuming his or her duties in the relatively near future.

But if Josue's rule is adopted here, employers will face liability for executing decisions necessary to preserve the business. This puts small employers in a particularly unenviable position because—without sufficient cash-flow—they cannot fill a vacant position without incurring liability. Indeed, the business might fail altogether if the employer lacks the flexibility necessary to make efficient business decisions, but a single lawsuit might also sink the business. Josue's rule would force the employer "between Scylla and Charybdis."

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the Decision and Order.

DATED: Honolulu, Hawaii, _____.

DAMON KEY LEONG KUPCHAK HASTERT

_____

ROBERT H. THOMAS
CHRISTOPHER J.I. LEONG

Attorneys for Amicus Curiae
NFIB Small Business Legal Center

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In the Matter of BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, INC., Respondent-Appellant, DWIGHT TAKAMINE in his official capacity as the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; and DEPARTMENT OF LABOR, STATE OF HAWAII, Appellees, and TAMMY L. JOSUE, Complainant-Appellee.	Civ. No. 13-1-1817-06 (Agency Appeal) DECLARATION OF ROBERT H. THOMAS

DECLARATION OF ROBERT H. THOMAS

ROBERT H. THOMAS declares as follows:

1. I am an attorney licensed to practice law in all the courts of the State of Hawaii.

2. I have personal knowledge of the matters contained herein, unless otherwise indicated, and am competent to testify thereto.

3. NFIB Small Business Legal Center's staff attorney has contacted the parties to this proceeding, informing them of its intent to file this motion and the proposed amicus curiae brief, and requesting consent. Counsel for Appellant, BCI Coca-Cola Bottling Co. of Los Angeles, Inc. has consented in writing. Counsel for Respondent, Tammy Josue, has withheld consent. Counsel for the Department of Labor and Industrial Relations has likewise withheld consent.

4. A true and correct copy of the proposed amicus curiae brief of National Federation of Independent Business Small Business Legal Center is attached hereto as Exhibit "A."

I, Robert H. Thomas declare under penalty of law that the foregoing is true and correct.

Executed this 2d day of July, 2014 at Honolulu, Hawaii.

ROBERT H. THOMAS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In the Matter of BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, INC., Respondent-Appellant, DWIGHT TAKAMINE in his official capacity as the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; and DEPARTMENT OF LABOR, STATE OF HAWAII, Appellees, and TAMMY L. JOSUE, Complainant-Appellee.	Civ. No. 13-1-1817-06 (Agency Appeal) NOTICE OF HEARING MOTION and CERTIFICATE OF SERVICE

NOTICE OF HEARING MOTION

TO: Ronald T. Fujiwara, Esq.
Kendall Building, Penthouse 2
888 Mililani Street
Honolulu, Hawaii 96813
Attorney for Complainant-Appellee

Anna Elento-Sneed , Esq.
Malia E. Kakos, Esq.
Alston Hunt Floyd & Ing
1001 Bishop Street, Suite 1800
Honolulu, Hawaii 96813
Attorneys for Respondent-Appellant

David M. Louie, Esq.
Attorney General of Hawaii
Frances Lum, Esq.
Adam S. Rosenberg, Esq.
Deputy Attorneys General
Department of the Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
Attorneys for Appellees

NOTICE IS HEREBY GIVEN that the above-identified Motion shall come on for hearing before the **Honorable Rhonda A. Nishimura, Judge** of the above-entitled court, in her courtroom in the Kaahumanu Hale, 777 Punchbowl Street, Honolulu, Hawaii, on Wed. 8/6/14, 9:30 a.m., or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawaii, July 2, 2014.

DAMON KEY LEONG KUPCHAK HASTERT

ROBERT H. THOMAS
CHRISTOPHER J.I. LEONG

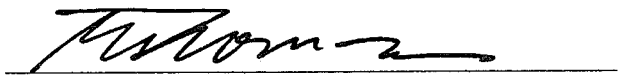
Attorneys for Movant-Amicus Curiae
NFIB Small Business Legal Center

CERTIFICATE OF SERVICE

I certify that one copy of the foregoing documents were served upon the above-identified parties noted below by U.S. Mail, first-class, postage prepaid at her/his last known address.

DATED: Honolulu, Hawaii, July 2, 2014.

DAMON KEY LEONG KUPCHAK HASTERT



ROBERT H. THOMAS
CHRISTOPHER J.I. LEONG

Attorneys for Movant-Amicus Curiae
NFIB Small Business Legal Center