CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO, Executive Director, on behalf of the complaint filed by SHAWN M. SMITH, v. TABERU MANAGEMENT, INC. dba RB HONOLULU #1, Respondent.	)	Docket No. 97-009-E-P HEARINGS EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER; APPENDIX "A".

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

I. INTRODUCTION

A. Chronology of Case

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

B. Summary of the Parties' Contentions

The Executive Director alleges that Respondent Taberu Management, Inc. (hereinafter "TMI") violated H.R.S. § 378-2 and Hawaii Administrative Rules (H.A.R.) §§ 12-46-106, 12-46-107 and 12-46-108 when it: 1) refused to reinstate Complainant Shawn M. Smith to her position as general manager after the completion of her maternity leave; and 2) terminated Complainant because she was on maternity leave. The Executive Director also asserts that Respondent's actions prevented Complainant from being hired by a successor employer, Arby's Inc., and caused Complainant to suffer lost wages, benefits and emotional distress.

Respondent TMI contends that: 1) it sold the Windward Mall franchise on June 22, 1994 and did not own the restaurant on June 27, 1994, the date Complainant was released to return to work; 2) alternatively, even if it owned and operated the Windward Mall restaurant on and after Complainant's June 27, 1994 return date, it was barred from making any personnel changes after June 22, 1994 pursuant to a settlement agreement with Arby's Inc.; and 3) it could not afford to reinstate Complainant.

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

II. FINDINGS OF FACT[1]

1. The Windward Mall shopping center, located in Kaneohe, Hawaii, contains an Arby's restaurant. This Arby's restaurant is a franchise which has been and continues to be licensed by Arby's Inc., a Delaware corporation, to other entities to operate. (Ex. 13)[2]

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[1] To the extend that the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

[2] Unless otherwise indicated, "Tr." preceding a page number refers to the transcript of the contested case hearing held on May 26, 28 and 29, 1998; "Ex." followed by a number refers to the exhibits submitted by the Executive Director.

2. In November 1987 Pacific Far East International ("PFEI") purchased the Arby's Windward Mall franchise and hired Complainant Smith as a part time crew worker/cashier. In May 1988 PFEI promoted Complainant to be an assistant manager of the restaurant. (Affidavit of Shawn M. Smith dated 1/12/98 attached to the Executive Director's Motion To Amend Complaint filed on 1/13/98; Ex. 16)

3. In December 1988 PFEI sold the franchise to DGH Properties. DGH Properties continued to employ Complainant as an assistant manager. (Ex. 16)

4. In April 1990, DGH Properties sold the franchise to Respondent TMI. Respondent TMI was a Nevada corporation which was registered to do business in the State of Hawaii. Respondent TMI continued to employ Complainant as an assistant manager. (Exs. 13, 16)

5. In August 1990 Complainant requested and was granted maternity leave from Ted McAvoy, TMI Vice President, to give birth to her first child. While on maternity leave, Complainant received temporary disability insurance benefits (TDI). At that time Complainant and her first child were covered by her husband's medical insurance plan. After her maternity leave was completed, Respondent TMI reinstated Complainant to her position as assistant manager in January 1991. In December 1991 Respondent TMI promoted Complainant to be general manager of the restaurant. (Tr. at 47, 54; Affidavit of S.M. Smith dated 1/12/98; Ex. 1)

6. From November 1988 to May 1996 Complainant's husband, Paul Smith, was employed as a waste water treatment worker by the City and County of Honolulu. In 1991 Paul Smith had an allergic reaction to certain chemicals used at his job, was on disability leave from 1991-1992 and received workers' compensation benefits and medical insurance coverage only for himself. Complainant then obtained medical insurance for herself and her child from TMI. (Tr. at 54-56, 94-97, 116-117)

7. In December 1993 Complainant informed McAvoy that she was pregnant with her second child. Complainant requested and was granted a second maternity leave beginning in March 1994. At that time Complainant received a salary of $26,400 per year. McAvoy assigned then assistant manager Nila Abanggan to assume Complainant's general manager duties. During this maternity leave, Complainant received TDI benefits and medical insurance coverage from TMI. She also periodically dropped by the restaurant and assisted Abanggan with bookkeeping, repairing cash registers and other management problems. (Tr. at 46-48; Affidavit of S.M. Smith dated 1/12/98; Exs. 1, 8, 12, 19, 22)

8. McAvoy was also employed by Kanpai, Inc., the licensee of the Arby's restaurant located at Pearlridge Shopping Center, and was in charge of personnel matters for that franchise. In early 1994 McAvoy granted maternity leave to Tanya Graham, the general manager of the Pearlridge Arby's. On or about May 1994 McAvoy reinstated Graham to her position as general manager after her maternity leave was completed. (Affidavit of S.M. Smith dated

1/12/98; Ex. 1)

9. During Complainant's maternity leave, Respondent TMI began to have financial difficulties. As a result, McAvoy laid off two assistant managers and imposed a 20% pay cut on the remaining managers. McAvoy and Raymond David, TMI President, also discussed the possibility of not bringing Complainant back after her maternity leave. Upon overhearing these discussions, Abanggan, a close friend of Complainant's, offered to resign as general manager so that Complainant could return to work. McAvoy and David rejected Abanggan's offer to resign, stating that since Complainant was already on maternity leave, it was "easier" to let Complainant go. (Tr. at 81-82; Ex. 19)

10. Some time during June 1994 Complainant obtained a note from her doctor releasing her to return to work on June 27, 1994. Complainant gave this note to Abanggan to forward to McAvoy. A few days later Complainant called McAvoy, who acknowledged receipt of the note. McAvoy informed Complainant that TMI was having financial problems and was imposing a 20% pay cut on all employees. McAvoy asked Complainant if she was willing to take such a pay cut, and Complainant answered affirmatively. (Tr. at 48-50; Ex. 1)

11. Some time around June 22, 1994 Respondent TMI decided to settle a civil action which had been brought by Arby's Inc. against it and Kanpai, Inc. As part of the settlement, Respondent TMI and Kanpai Inc. agreed to sell the Windward Mall and Pearlridge franchises to Arby's Inc. A Hearing To Note Settlement was held on June 22, 1994 before the Honorable Melvin Soong of the First

Circuit Court. Pursuant to the representations made by the parties at the hearing, Arby's Inc. was to take over the operations of both restaurants on July 15, 1994 if it could assume their leases. Arby's Inc., however, was not able to assume the leases on both restaurants until July 28, 1994 and the settlement agreement was not executed until August 13, 1994. (Exs. 5, 14, 15)

12. On June 26, 1994 Complainant telephoned McAvoy to remind him that she was returning to work the next day. McAvoy told Complainant that TMI couldn't afford to bring her back and that she had no position to return to. Complainant was stunned. She asked McAvoy if she had "done anything wrong". McAvoy stated that the decision not to bring her back was "nothing personal", but just a "matter of economics". (Tr. at 32-33, 51, 100-101; Affidavit of S.M. Smith dated 1/12/98)

13. Complainant was devastated, angry and began to cry. She couldn't believe that TMI would do this to her, since she had been a dependable, long time employee. She was also worried about her family's financial situation. Complainant and her husband had just purchased a car in January 1994 and a condominium in early February 1994. They had car payments of about $220/month and a mortgage of about $1,000/month. The Smiths also took out a loan with a credit union for the down payment on their condominium and had payments of about $600/month for this loan. In late February 1994 Paul Smith again become disabled from his job and only received workers' compensation benefits of about $1,150/month. They also had a new born child. (Tr. at 29, 33, 51, 57-58, 84, 96-97, 100; Ex. 1)

14. The next day Complainant telephoned David and asked why McAvoy would not reinstate her, since McAvoy had reinstated Graham only one month earlier. David told Complainant that it was "just a matter of timing", that he no longer had control over personnel matters because the franchise was being sold to Arby's Inc., and that he could only recommend her to Arby's Inc. (Tr. at 77; Affidavit of S.M. Smith dated 1/12/98; Ex. 1)

15. Complainant continued to receive TDI and medical insurance benefits from TMI through June 30, 1994. On that date, Respondent TMI terminated Complainant. (Exs. 1, 22)

16. On or about July 18, 1994 Complainant went to the Windward Mall Arby's and spoke with Jerry Podoyak, the Arby's Inc. Operating Consultant overseeing the transfer of the franchise from TMI. Complainant informed Podoyak that TMI failed to reinstate her after her maternity leave and that she wanted to return to work at the restaurant. Podoyak stated that Arby's Inc. did not have possession of the restaurant yet and that he could not demote Abanggan and bring Complainant back as general manager. Complainant stated that she was willing to work as an assistant manager under Abanggan. Podoyak stated that after the transfer, he might have a management position for Complainant, that Arby's Inc. planned to meet with TMI employees later in the month to discuss employment with Arby's Inc., and invited Complainant to that meeting. (Tr. at 71-74, 91-92; Ex. 18)

17. On or about August 10, 1994 Podoyak held a meeting with TMI employees and informed them that all current employees would be

transferred to Arby's Inc. Also present at the meeting was Patricia Haught, the Human Resource Manager for Arby's Inc., David and Complainant. Abanggan passed out employment application forms to the TMI employees and Complainant. Complainant filled out the forms and returned them to Haught. Complainant informed Haught that she had been the general manager of the Windward Mall Arby's and that TMI failed to reinstate her after her maternity leave. Haught stated that TMI had to reinstate Complainant before Arby's could transfer her, questioned the legality of TMI's actions, and suggested that Complainant "seek some legal advice". (Tr. at 8-9, 12-13, 74-76; Exs. 17, 18)

18. A few days after this meeting, Complainant called Podoyak and asked if Arby's Inc. had a management position for her. Podoyak stated that he had contacted the Arby's Inc. corporate office, which stated that it did not have an open management position and could not afford to create one for her. (Tr. at 78-79, 89-92)

19. On or about August 14, 1994 Respondent TMI terminated all its employees and ceased its operation of the Windward Mall restaurant. On August or about 15, 1994 Arby's Inc. began operating the Windward Mall restaurant with the ex-TMI employees who had been terminated the prior day. Abanggan was retained as general manager. (Tr. at 9, 11-12, 83; Exs. 14, 15, 19)

20. Complainant paid TMI $400 to continue the medical insurance for herself and her two children through the month of July 1994. From August 1, 1994 through October 31, 1994

Complainant and her two children had no medical insurance and Complainant had to utilize free clinics for her new born daughter's check ups and immunizations. She applied for and was accepted into the state's MedQuest program in November 1994. (Tr. at 62-64, 109-110, 116-117; Ex. 1)

21. Complainant was unemployed from July 1, 1994 through April 14, 1995. She applied for and received unemployment insurance benefits of $337/week or about $1,460/month from July 1, 1994 through December 31, 1994. (Exs. 6, 7, 9, 10, 11, 12, 21)

22. Complainant unsuccessfully applied for numerous management, banking and clerical positions during this 9.5 month period. Some time around July 1994, Complainant asked McAvoy to write a letter of recommendation on her behalf. McAvoy stated he would not write such a letter unless Complainant signed a "hold harmless" form. Complainant inquired about signing such a form with the State of Hawaii Department of Labor and Industrial Relations (DLIR). DLIR advised Complainant not to sign such a form and Complainant was therefore not able to obtain a letter of recommendation from TMI. (Tr. at 39-40, 64-71, 79-80, 106-107; Ex. 20)

23. During her unemployment, Complainant became stressed, depressed and withdrawn. She fell behind in her maintenance fee payments and incurred penalties. To pay some of her loans and make ends meet, she borrowed money from her parents, her grandmother and her in-laws. From August through October 1994 she felt insecure and stressed about not having health insurance for her new born

infant, her young daughter and herself. After her unemployment insurance benefits ran out, Complainant became desperate and applied for welfare and received food stamps. From January through March 1995 Complainant defaulted on her mortgage payments and would have had her home foreclosed if her grandmother had not made the payments for her. Complainant had been a very stable, mature, responsible, take charge, independent person who was proud of her ability to advance herself and take care of her family. During her unemployment, she lost her self-esteem and felt ashamed about her inability to secure another management-level job, having to ask her family and in-laws for money and applying for welfare. She stopped speaking to her family and socializing with her friends. (Tr. at 26-31, 34-39, 52-53, 59-61, 84-88, 98-99, 101-106, 110-116)

24. On or about April 15, 1995 Complainant was hired by Mahalo Air Lines as a revenue accountant at a salary of $8.00/hour or about $1,386/month. On or about September 14, 1995 Complainant was laid off from this position. (Tr. at 61, 67-69, 118)

25. In October 1995 Arby's Inc. sold the Windward Mall and Pearlridge franchises to Clover International, Inc. ("CII"). CII was owned by Oak Nam, who formerly owned PFEI and originally hired Complainant in 1987. In October 1995 CII hired Complainant as general manager of the Arby's Windward Mall restaurant at a salary of $28,000/year. On January 1, 1996 Complainant received a salary increase to $30,000/year. Complainant is presently employed by CII as the regional manager of the Arby's Windward Mall, Pearlridge and Waipahu restaurants at a salary of $35,000/year. (Tr. at 54, 69,

117-118; Ex. 16)

26. On January 1, 1995 David sold Respondent TMI to Gale A. Kelley and John H. McKevitt. On October 17, 1997 the Department of Commerce and Consumer Affairs cancelled Respondent TMI's registration to conduct business in the State of Hawaii. On December 15, 1997 the Secretary of the State of Nevada revoked TMI's status as a Nevada corporation. (Exs. B, J, K and L attached to Executive Director's Motion To Amend Complaint filed on 1/13/98)

III. CONCLUSIONS OF LAW[3]

A. Jurisdiction

During Complainant's employment with TMI, Respondent TMI was a corporation with one or more employees. It is therefore an employer under H.R.S. § 387-1 and is subject to the provisions of H.R.S. Chapter 378.

B. Pregnancy Discrimination

Under H.R.S. § 378-2(1)(A), an employer may not bar, discharge or otherwise discriminate against an individual because of sex. The term "because of sex" includes because of pregnancy, childbirth or related medical conditions. H.R.S. § 378-1.

Under H.A.R. § 12-46-107(b) an employer may not discharge an employee because she requires time away from work for disabilities

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

due to or resulting from pregnancy, childbirth or related medical conditions. Under H.A.R. § 12-46-108, such disabled employee is entitled to leave, with or without pay, for a reasonable period of time. In addition, § 12-46-108(c) requires employers to reinstate such employees to their original jobs or to positions of comparable status and pay, without loss of accumulated service credits and privileges. See also, In Re Shaw / Sam Teague, Ltd. et. al., Docket No. 94-001-E-P (March 3, 1995)

The weight of the evidence in this case shows that Respondent TMI refused to reinstate Complainant after the completion of her second maternity leave. It also terminated Complainant because she was on maternity leave.

Respondent TMI claims it could not reinstate Complainant because: 1) it sold the Windward Mall franchise on June 22, 1994 and did not own the restaurant on June 27, 1994, the date Complainant was released to return to work; 2) alternatively, even if it owned and operated the Windward Mall restaurant on and after Complainant's June 27, 1994 return date, it was barred from making any personnel changes after June 22, 1994 pursuant to the settlement agreement with Arby's Inc.; and 3) it could not afford to reinstate Complainant.

These arguments are unsupported by the record. While a settlement agreement was noted at a June 22, 1994 hearing, it was not executed and the sale of the Windward Mall franchise did not close until August 13, 1994. (Ex. 14) Until that date, Respondent TMI still owned and operated the restaurant. (Ex. 15) In

addition, the June 22, 1994 hearing transcript and settlement agreement are silent as to the status of TMI employees. (Exs. 14, 15) A letter dated June 24, 1994 from David to Podoyak recites that Arby's Inc. instructed TMI not to alter its present "employment status". (Ex. 3) However, on that date Complainant was still on TMI's payroll as an employee and was receiving TDI and medical benefits. Respondent TMI was therefore not barred by the settlement from reinstating Complainant. Finally, although Respondent TMI laid off two assistant managers during Complainant's maternity leave, it did not eliminate the general manger position and did not lay off Abanggan, who had filled that position. Furthermore, it knew Complainant was willing to take a pay cut and rejected Abanggan's offer to resign so that Complainant could be reinstated. Therefore, TMI could have reinstated Complainant to her general manager position on June 27, 1994. Finally, the record shows that the real reason why TMI did not reinstate Complainant was because McAvoy and David felt it was "easier" to let Complainant go because "she was already on leave". (Ex. 19)

C. Liability

Because Respondent TMI refused to reinstate Complainant to her general manager position after her maternity leave and terminated Complainant because she was on leave, I conclude that it is liable for violating H.R.S. § 378-2 and H.A.R. §§ 12-46-107

and -108.[4]

D. Remedies

1. Back Pay

Back pay encompasses the amount Complainant would have earned if she had been reinstated by Respondent TMI. Respondent has the burden to prove any offsets to Complainant's expected earnings, including the failure to mitigate damages by seeking comparable employment. In Re Shaw, supra; Sias v. City Demonstration Agency, 588 F.2d 692, 18 EPD 8773 at 5141 (9th Cir. 1978). Back pay may also include expenses Complainant incurred because of Respondent's discriminatory acts. 5 Larson Employment Discrimination, 2nd Ed. 92.07 (1998); Marcing v. Fluor Daniel, Inc., 826 F. Supp 1128, 62 BNA 1129 (N,.D. Ill. 1993), rev'd in part on other grounds, 66 BNA 1120 (7th Cir. 1994) (backpay award can include $7,179 penalty plaintiff incurred when she was forced to make early withdrawals from her retirement savings after her discriminatory discharge).

a. lost income

Complainant was unemployed from July 1, 1994 to April 14, 1995. Respondent argues that its liability for back pay should end on August 14, 1994, the date it terminated all TMI employees and ceased its operation of the Windward Mall restaurant. However, the

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[4] Because the Executive Director has reached a settlement agreement with Arby's Inc. and dismissed it as a party respondent from this case, I do not determine whether Arby's Inc. is jointly and severally liable for such discriminatory acts as a successor employer.

record shows that if TMI had reinstated Complainant as general manager on June 27, 1994, Arby's Inc. would have transferred and continued to employ Complainant as general manager after August 14, 1994. Therefore, Complainant's back pay need not be terminated at the date of the restaurant's sale. See, Gaddy v. Abex Corp., 884 F.2d 312, 51 EPD 39,335 at 59,323 (7th Cir. 1989) (plaintiff's back pay not terminated as of date plant sold because record showed that plaintiff would have been retained by successor employer if she had not been discriminatorily laid off); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 55 EPD 40,540 at 65,805 (11th Cir. 1991), superseded in part on other grounds by statute, (defendant's back pay liability not severed on the date it sold its restaurant to another corporation because record showed that if plaintiff had not be discriminatorily denied promotion, he would have been transferred to and employed by successor corporation). I therefore determine that Respondent should be ordered to pay Complainant her salary for the period between July 1, 1994 and April 14, 1995 This computes to $2,200/month x 9.5 months = $20,900.

In addition, Respondent should pay the difference between what Complainant would have earned had she been reinstated as general manager and what she earned with Mahalo Air Lines between April 15, 1995 and September 30, 1995. This computes to ($2,200/month x 5.5 months = $12,100) - ($1,386/month x 5 months = $6,930) = $5,170. The amount of Complainant's total lost income is therefore $26,070.

The Executive Director also claims that Complainant should receive the salary difference for the three month period between

October 1, 1995 and January 1, 1996 when she began employment with CII. The record, however, shows that Complainant received a salary of $2,200/month or $26,400/year from TMI before she was terminated. (Ex. 12). It also shows that CII paid Complainant a higher salary of $28,000/year when it hired her in October 1995. Therefore, I decline to award Complainant back pay for the period commencing October 1, 1995.

b. expenses

The record shows that Complainant incurred expenses of $400 for medical insurance during the month of July 1994 and $968.94 in late maintenance fee payment penalties as a result of TMI's discriminatory conduct. (See Exs. A - D attached to the Executive Director's Post Hearing Memorandum filed on 6/5/98) She should also be awarded $1,368.94 backpay for such expenses. Thus, Complainant's total backpay award is $27,438.94.

2. Compensatory Damages

The Executive Director requests that Respondent be ordered to pay Complainant compensatory damages of $75,000 for the emotional distress she suffered. The Executive Director must demonstrate the extent and nature of the resultant injury and Respondents must demonstrate any bar or mitigation to this remedy.

The evidence shows that Complainant suffered significant emotional distress after McAvoy informed her that she would not be reinstated and during the 9.5 months she was unemployed. Complainant testified that she was stunned and devastated after her June 26, 1994 discussion with McAvoy. Prior to that, Complainant

had no clue that TMI planned to terminate her. Complainant became angry, upset and began to cry. Paul Smith and Bambi Abalos (Complainant's mother) observed Complainant sobbing and unable to speak after this phone call.

During her 9.5 months of unemployment Complainant became stressed, depressed and withdrawn. She and her family were under great financial strain because they had just purchased a new home, had several outstanding loans and Paul Smith was on disability leave. Paul Smith and Abalos testified that Complainant lost her self esteem, withdrew, stopped talking to them and other family members, and stopped socializing with her friends. After her unemployment insurance benefits ran out, Complainant became desperate. Prior to this, Complainant had been a very stable, mature, responsible, take charge, independent person who was proud of her ability to advance herself and take care of her family.

The Executive Director also contends that as a result of her unemployment and lower salary from Mahalo Air Lines, Complainant missed several credit union loan payments, could not make up these payments, had to file for personal bankruptcy in June 1997, and therefore suffered additional emotional distress. However, the evidence in the record is insufficient to show that Complainant's unemployment caused her personal bankruptcy almost two years later. Specifically, the Executive Director did not present details as to the amount of missed payments and Complainant's other financial circumstances during this period. Such evidence is necessary given that: a) the Smith's income during most of Complainant's

unemployment and her employment with Mahalo (June to December 1994 - approximately $2,610/month; March to September 1995 - approximately $2,536/month) exceeded their loan payments (approximately $1,800/month); b) Complainant was employed by CII at a higher salary by October 1995; and c) Mr. Smith was also fully employed by June 1996.

Considering these circumstances, I determine that $60,000 is appropriate compensation for the injury to Complainant's feelings, emotions and mental well-being caused by Respondent TMI's discriminatory conduct.

3. Punitive Damages

The Executive Director seeks an award of $25,000 in punitive damages against Respondent TMI. H.R.S. § 368-17 authorizes this 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. Tseu/Gould v. Dr. Robert Simich, et. al., Docket No. 95-012-E-SH (October 29, 1996); Tseu/Collins v. Cederquist, Inc. et. al., Docket No. 95-001-E-R-S (June 29, 1996); Masaki v. General Motors Corp., 71 haw. 1, 6 (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 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.

I conclude that the Executive Director has not met this burden. While the record shows that McAvoy and David felt that it was economically and logistically easier to terminate Complainant than to terminate Abanggan and reinstate Complainant (given TMI's poor financial situation and the franchise's imminent sale) the Executive Director did not show by clear and convincing evidence that they intentionally or deliberately violated Complainant's reinstatement rights under H.A.R. § 12-46-108. No evidence was presented to show: 1) that McAvoy and David were aware of such rights; 2) that McAvoy and David knew of Complainant's financial situation (i.e., purchase of a new home, husband's disability); or 3) the type of "hold harmless" form McAvoy asked Complainant to sign and for what purpose. For these reasons, I decline to award punitive damages.

4. Equitable Relief

Finally, the Executive Director asks that the Commission order Respondent to:

a) immediately cease and desist from further discriminatory practices on the basis of sex due to pregnancy;

b) develop and implement a written non-discrimination policy based on sex due to pregnancy and offer training to TMI management and employees on such policy;

c) post notices published by the Commission regarding compliance with discrimination laws in conspicuous places

on TMI premises;

d) publish the results of this contested case hearing in a newspaper published in the state and having general circulation in Honolulu, Hawaii.

Because Respondent TMI is no longer registered to do business in the State of Hawaii, I recommend that the Commission award such affirmative relief only if it returns to conduct business in Hawaii.

IV. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondent TMI violated H.R.S. § 378-2 and H.A.R. §§ 12-46-107 and 12-46-108 when it refused to reinstate Complainant as general manager of the Windward Mall Arby's restaurant after her maternity leave and terminated her because she was on maternity leave.

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

1. Respondent TMI to pay Complainant back pay in the amount of $27,438.94.

2. Respondent TMI to pay Complainant $60,000 as damages in compensation for her emotional injuries.

3. Respondent TMI to:

a) immediately cease and desist from further discriminatory practices on the basis of sex due to pregnancy;

b) develop and implement a written non-discrimination policy based on sex due to pregnancy and offer training to TMI management and employees on such policy;

c) post notices published by the Commission regarding compliance with discrimination laws in conspicuous places on TMI premises;

d) publish the results of this contested case hearing in a newspaper published in the state and having general circulation in Honolulu, Hawaii

should it return to conduct business in the State of Hawaii.

Dated: Honolulu, Hawaii, June 26, 1998.

HAWAII CIVIL RIGHTS COMMISSION

LIVIA WANG
Hearings Examiner

Copies sent to:

Paul F.N. Lucas, Esq. HCRC Enforcement Attorney
Gale A. Kelley, President, Respondent TMI

APPENDIX A

On October 7, 1994 Complainant Shawn M. Smith filed a complaint with this Commission alleging that her former employer, Respondent Taberu Management, Inc. (hereinafter "TMI"). discriminated against her on the basis of her sex by failing to reinstate her after the completion of her maternity leave. Smith amended the complaint on December 15, 1994 to include Arby's Inc. as a Respondent.

On December 1, 1997 the complaint was docketed for hearing and a Notice Of Docketing Of Complaint was issued.

The Executive Director filed its Scheduling Conference Statement on December 10, 1997. On December 17, 1997, Raymond G. David, former President of TMI, filed a Scheduling Conference Statement on behalf of Respondent TMI. Respondent Arby's Inc. filed its Scheduling Conference Statement on December 18, 1997. A scheduling conference was held on December 22, 1997 and the Scheduling Conference Order was issued that day.

By letter dated January 8, 1998, David informed the parties and this Hearings Examiner that TMI was sold on December 31, 1994 and that he was no longer an officer or representative of Respondent TMI. On January 13, 1998 the Executive Director filed a motion to amend complaint to add David as a Respondent. On January 30, 1998 Respondent Arby's filed a statement in support of the motion, and on David filed a memorandum in opposition. On February 5, 1998 the Executive Director filed a reply to David's

memorandum in opposition. A hearing on the motion was held on February 9, 1998 before this Hearings Examiner. In attendance were: Enforcement Attorney Paul F.N. Lucas on behalf of the Executive Director; Richard K. Griffith, Esq. on behalf of David; and Alan Van Etten, Esq. on behalf of Respondent Arby's Inc. At the hearing the Hearings Examiner orally denied the motion to amend and issued a written order on February 13, 1998.

On February 27, 1998 the Executive Director filed a petition for declaratory relief with the Commission seeking a declaration as to whether the Hearings Examiner correctly applied H.A.R. § 12-46-6.1 in denying its motion to amend. On March 13, 1998 David filed a memorandum in opposition to the petition. On April 14, 1998 the Commission issued an order summarily denying the petition for declaratory relief.

On March 30, 1998 the Executive Director filed an ex parte motion to dismiss complaint against Respondent Arby's Inc. on the grounds that it had reached a settlement agreement with this respondent. On that day, this Hearings Examiner issued an order granting the motion to dismiss.

On April 20, 1998 notices of hearing and pre-hearing conference were issued and were sent by certified mail to Gale A. Kelley, President of Respondent TMI at his or her last known address. On or about April 24, 1998, the notices sent to Gale A. Kelley were returned stamped "attempted delivery - address unknown". Pursuant to H.R.S. § 91-9.5 notices of hearing were

published in the Honolulu Sunday Advertiser on May 3 and 10, 1998. On May 7, 1998 the Executive Director filed its pre-hearing conference statement. On May 14, 1998 a pre-hearing conference was held.

Pursuant to H.R.S. Chapters 91 and 368, the contested case hearing on this matter was held on May 26, 28 and 29 1998 at the Hawaii Civil Rights Commission conference room, 830 Punchbowl Street, room 411, Honolulu, Hawaii before the undersigned Hearings Examiner. The Executive Director was represented by Enforcement Attorney F.N. Lucas. Complainant Smith was present during portions of the hearing. A representative for Respondent TMI did not appear at the hearing.

On June 5, 1998 the Executive Director filed its post-hearing brief.