

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

LINDA C. TSEU, Executive Director, on behalf of the complaint filed by LINDA LOUISE GOULD,)
) Docket No. 95-012-E-SH
)
) HEARINGS EXAMINER'S FINDINGS
) OF FACT, CONCLUSIONS OF
) LAW AND RECOMMENDED ORDER;
) ATTACHMENT 1; APPENDIX A
)
 v.)
)
 DR. ROBERT SIMICH, formerly)
 dba DR. ROBERT L. SIMICH)
 AND ASSOCIATES, also)
 formerly dba KAILUA FAMILY)
 AND URGENT MEDICAL CARE;)
 and DR. HAROLD STEINBERG;)
)
 Respondents.)
)
 _____)

HEARINGS EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

1. Chronology of Case

The procedural history of this case is set forth in the attached Appendix A.

2. Summary of the Parties' Contentions

The Executive Director asserts that Respondent Dr. Robert Simich, formerly doing business as Dr. Robert L. Simich and Associates and also formerly doing business as Kailua Family and Urgent Medical Care¹ and Respondent Dr. Harold Steinberg violated

¹ The Executive Director initially also named Simich Associates, Inc. and Dr. Debra Moorehead-Dunn as respondents to this case. On March 29, 1996 the Executive Director dismissed Moorehead-Dunn as a party respondent. (See, Tr. 1; Appendix A p. iii.) On April 1, 1996 the Executive Director dismissed Simich Associates, Inc. as a party respondent and clarified that the correct respondent is Dr. Robert Simich, formerly dba Dr. Robert L. Simich and Associates, also formerly dba Kailua Family and Urgent Medical Care. (Tr. 1-2; see also, Appendix A p. iii.) Accordingly, the Hearings Examiner, sua sponte amends the caption in this case to reflect these changes.

H.R.S. § 378-2 and H.A.R. § 12-46-109 by subjecting Complainant Linda Louise Gould to unwelcome sexual conduct which created a hostile work environment and by constructively discharging her.

Respondents deny that the alleged sexual harassment occurred. Alternatively, Respondents assert that any conduct which occurred was juvenile, not sexual in nature. Respondents also contend that Complainant voluntarily quit her employment because she found a higher paying job.

Having reviewed and considered the evidence and arguments presented at the hearing together with the entire record of these proceedings, the Hearings Examiner hereby renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT²

1. Respondent Dr. Robert Simich is a physician. Some time around 1984 Simich started his practice known as Dr. Robert L. Simich and Associates, which was also doing business as Kailua Family and Urgent Medical Care (hereinafter referred to as the "clinic"). Simich was the medical director in charge of the clinic's operations. The clinic specialized in walk-in urgent

² As a preliminary matter, this Hearings Examiner has considered the proposed findings of fact and conclusions of law filed by the Executive Director as well as the post-hearing arguments filed by the parties. To the extent that the Executive Director's proposed findings of fact are in accord with the findings of fact stated herein, they are accepted, and to the extent that they are inconsistent, they are rejected. In addition, some of the proposed findings are omitted because they are irrelevant or not necessary to determine the material issues in this case.

To the extent that the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

care. It was open seven days a week, from 8:00 a.m. to 8:00 p.m. At times there were many patients in the clinic and the work load was very busy. At other times, there were no patients and the work load was very slow. (Tr. 15-16, 19; Ex. 8 p. 34; Ex. 9 p. 11-12, 15)

2. Simich hired doctors, medical assistants and receptionists to staff the clinic. Doctors and medical assistants generally worked 2 to 3 twelve-hour shifts per week. The clinic usually had one doctor on duty per shift. The doctor on duty was in charge of the clinic during his or her shift, and supervised the medical assistants and receptionists in treating patients and running medical tests. The medical assistants and receptionists were also supervised by Pearl Popiak, the chief medical assistant. Popiak scheduled employees, conducted work performance evaluations, handled employee complaints and oversaw the cleaning and stocking of supplies and equipment. (Tr. 16-19, 22-23, 119-120; Ex. 8 p. 8-9, 34-35; Ex. 9 p. 15-17; Ex. 10 p. 11-12)

3. On June 27, 1990 Simich hired Dr. Harold Steinberg as a physician and surgeon for the clinic. On June 1, 1991 Simich hired Dr. Debra Moorehead-Dunn as a physician for the clinic. (Exs. 14, 15)

4. Some time around September 1991 Complainant Linda Louise Gould moved to Honolulu, Hawaii from Massachusetts. Complainant received an emergency medical technician certificate from Center City Community College in Pennsylvania and a bachelors degree in politics from Mount Holyoke College. Prior to moving to Hawaii,

Complainant had been employed as a lifeguard, student athletic trainer, fire fighter and emergency medical technician. (Tr. 7-8; Ex. S-4)

5. After arriving in Hawaii, Complainant sought employment as a medical assistant. On September 26, 1991 Simich hired Complainant as a medical assistant. (Tr. 10-14; Ex. 13)

6. On her first day of work, Complainant was given a copy of the clinic's Policy Information and Procedure Manual. Under the subject "Discharge - Staff and Physicians" the manual states in relevant part:

A. The following are grounds for discharge from employment; this is not intended to be an all inclusive list; management reserves the right to add to this list without prior notice.

14. Subjecting fellow employees to physical or verbal abuse.

25. Sexual harassment of another employee or patient.

The manual also contained a section titled, "Corrective Action Procedure" which outlined disciplinary procedures. Complainant read these sections of the manual and signed a statement to this effect. (Tr. 132-135; Ex. S-5)

7. Complainant worked 3 twelve-hour shifts per week at the clinic. During most of her employment, Complainant worked two shifts per week with Steinberg and one shift per week with Moorehead-Dunn. Simich stopped by the clinic a few hours each week to do paper work. Simich occasionally worked a full twelve hour shift to cover for an absent doctor. Complainant worked only five shifts with Simich. (Tr. 21-22, 62, 83-84; Ex. 9 p. 14, 16-

17, 20; Ex. 10 p. 18-19)

8. When there were no patients at the clinic, the work atmosphere was informal and at times unprofessional and juvenile. During these slow periods, the doctor and medical assistants would congregate in the laboratory equipment room³ and "talk story", eat, do crossword puzzles or play cards together. On two occasions rubber band fights broke out among the staff. (Tr. 17, 36-37; Ex. 8 p. 10, 19, 27)

9. During Complainant's employment at the clinic, Steinberg subjected Complainant and the female employees to the following offensive and unwanted sexual conduct:

a) Steinberg often listened to the Rush Limbaugh radio show during which sexist or derogatory statements were sometimes made about women. Steinberg would often turn the radio up louder or state his agreement with such comments. (Tr. 186, 258-260)

b) When female staff went to use the rest room, Steinberg, on at least two occasions remarked, "Why women don't pee in the shower like men?" Once when a woman employee took her purse to the rest room, Steinberg snickered and remarked, "There's only one reason why a woman would take her purse into the rest room". (Tr. 35-36, 104-105, 178-179)

c) Steinberg regularly commented about the breast sizes of employees, patients and celebrities mentioned on radio talk shows, saying things like, "She's really stacked", "I don't know why

³ Doctors and medical assistants at the clinic did not have individual offices or stations. (Tr. 43; Ex. 17)

everybody thinks she's so great - she's got nothing up here", "Did you see the knockers on her?" He also regularly discussed the large breasts of a medical school acquaintance and how they "got in the way". (Tr. 26-31, 49, 100-102)

d) On a weekly basis, Steinberg made remarks about female employees' nipples saying something like, "Is it cold in here, or are you excited to see me?" (Tr. 28, 100)

e) Steinberg snapped Complainant's bra strap at least ten times as he walked passed her. He also once snapped the bra strap of Debbie Choike, a receptionist. (Tr. 38-39, 106, 177-178)

f) After snapping Choike's bra strap, Steinberg asked Choike what was the way to "get a proper fit in a bra". He also once commented to Complainant on the type of bras he thought female employees should wear because of their breast sizes. (Tr. 35, 178)

g) Steinberg also made comments about patients' other intimate body parts. Once he commented that a former patient was attractive, but would be better looking if she "took quite a bit off that ass of hers". Once he stated that a patient had "huge fucking thighs" and remarked, "How's the guy supposed to get it in there with thighs like that?" (Tr. 32-34, 103-104)

h) On at least two occasions Steinberg suggested that the medical assistants and receptionists wear sexier clothing, such as short skirts and tighter blouses. (Tr. 34-35, 104, 244)

i) A few times Steinberg threw paper clips, pins, pens and shot small rubber bands at Complainant; when those objects hit her breast or crotch areas Steinberg would say, "Oh, got it on target

there!" (Tr. 36, 105-106, 184)

j) Once Steinberg dropped something down the front of Complainant's shirt and laughed. (Tr. 39-40)

k) Steinberg also rubbed up against Complainant when he passed her in the lab area. Complainant would turn around and put her arms in front of her to create a buffer between herself and Steinberg. (Tr. 40-41)

10. Steinberg did not similarly subject male employees to such sexual conduct.

11. Complainant was shocked by Steinberg's conduct. She had never heard anyone speak that way about women or treat women in that manner. (Tr. 31-32; 34)

12. Complainant first ignored Steinberg's conduct, hoping that he would stop. Later, Complainant responded to some of the incidents saying, "Doctor, that's offensive". Steinberg would laugh and not take her objections seriously. Once Complainant told Steinberg, "This would really be considered sexual harassment". Steinberg laughed and responded, "It can't be sexual harassment - you're a dyke,⁴ how could I sexually harass you? That can't happen." (Tr. 31-32, 50-51)

13. During Complainant's employment at the clinic, Dr. Moorehead-Dunn subjected both female and male employees to the following offensive and unwanted sexual conduct:

⁴ Complainant is a lesbian. However, the Executive Director contends that Complainant was sexually harassed because she is a woman. It is not claiming harassment on the basis of her sexual orientation.

a) On at least three occasions, Moorehead-Dunn boasted to the staff that she had "screwed her way through medical school" and that she could "give a really good blow job". (Tr. 64-65, 94-95, 218-219)

b) On about two occasions, Moorehead-Dunn discussed her sexual experiences with someone on the telephone. Complainant and other staff overheard these conversations. (Tr. 63-64, 92-94)

c) On several occasions, Moorehead-Dunn asked a male medical assistant, Phillip Gaines, about his sex life and desires. Gaines, who was having sexual identity problems, got upset, refused to answer and tried to ignore Moorehead-Dunn. Moorehead-Dunn persisted, asking Gaines, "What excites you?" "What gets you off?" "Would you like to do it with [Complainant]?" "Would you like to do it with two other women?" "Do you like little boys?" (Tr. 66-67, 182-183)

d) On two occasions, Moorehead-Dunn announced to the staff that she wanted to "get laid" and the type of sexual experiences she was hoping to have on upcoming dates. (Tr. 62-63)

e) On about five occasions Moorehead-Dunn made comments about men in the waiting room. She once said to Complainant, "He's a nice looking one. . . I bet he's well hung. . . what do you think?" (Tr. 63, 91-92)

f) Once Moorehead-Dunn commented about Complainant and her life partner's sex life, by remarking to Patricia Kilmer, another receptionist, "I wonder which of them is dominant?" (Tr. 218-219)

14. Some time prior to December 26, 1991 Complainant told Popiak that some of the doctors' comments and actions were offensive and made her feel uncomfortable. Complainant did not give any specific examples. Popiak did not understand what Complainant was talking about and said something to the effect that, "it's just their way to tell you what to do". (Tr. 52-55; Ex. S-2)

15. On December 26, 1991 Steinberg and Popiak conducted a job performance evaluation of Complainant. As part of the evaluation, Complainant filled out a appraisal sheet. In partial response to question #2 which asks, "What do you like the least about your job?" Complainant wrote, "The radio played in the back office". Complainant did not answer question #5, which asks, "Do you feel you have opportunities to express your ideas about our policies and procedures?" In response to question #6, which asks "What suggestions do you have to improve our clinic?" and question #7 which asks, "Is there anything specific you would like to discuss about your job?" Complainant did not state any complaints regarding Steinberg's or Moorehead-Dunn's sexual conduct. This was because Complainant was afraid that she might be fired if she complained, and wasn't sure if Steinberg or Moorehead-Dunn's conduct constituted sexual harassment. (Tr. 54-58, 137-139; Ex. 13)

16. On a few occasions Gaines made remarks to Complainant about having sex with her and her life partner. Complainant became upset about these comments, but didn't want to report the comments to Popiak or Simich because she hoped the situation could be

resolved without formal disciplinary action. Complainant asked Steinberg to speak to Gaines and tell him to stop. Steinberg informed Gaines that his comments were annoying Complainant and that if he didn't stop, Steinberg would report him to Simich. Thereafter, Gaines stopped making such comments to Complainant. (Tr. 67-69; Ex. 8 p. 15-19, 42-43)

17. Steinberg's conduct made Complainant tense, anxious and have headaches when she was at work. She felt embarrassed and humiliated whenever Steinberg snapped her bra strap. After work, Complainant was angry, tense, irritable, tired and would get knots in her stomach, constipation or diarrhea when she was at home. She began to snap at Maggie Tanis, her life partner, and they started to fight over household matters and whether Complainant should continue to work at the clinic.⁵ Complainant began to feel powerless and started to lose her self confidence because her objections to Steinberg and complaint to Popiak didn't change things. She lost interest in socializing with friends. She often cried before going to work because she didn't want to work with Steinberg and Moorehead-Dunn. (Tr. 39, 72-80, 246-250)

18. When Simich was at the clinic, he usually acted gruff, crabby and unapproachable towards the staff. Complainant felt he gave orders to employees "the way he would give orders to . . . a dog". Complainant did not report Steinberg's sexual conduct to Simich because she didn't think Simich would be receptive to her

⁵ Complainant testified that Tanis wanted Complainant to leave her job at the clinic, but Complainant wanted to stay because she was learning about post-emergency care treatment. (Tr. 78-79)

complaints. Simich did not observe or know of Steinberg and Moorehead-Dunn's offensive conduct because he didn't work with them and was seldom at the clinic. (Tr. 59, 61-62; Ex. 8 p. 25)

19. In late February or early March, 1992 Complainant felt she could no longer take Steinberg, Simich and Moorehead-Dunn's conduct and decided to find another job. (Tr. 70-71)

20. On April 4, 1992 Steinberg left the clinic to start his own practice. Prior to this date, Complainant knew that Steinberg was leaving the clinic. After April 4, 1992 Steinberg visited the clinic and socialized with the employees in the receptionist and laboratory equipment areas. (Tr. 289-290, 300; Ex. 8 p. 9; Exs. S-2, S-8, S-9)

21. After Steinberg left the clinic, Complainant continued to seek other employment because she still felt that Simich and Moorehead-Dunn's behavior was intolerable, and because Steinberg sometimes visited the clinic. (Tr. 289-290, 303-304)

22. On April 9, 1996 Complainant applied for a medical assistant position with Dr. James Miller. On or about April 10, 1996 Dr. Miller offered Complainant the medical assistant position. On or about April 11, 1996 Complainant accepted this job offer and informed the clinic she would quit in two weeks. Complainant told the clinic staff she was leaving because she wanted to work closer to home and didn't want to work with sick people. Complainant didn't disclose the real reason she was leaving because she just wanted to leave. (Tr. 71-72, 293-294 Ex. 18, S-2)

23. On April 25, 1992 Complainant quit her job at the clinic. On April 27, 1992 Complainant began working for Dr. Miller at a higher salary. (Tr. 8-9, 71, 143; Exs. 18, S-9)

24. On October 1, 1995 Simich sold the clinic to settle tax debts. He is now retired. (Ex. 9 p. 15)

III. CONCLUSIONS OF LAW⁶

A. Jurisdiction

H.R.S. § 378-1 defines "employer" to mean

. . . any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States.⁷

The statute in turn defines "person" to mean one or more individuals and includes, but is not limited to, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, or the State or any of its political subdivisions.

1. Respondent Simich

During Complainant's employment at the clinic, Respondent Simich employed more than one employee. I therefore conclude that he is an employer under H.R.S. § 378-1 and is subject to the provisions of H.R.S. Chapter 378.

⁶ To the extent that the following conclusions of law also contain findings of fact, they shall be deemed incorporated into the findings of fact.

⁷ This definition has been in effect since 1981. See, L 1981, c 94 § 2)

2. Respondent Steinberg

Respondent Steinberg, who was employed as a physician and surgeon by Simich, served in a supervisory position over Complainant. He evaluated her work performance and exercised significant control over her work conditions when they were on duty together. He is therefore an agent of Respondent Simich and an employer under H.R.S. § 378-1. In Re Shaw / Sam Teague Ltd., Docket No. 94-001-E-P (March 3, 1995) (hereafter referred to as Shaw); In Re Santos / Hawaiian Flowers Exports, Inc., Docket No. 92-001-E-SH (January 25, 1993) (hereinafter referred to as Santos); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 59 EPD 41,642 at 71,691 (6th Cir. 1992).

3. Latches

Respondents argue that this complaint should be dismissed because the Executive Director failed to issue a determination of reasonable cause within 180 days from the date the complaint was filed.

H.R.S. § 368-13 requires the Executive Director to issue a determination of whether or not there is reasonable cause to believe that an unlawful discriminatory practice occurred within 180 days of the filing of a complaint unless the commission grants an extension of time to issue such determination.

H.A.R. § 12-46-12(f) likewise requires the Executive Director to conclude an investigation within 180 days of the filing of a Chapter 378 complaint, but provides that the Commission may grant an extension. Neither the statute nor the rule limits the number

of extensions or the length of extensions which may be granted.

In the present case, the record shows that the Commission granted three extensions through the time the determination of reasonable cause was made. Therefore, the determination of reasonable cause was made in accordance with H.R.S. § 378-13 and H.A.R. § 12-46-12(f).

B. Due Process

Respondents argue that they were not afforded due process in preparing for the hearing when: a) this Hearings Examiner allowed Complainant to be deposed by telephone conference instead of requiring her to appear in Hawaii; and b) the Executive Director disclosed 12 documents at the eve of the contested case hearing.

1. Complainant's deposition

Generally, under Rule 30, HRCF, a plaintiff is required to make himself or herself available for deposition in the county in which the action is brought. See, Wright, Miller & Marcus, Federal Practice and Procedure Civil 2d § 2112 (1994). However, this is a general rule and is not adhered to if a plaintiff can show good cause for not being required to come to the county where the action is pending. Id. In addition, under H.A.R. § 12-46-32, a hearings examiner has the power to allow and supervise discovery as deemed reasonable and necessary. On a motion to change the place of examination or motion to take deposition by telephone conference, a hearings examiner has wide discretion in selecting the place of examination and in attaching conditions concerning the payment of expenses. Wright, Miller & Marcus, supra.

In the present case, the Complainant is not a party to this action, she is a witness. The party bringing this action is the Executive Director, on behalf of the complaint. See, Tseu, on behalf of the complaint filed by Mary Anne Cole v. Treehouse Restaurant, Inc., Docket No. 96-002-E-A-D-RET (May 2, 1996) (footnote 1). Complainant is therefore not required to be available on Oahu for her deposition. In addition, Complainant showed good cause for not being required to attend a deposition in Hawaii. She resides in San Francisco, California and could not take leave from work to attend a deposition in Hawaii. In addition, neither she nor the Executive Director had funds for her travel to Hawaii. However, she was available for deposition by telephone conference. Furthermore, Complainant was ordered to utilize a speaker phone and to videotape herself listening to and answering the questions propounded to her during the deposition. She was also ordered to send copies of the deposition videotapes by express mail to Respondents' counsel. All expenses for the telephone conference, videotaping and express mailing were to be borne by the Executive Director and/or Complainant. Under these circumstances, I conclude that Respondents were afforded due process in their deposition of Complainant.

2. Late disclosure of documents

While Respondents object to the Executive Director's late disclosure of 12 documents (which were not introduced into evidence at the contested case hearing), they have not shown any harm. In addition, Respondents could have moved to continue the contested

hearing to obtain more time to review such documents, or could have moved to re-open the hearing for the taking of further evidence. They did neither. For these reasons, I conclude that the late disclosure did not affect Respondents' due process rights.

C. Hostile Work Environment Sexual Harassment

H.R.S. § 378-2(1)(A) makes it an unlawful discriminatory practice for any employer to discriminate against an individual in the terms, conditions or privileges of employment because of sex. Hostile work environment sexual harassment is a violation of the above statute. H.A.R. § 12-46-109(a); Santos, supra.

To establish a claim of hostile work environment sexual harassment, the Executive Director must prove by the preponderance of the evidence that:

- (1) The complainant was subjected to sexual advances, requests for sexual favors or other visual, verbal or physical conduct of a sexual nature. Santos, supra; Ellison v. Brady, 924 F.2d 872, 55 EPD 40,520 at 65,624 (9th Cir. 1991).
- (2) The conduct was unwelcome in the sense that the complainant did not solicit or incite it, and in the sense that the complainant regarded the conduct as intimidating, hostile or offensive. Santos, supra; Ellison, supra; Harris v. Forklift Systems Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d. 295, 62 EPD 42,623 at 77, 397 (1993).
- (3) The conduct was sufficiently severe or pervasive to alter the conditions of employment, such as having the purpose or effect of unreasonably interfering with an individual's work

performance or by creating an intimidating, hostile or offensive working environment. H.A.R. § 12-46-109(a)(3); Santos; supra; Ellison, supra. The perspective to be used in evaluating the severity or pervasiveness of the harassment is that of the victim. Santos, supra; Ellison, supra, at 878-879. Because the Complainant in the present case is a woman, this objective standard is met if a reasonable woman would consider such conduct sufficiently severe or pervasive to unreasonably interfere with work performance or create an intimidating, hostile or offensive environment.

In same gender hostile work environment sexual harassment cases, the Executive Director must additionally show that the complainant was subjected to sexual conduct (element #1 above) because of his or her sex. Hopkins v. Baltimore Gas and Electric Company, 77 F.3d 745, 752, 67 EPD 43,923 (4th Cir., 1996) (sexual harassment of male employee by male co-worker actionable under Title VII if basis for harassment is because employee is a man); Easton v. Crossland Mortg. Corp., 905 F.Supp. 1368, 1378-1383, 67 EPD 43,926 (C.D. Cal. 1995) (female on female hostile work environment sexual harassment actionable under Title VII and California Fair Employment and Housing Act); Fox v. Sierra Development Co., 876 F.Supp. 1169, 1172, 1175-1176, 66 EPD 43,475 (D. Nev. 1995) (male supervisors and co-workers' sexual conduct could be actionable as male on male hostile work environment sexual harassment); Sardinia v. Dellwood Foods, Inc., 67 EPD 43,784 at

83,901-83,904 (S.D.N.Y. 1995) (male on male hostile work environment sexual harassment actionable under Title VII and New York Human Rights Law); Blozis v. Mike Raisor Ford, Inc., 896 F.Supp. 805, 67 EPD 43,787 at 83,916-83,917 (N.D. Ind. 1995) (male on male sexual harassment actionable under Title VII).⁸

Sexual harassment is a form of sex discrimination. Like Title VII, H.R.S. Chapter 378 affords employees the "right to work in an atmosphere free from discriminatory intimidation, ridicule and insult". Meritor Savings Bank, FSB v. Vinson, 40 EPD 36,159 at 42,578 (Emphasis added). The statute does not prohibit sexually crude or offensive conduct that is not discriminatory. See, Blozis, 67 EPD 43,787 at 83,917 ("[i]t is being the victim of anti-male or anti-female bias that forms the basis of a Title VII sexual

⁸ Federal courts are split as to whether same gender sexual harassment claims are actionable under Title VII. See, discussion in Easton, supra, 67 EPD 43,926 at 84,708-84,709; Sardinia, supra, at 83,901-83,904; Ecklund v. Fuisz Technology, Ltd., 905 F. Supp. 335, 67 EPD 43,861 at 84,312-84,313 (E.D. Va 1995). State courts which have addressed this issue have generally allowed such claims under their state fair employment acts. See, Mogilefsky v. Superior Court, Los Angeles County, 26 Cal.Rptr.2d. 116, 63 EPD 42,746 (Cal. App. 2nd Dist. 1993); Holien v. Sears, Roebuck and Co., 689 P.2d 1292, 35 EPD 34,801 at 35,473 (n. 5) (Ore. 1984). I find cases allowing same gender sexual harassment claims persuasive and conclude that such claims are actionable under H.R.S. Chapter 378 because: 1) the plain language of H.R.S. § 378-2, H.A.R. § 12-46-109 and Title VII do not preclude a same gender sexual harassment claim for relief; 2) cases holding that Title VII does not allow same sex harassment claims are based on the mistaken rationale that harassers cannot discriminate against members of their own sex (see, Easton, supra; Sardinia, supra); 3) the EEOC has interpreted Title VII to protect victims of same sex discrimination in the work place (see, EEOC Compliance Manual § 615.2); 4) in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49, 40 EPD 36,159 at 42,577 (1986), the U.S. Supreme Court used gender neutral language to articulate the definition of sex discrimination rather than requiring crossgender discrimination ("when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex") and 5) the Ninth Circuit has indicated that it would find same gender sexual harassment claims legally cognizable. See, Steiner v. Showboat Operating Co., 25 F.3d 1459, 64 EPD 43,114 at 80,221 ("although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that both men and women working at Showboat have viable claims against [the supervisor] for sexual harassment".)

harassment claim, not simply being exposed to 'sexual'-type comments or behavior"); Fox, 876 F.Supp. 1169, 1173, 1175 (male supervisors and co-workers' conduct in writing, drawing and discussing excrement, urine and male homosexuality to the general employee population did not constitute gender oriented harassment).

In opposite gender hostile work environment sexual harassment cases, sex-based treatment is presumed. For instance, when a man touches a woman in a sexual manner or makes sexually suggestive remarks to a woman, it can be assumed that he is doing so because she is a woman. However, no such presumption arises in same gender sexual harassment cases because sexually suggestive words and acts among men (or among women) can take on a whole other meaning.⁹ Hopkins, supra, at 752; Easton, supra, at 1383; Blozis, supra, at 83,916.

Thus, under H.R.S. Chapter 378 a man can state a claim against another man for hostile work environment sexual harassment if he is subject to sexual conduct because he is a man. Similarly, a woman can state a claim for sexual harassment by another woman if she is subject to sexual conduct because she is a woman. The Executive

⁹ In our society, women are subjected to greater instances of violence, objectification and sexual coercion by men which can make the "appearance of sexuality in an unexpected context or a setting of ostensible equality. . . an anguishing experience." Easton, supra, at 1383 quoting Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand.L.Rev. 1183, 1205 (1989). Communications among men, or among women generally do not carry the same societal baggage because they usually occur within an environment free from concerns about gender dominance and sexual violence. For instance, imagine a male employee making sexual remarks about women employees to a male co-worker. Then imagine the male employee making the same remarks to a female co-worker. While such comments might offend the morals of both co-workers, the female co-worker might also feel that such comments were demeaning, insulting or intimidating to her sex, whereas the male co-worker would not.

Director may prove such sex-based treatment by showing any of the following: a) that the sexual conduct was directed only at members of complainant's sex; Fox, supra. at 1173; Easton, supra, at 1383; b) that the sexual conduct was specifically related to complainant's sex or to members of complainant's sex; Fox, supra; Sardinia, supra; see also, Steiner v. Showboat Operating Co., 64 EPD 43,114 at 80,220-80,221 (although supervisor verbally abused both men and women subordinates, abuse of women related to their gender, [i.e., calling them "dumb fucking broads" or "fucking cunts"] while abuse of men did not)¹⁰; c) that the sexual conduct was disproportionately more offensive or demeaning to members of complainant's sex; Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486, 1522, 55 EPD 40,535 at 65,759 (M.D. Fla. 1991) (pictures of nude and partially nude women throughout work site created offensive and hostile work environment for female employees); or d) that the harasser acted out of sexual attraction to the complainant. Hopkins, supra, at 752; Ecklund, supra at 84,312-84,313, (female employee's allegations that female co-worker stroked her hair and body, hugged and forcibly kissed her, partially undressed in front of her and made explicit comments about sexual acts could be evidence of female on female sexual harassment).

The establishment of the above prima facie case of hostile work environment sexual harassment constitutes direct evidence of

¹⁰ The Ninth Circuit, however, noted that if the supervisor had also used male sexual epithets against men employees, the men might also have viable sexual harassment claims. See, footnote 8, supra.

intent to discriminate. Santos, supra; Katz v. Dole, 709 F.2d 251, 255, 32 EPD 33,639 at 30,002 (4th Cir. 1983). Thus, once a complainant makes out the above prima facie case of hostile environment sexual harassment, the burden of proof shifts to the employer to rebut such showing by: 1) proving that such conduct did not take place; 2) showing that the conduct was not unwelcome; 3) showing that such conduct was trivial or isolated. Santos, supra; Katz, supra.

1. Whether the Sexual Conduct Occurred

The Executive Director alleges that Steinberg and Simich subjected Complainant to sexual conduct.

Respondent Steinberg

The Executive Director has shown by a preponderance of the evidence that Steinberg subjected Complainant to verbal and physical sexual conduct. Respondents deny that Steinberg engaged in such conduct and argue that Complainant's testimony is not credible because: a) she could not recall any dates on which the incidents occurred; b) she did not complain about any sexual conduct during her 3 month evaluation; c) she exaggerated the number of times she cried; and d) she did not mention sexual conduct as a reason for quitting. Alternatively, Respondents argue that while some of Steinberg's alleged conduct may have occurred, it was juvenile, not sexual in nature.

I find Complainant's testimony regarding Steinberg's conduct credible because her statements about the incidents were generally consistent, portions were corroborated by other witnesses and she

complained about some of the conduct to others. In her work performance evaluation, which was conducted on December 26, 1991, Complainant did complain about the radio being played in the laboratory equipment room. (Ex. 13) In her pre-complaint questionnaire dated September 2, 1992, Complainant states that she was ". . . repeatedly sexually harassed at work. Dr. Steinberg said that he could get away with it because of my sexual orientation" (Ex. S-6). In her answers to interrogatories dated February 5, 1996 Complainant states, "Dr. Steinberg made frequent, almost daily, comments of a sexual nature about the bodies of women working at the Clinic, including myself, and also about female patients." She also states that Steinberg snapped her bra strap and shot rubber bands and tossed other small objects at her breast and genital areas. (Ex. S-3) At the hearing, Complainant testified in detail about this conduct and other conduct which occurred. (Tr. at 26-41)

Choike confirmed that Steinberg listened to the Rush Limbaugh radio show and would go "on rampages". (Tr. 186) Choike also heard Steinberg make "dirty jokes" and comments about "big breasted women" and saw Steinberg throw paper clips, pens, pins and shoot things from syringes at Complainant. (Tr. 179, 184) Kilmer heard Complainant state, "That's not appropriate" a few times after Steinberg made comments. (Tr. 222, 231)

Kilmer also testified that Complainant complained about some of Steinberg's sexual comments and about Steinberg snapping her bra strap. (Tr. 217-218) Brian Baker, Complainant's friend and an

Episcopal priest, testified that in late 1991 and early 1992 Complainant complained about a male doctor at work making offensive and lewd statements. (Tr. 198-199) Tanis, Complainant's life partner and a Metropolitan Community Church pastor, testified that Complainant complained about Steinberg snapping her bra strap, listening to Rush Limbaugh, telling "dirty jokes", and making sexual comments.¹¹ (Tr. 242-243, 251-252, 258-260)

Steinberg's conduct was not merely juvenile or crude in nature. His conduct towards Complainant and the female employees was clearly sexual and centered on the fact that they were women. See, Steiner, supra. Steinberg made remarks to female employees about their intimate body parts i.e., why they didn't "pee in the shower like men", and insinuated that a woman employee was having her menstrual period. Steinberg stated that the women employees should wear sexier clothing. He made explicit comments about women's bodies - discussing the size of women's breasts, the female employees' erect nipples and what types of bras they wore. He also touched the female employee's intimate clothing when he snapped the their bra straps.

Respondent Simich

The Executive Director alleges that Simich subjected Complainant to verbal sexual conduct when he once stated he had

¹¹ Aside from the radio being played, I find that Complainant did not make other more specific complaints about Steinberg's conduct on her evaluation because she was afraid she would lose her job. See, Finding of Fact No. 15. Complainant had just moved to Hawaii and started a new job. She understandably did not want to make a written complaint against the doctor who was evaluating her work. I also find that Complainant did not mention Steinberg's conduct as a reason for quitting because she was also fed up with the other doctors' behavior and just wanted to leave. See, Finding of Fact Nos. 21, 22.

"nothing to do but stand around and play pocket pool". The weight of the evidence, however, does not show what Simich actually said or meant by such statement. Complainant testified that Simich made the above statement one afternoon when there were no patients in the clinic and he was bemoaning the lack of business. Complainant testified that Simich made the comment to no one in particular, that it was not part of a conversation and that Simich just spoke "out loud to the room in general, whomever was present". (Tr. 59-60, 83-88) Complainant had never heard the expression "pocket pool" and assumed that Simich was referring to masturbation. (Tr. 86-88) Kilmer's testimony regarding this incident was very different. She stated that Simich approached her and Complainant as they were standing in the laboratory equipment room and asked for a needle and thread. He pulled his pocket out from his pants, showed them a hole and said to them, "I need to sew it up, because I'm sick of playing pocket pool with myself". Kilmer testified that Complainant immediately told Simich that his comment was "not appropriate". (Tr. 221, 231) Simich denied ever making the statement. (Ex. 9 p. 23) For these reasons, weight of the evidence does not show what Simich said or meant and I conclude that he did not subject Complainant to any sexual conduct.

2. Whether Moorehead-Dunn subjected Complainant to sexual conduct because of Complainant's sex

The Executive Director asserts that Moorehead-Dunn also subjected Complainant to verbal sexual conduct. The evidence shows that Moorehead-Dunn did make comments about her past sexual

experiences, her sex life and other employees' sexual practices. Choike heard Moorehead-Dunn discuss her past sexual experiences and ask Gaines about his sexual proclivities. (Tr. 181-183) Kilmer heard Moorehead-Dunn's comment about "sleeping her way through medical school". (Tr. 219)

The evidence, however, does not show that Moorehead-Dunn subjected Complainant to sexual conduct because of her sex. Moorehead-Dunn's boasting about her sexual experiences and sex life was directed at the entire staff, not just the female employees. She speculated about Complainant's sex life and more thoroughly "needled" Gaines, a male, about his sexual desires and practices, and often upset him. (Tr. 182-183) Her comments were not gender specific or disproportionately more offensive to women. Therefore, while Moorehead-Dunn's sexual conduct was unprofessional, crude and offensive to both men and women employees, it was not discriminatory. See, Fox, supra, at 1173, 1175 (male supervisors and co-workers' sexual conduct directed at the general employee population did not constitute gender oriented harassment).

3. Whether The Sexual Conduct Was Unwelcome

The Executive Director has shown by a preponderance of the evidence that Steinberg's sexual conduct was unwelcome. Complainant testified that after some of Steinberg's remarks, she stated, "Doctor, that's offensive". She once told Steinberg that his behavior could be considered sexual harassment. Choike observed Complainant being tense, red-in-the-face, upset and fed up after some of the incidents. (Tr. 185) Kilmer heard Complainant

tell Steinberg that his comments were "not appropriate" and saw Complainant get upset after some of the incidents. (Tr. 222, 231) Baker and Tanis testified that Complainant was upset and angry when she complained about Steinberg's behavior. (Tr. 199, 243) Complainant was clearly offended by the conduct and no evidence was presented to show that she solicited, incited or welcomed such conduct.

4. Whether The Conduct Created An Intimidating, Hostile Or Offensive Work Environment

The record shows that Steinberg constantly made remarks about women's intimate body parts, which Complainant heard. It also shows that Steinberg snapped Complainant's bra strap, threw small objects at her breast and crotch areas and rubbed up against her.

The evidence also shows that Steinberg's sexual conduct was pervasive. Choike testified that Steinberg snapped her bra strap and asked her how women got a bra to fit properly. (Tr. 177-178) Kilmer testified that she heard Steinberg recite perverted versions of nursery rhymes and once stated he had to stop himself from "wolf whistling" at her [Kilmer] when she was in the parking lot.

(Tr. 215-216) Tanis heard Steinberg make comments about Kilmer's breasts and state that Kilmer should wear tighter blouses and shorter skirts. (Tr. 244-245) Tanis also testified that Steinberg once graphically described surgery he had performed on a man's penis even though she had asked him to stop. (Tr. 245)

Kilmer and Choike testified that they were also offended by Steinberg's conduct. (Tr. 185-186, 216, 223-224) After Steinberg

snapped her bra strap, Choike told him that she didn't appreciate what he had done and not to do it again. (Tr. 178) I therefore conclude that a reasonable woman would consider Steinberg's conduct sufficiently severe and pervasive to create a hostile and offensive work environment.

D. Constructive Discharge

Constructive discharge occurs when a reasonable person in the employee's position would have felt that she was forced to quit because of intolerable and discriminatory working conditions. Tseu, on behalf of the complaint filed by Davis v. Volcano Island Farms, Inc. Docket No. 94-003-E-R (February 8, 1995) (hereinafter Davis); Santos, supra; Watson v. Nationwide Ins. Co., 823 F.2d 360, 361, 43 EPD 37,298 (9th Cir. 1987). This test is an objective one and does not involve showing employer intent to force the complainant to resign. Davis; supra; Santos; supra; Watson, supra. In general, a single isolated instance of employment discrimination is not sufficient to support a finding of constructive discharge. Id. A complainant must instead show some aggravating factors, such as a continuous pattern of discriminatory treatment. Id. In addition, the discriminatory treatment must be intolerable at the time of the employee's resignation. Davis; supra (no constructive discharge when last incident of racial harassment occurred one month prior to complainant's resignation); Steiner, supra, at 80,222 (no constructive discharge when harassing supervisor fired 2-1/2 months prior to plaintiff's resignation).

In the present case the Executive Director has not shown by a preponderance of the evidence that Complainant was forced to quit because of Steinberg's discriminatory sexual conduct. The record shows that Steinberg left the clinic on April 4, 1992. Complainant subsequently applied for her job with Dr. Miller on April 9, 1992 and her last day at the clinic was April 25, 1992. Although Complainant testified that Steinberg visited the clinic after April 4, 1992, she could not recall how often he visited, how long his visits were, or if he engaged in any sexual conduct during these visits. (Tr. 298-299) Thus, the weight of the evidence does not show that Steinberg's presence and conduct after April 4, 1992 was so intolerable that Complainant was forced to quit.

In addition, Complainant testified that even if Steinberg hadn't visited the clinic, she would have quit anyways because she felt that Simich and Moorehead-Dunn's behavior was also intolerable. (Tr. 303-304) However, while Simich and Moorehead-Dunn's conduct may have been unpleasant, it was not discriminatory. (See discussion in Sections C.1. and C.2. above.) For these reasons, I conclude that Complainant was not constructively discharged.

E. LIABILITY

1. Respondent Simich

An employer is responsible for its acts of sexual harassment and those of its agents and supervisory employees regardless of whether the acts were authorized or even forbidden, and regardless

of whether the employer knew or should have known of their occurrence. H.A.R. § 12-46-109(c). Because Steinberg was a supervisory employee and agent of Respondent Simich during Complainant's employment, Simich is liable for Steinberg's conduct towards Complainant.

2. Respondent Steinberg

Respondent Steinberg, as an agent of Simich, is an employer under H.R.S. § 378-1. Therefore, pursuant to H.A.R. 12-46-109(c), he is personally liable for sexually harassing Complainant.

F. REMEDIES

The Executive Director requests that Respondents be ordered to pay Complainant compensatory damages and that Respondent Steinberg be ordered to pay Complainant punitive damages. The Executive Director also seeks to have the Commission: a) award lost benefits; b) issue a cease and desist order; c) require Respondents to implement and adopt policies and procedures against employment discrimination based on sex, harassment and retaliation; and d) require Respondents to publish a summary of the Commission's final decision in a press statement provided by the Commission in the Sunday edition of the Honolulu Advertiser or in a newspaper having a general circulation in the City and County of Honolulu.

1. Lost benefits

Because I conclude that Respondents did not constructively discharge Complainant, she is not entitled to lost benefits.

Alternatively, should the Commission find that Complainant was constructively discharged, the Executive Director did not present any evidence to show that Complainant lost any benefits. For this reason, I also decline to award compensation for lost benefits.

2. Compensatory Damages

Pursuant to H.R.S. §368-17, the Commission has the authority to award compensatory damages for any pain, suffering, embarrassment, humiliation, emotional distress, loss of enjoyment of life or other injury Complainant suffered as a result of the sexual harassment. The amount awarded as compensatory damages is generally based on a consideration of both the severity and duration of the harm. Restatement of Torts 2d § 905 (1979).

The evidence shows that Complainant was significantly embarrassed, humiliated, angry and upset by Steinberg's harassment. Prior to working at the clinic, Complainant was a confident and sociable person. She had just graduated from a prestigious women's college and was eager to move to Hawaii and obtain full time employment in the "real world". (Tr. 130, 246) She prided herself in having leadership, organization, communication and crisis management skills. (Tr. 129-130) Steinberg's conduct shocked and insulted her. She began to feel powerless and lost her self confidence when her actions didn't change things. She often cried before going to work when she had never cried about any job before. (Tr. 114-116) For nearly six months she was tense, anxious and had headaches when she was at work, and was angry, tense, irritable, exhausted and had stomach problems when she was at home. (Tr. 72-

80) She became withdrawn and lost interest in socializing with friends. (Tr. 246-247)

Complainant's emotional injuries were observed in part by other witnesses. Choike saw Complainant get red in the face, tense and fed up after some incidents. (Tr. 185) Choike also testified that Complainant got upset and felt that she was getting "picked on" by Steinberg. (Tr. 183-184) Kilmer also observed Complainant become angry and upset after Steinberg snapped her bra strap and after he made sexual remarks to her. (Tr. 217-218, 222) Baker testified that Complainant got very angry and agitated but also felt helpless and trapped when she told him about some of the incidents. (Tr. 199-201) Tanis testified that Complainant's self esteem took a "nose dive" and observed Complainant become withdrawn, irritable, hesitant and fearful. She also testified that Complainant would cry several times a week and would leave work physically and emotionally exhausted. (Tr. 246-250) Finally, Tanis testified that it took Complainant a few months into her new job with Dr. Miller before Complainant felt better about working and behaved normally again. (Tr. 249-250)

Considering these circumstances, I determine that \$40,000 is appropriate compensation for Complainant's emotional distress caused by Steinberg's conduct.

3. Punitive Damages

The Executive Director seeks punitive damages against Respondent Steinberg. H.R.S. § 368-17 also authorizes the Commission to award punitive damages. Punitive damages are

assessed in addition to compensatory damages to punish a respondent for aggravated or outrageous misconduct and to deter the respondent and others from similar conduct in the future. See, Shaw, supra; Santos, supra; Masaki v. General Motors Corp., 71 Haw. 1, 6, 780 P.2d 566 (1989). Since its purposes are punishment and deterrence, punitive damages are awarded only when a respondent's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime. Id.

The Executive Director is required to show, by clear and convincing evidence, that a respondent acted wantonly, oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful misconduct or entire want or care which would raise the presumption of a conscious indifference to consequences. Id. at 15-17.

In the present case, the Executive Director has shown by clear and convincing evidence that Steinberg acted wilfully and with a conscious disregard for Complainant's right to work in an environment free of sexual harassment. Besides making demeaning and offensive verbal comments, Steinberg physically threw small objects at Complainant's breast and crotch areas, often snapped her bra strap, and rubbed up against her. When Choike objected to similar conduct, Steinberg stopped. (Tr. 178) In contrast, he ignored Complainant's objections and warning that his conduct could be considered sexual harassment. He believed he could harass Complainant with impunity based on his mistaken notion that

lesbians could not be sexually harassed by men.

To determine the amount of punitive damages, the following factors are to be considered: 1) the degree of malice and reprehensibility of Respondent's conduct; 2) Respondent's financial situation; and 3) the amount of punitive damages which will have a deterrent effect on Respondent in light of his or her financial situation. See, Santos, supra; Beerman v. Toro Mfg. Co., 1 Haw. App. 111, 119 (1980); Kang v. Harrington, 59 Haw. 652, 663-664 (1978).

At the hearing, no evidence was presented as to Dr. Steinberg's net worth. However, the wealth of a respondent is only one factor to be considered in assessing punitive damages. Ahmed v. Collins, 23 Ariz. App. 54, 530 P.2d 900, 904 (1975); see also, Romero v. Hariri, 80 Haw. 450, 458 (App. 1996) (the failure to show net worth does not necessarily invalidate a punitive damage award but only eliminates a factor in which to gauge the reasonableness of the award). The record shows that Steinberg currently is not working and lives in New York (Ex. 8 p. 7). However, the record also shows that Steinberg is 38 years old, is board certified in general surgery, and specializes in general and vascular surgery. (Ex. 8 p. 7, 14) He has the ability to be employed as a physician or a surgeon. Given Steinberg's wilful behavior and his potential to generate a substantial income as a physician and/or surgeon, I therefore award Complainant punitive damages of \$20,000.

4. Equitable Relief

The Executive Director also seeks to have the Commission:

- a) issue an order directing Respondents to cease and desist from further discriminatory practices and retaliation against Complainant or any other employees;
- b) require Respondents to implement and adopt policies and procedures against employment discrimination based on sex, harassment and retaliation; and
- c) require Respondents to publish the results of the Commission's investigation in a press statement provided by the Commission in the Sunday edition of the Honolulu Advertiser or other newspaper having a general circulation in the City and County of Honolulu.

Because Respondent Simich is retired and Respondent Steinberg now resides in New York, I recommend that the Commission order them to cease and desist from further discriminatory practices and to develop and implement non-discrimination policies based on sex and harassment should they resume practice or conduct business in the State of Hawaii.

The best way to publicize this decision to the public is to require Respondents to publish the attached Public Notice (Attachment 1) in the Sunday edition of the Honolulu Advertiser or in a newspaper having a general circulation in Honolulu, Hawaii.

V. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondents Simich and Steinberg violated H.R.S. § 378-2 and H.A.R. § 12-46-109 by subjecting Complainant Linda Louise Gould to unwelcome sexual conduct which created an intimidating, hostile and offensive work environment.

For the violations found above, I recommend that pursuant to H.R.S. § 368-17, the Commission should order:

1. Respondents Robert Simich and Harold Steinberg jointly and severally to pay Complainant \$40,000 as damages in compensation for her emotional injuries caused by Respondent Steinberg's sexual harassment.

2. Respondent Steinberg to pay Complainant \$20,000 as punitive damages.

3. Respondents Simich and Steinberg to jointly publish the attached Notice (Attachment 1) in the Sunday edition of the Honolulu Advertiser or in a newspaper having a general circulation in the City and County of Honolulu within 10 days of the Commission's final decision in this matter.

4. Respondents Simich and Steinberg to cease and desist from discriminating against all future employees and to develop a non-discrimination policy on the basis of sex and harassment should they resume practice or conduct business in the State of Hawaii.

DATED: Honolulu, Hawaii JUNE 20, 1996.

HAWAII CIVIL RIGHTS COMMISSION


LIVIA WANG
Hearings Examiner

ATTACHMENT 1

PUBLIC NOTICE

published by Order of the
HAWAII CIVIL RIGHTS COMMISSION
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
STATE OF HAWAII

After a full hearing, the Hawaii Civil Rights Commission has found that Respondent Robert Simich, formerly doing business as Dr. Robert L. Simich and Associates, also formerly doing business as Kailua Family and Urgent Medical Care and Respondent Harold Steinberg violated Hawaii Revised Statutes Chapter 378, Employment Discrimination, when Respondent Steinberg subjected a female employee to unwanted sexual conduct which created an intimidating, hostile and offensive work environment. (Linda C. Tseu on behalf of the Complaint filed by Linda Louise Gould v. Dr. Robert Simich, formerly dba Dr. Robert L. Simich and Associates, also formerly dba Kailua Family and Urgent Medical Care and Dr. Harold Steinberg, Docket No. 95-012-E-SH, [date of final decision], 1996).)

The Commission has ordered us to publish this Notice and to:

- 1) Pay that employee an award to compensate her for emotional injuries she suffered; and
- 2) Require us to immediately cease and desist from sexually harassing all future employees and develop written non-discrimination policies on sex and harassment should we resume practice or conduct business in the State of Hawaii.

The Commission has also ordered Respondent Steinberg to pay that employee punitive damages.

DATED: _____

BY: _____
ROBERT SIMICH

HAROLD STEINBERG

APPENDIX A

On October 20, 1992 Complainant Linda Louise Gould filed a complaint with this Commission alleging sexual harassment and constructive discharge against Respondents Simich Associates, Inc. dba Kailua Family and Urgent Medical Care, Dr. Robert Simich, Dr. Debra Moorehead-Dunn and Dr. Harold Steinberg.

On October 2, 1995 the complaint was docketed for hearing and a Notice Of Docketing Of Complaint was issued.

The Executive Director filed its Scheduling Conference Statement on October 16, 1995. A scheduling conference was held on November 1, 1995 and the Scheduling Conference Order was issued on November 2, 1995.

On November 2, 1995 this Hearings Examiner filed a motion to extend hearing date. On November 16, 1995 the Commission granted this motion.

On November 9, 1995 Respondents Simich and Steinberg filed a motion for summary judgment on the grounds that the Executive Director failed to issue a determination of reasonable cause within 180 days from the date the complaint was filed. On November 22, 1995 Respondent Moorehead-Dunn joined in the motion. On November 17, 1995 Respondents Simich and Steinberg filed a supplemental memorandum in support of their motion. On November 10, 1995 the Executive Director filed its memorandum in opposition to the motion. A hearing on the motion was held on November 22, 1995 before this Hearings Examiner. Participating in the hearing were

Enforcement Attorney Logan F. Young on behalf of the Executive Director and Wesley K.C. Lau, Esq. on behalf of Respondents Simich and Steinberg. On November 24, 1995 the Hearings Examiner issued an order denying Respondents' motion for summary judgement.

On February 28, 1996 the Executive Director filed a motion for protective order as to the location of Complainant Gould's deposition. On March 5, 1996 Respondent Steinberg filed a memorandum in opposition to the motion. On March 5, 1996 this Hearings Examiner issued an order granting in part the Executive Director's motion for protective order.

On March 6, 1996 the Executive Director filed a motion to compel discovery. This motion was withdrawn on March 27, 1996. On March 8, 1996 the parties filed a stipulation to extend discovery.

On March 7, 1996 notices of hearing and pre-hearing conference were issued. On March 18, 1996 the Executive Director filed its pre-hearing conference statement. On March 19, 1996 Respondents Steinberg and Moorehead-Dunn filed their pre-hearing conference statements. On March 25, 1996 Respondent Simich filed his pre-hearing conference statement. On March 25, 1996 a pre-hearing conference was held and on that date a pre-hearing conference order was issued. On March 27, 1996 the Executive Director filed its First Amended Pre-hearing Conference Statement. On March 28, 1996 the Executive Director filed its Second Amended Pre-hearing Conference Statement.

On March 29, 1996 the Executive Director filed an ex parte motion to dismiss the complaint against Respondent Moorehead-Dunn. That day, the Hearings Examiner issued an order granting the motion and dismissing the complaint against Respondent Moorehead-Dunn.

Pursuant to H.R.S. Chapters 91 and 368, the contested case hearing on this matter was held on April 1 and 2, 1996 at the Hawaii Civil Rights Commission conference room, 888 Mililani Street, 2nd floor, Honolulu, Hawaii before the undersigned Hearings Examiner. The Executive Director was represented by Enforcement Attorneys Karl K. Sakamoto and Cheryl Tipton. Complainant Gould was present during portions of the hearing. Respondents Simich and Steinberg were represented by Wesley K.C. Lau, Esq. At the hearing, the Executive Director orally moved to dismiss Simich Associates, Inc. as a party respondent and clarified that the correct respondent is Dr. Robert Simich, formerly doing business as Dr. Robert L. Simich and Associates, also formerly doing business as Kailua Family and Urgent Medical Care. The Hearings Examiner granted the motion and sua sponte amended the caption in this case to reflect these changes.

On March 16 and 17, 1995 Respondents and the Executive Director filed post-hearing briefs, respectively.

On March 21, 1996 the Hearings Examiner issued an order reopening the contested case hearing for the purpose of taking further evidence. The contested case hearing was reopened on May 29, 1996 at held at the Hawaii Civil Rights Commission conference

room, 888 Mililani Street, 2nd floor, Honolulu, Hawaii and by telephone conference before the undersigned Hearings Examiner. The Executive Director was represented by Enforcement Attorneys Cheryl Tipton and Karl K. Sakamoto. Respondents Simich and Steinberg were represented by Wesley K.C. Lau, Esq.