'98 MAY 19 P1:20

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO, Executive Director, on behalf of the complaint filed by ERIC WHITE, v. STATE OF HAWAII, UNIVERSITY OF HAWAII; and ROB WALLACE, Respondents.	Docket No. 97-001-PA-R FINAL DECISION AND ORDER

FINAL DECISION AND ORDER

The Hearings Examiner filed the Proposed Findings of Fact, Conclusions of Law and Recommended Decision on February 2, 1998. The Executive Director and Respondents State of Hawaii, University of Hawaii ("U.H."), and Rob Wallace ("Wallace") filed timely Written Exceptions and requested oral argument. The Executive Director also filed a timely Statement in Support.

The Commission heard oral argument on April 3, 1998. Present were Commissioners Jack Law, Allicyn Hikida Tasaka, Faye Kennedy, and Harry Yee. Cheryl Tipton, Esq., represented the Executive Director; Russell Suzuki, Esq., represented U.H., and Jeffrey Portnoy, Esq., represented Wallace.

Chairperson Claudio Suyat, who could not be present because of illness, listened to the tape recording of the oral argument, Affidavit of Claudio Suyat, filed on April 14, 1998, read the submissions, considered the portions of the record cited by the parties, H.R.S. § 368-14(a), and will participate in the decision.

I. STATEMENT OF FACTS:

This case involves racial slurs made to a spectator by a U.H. student manager during a basketball game at the U.H. Special Events Arena. Neither U.H. or Wallace took exception to the Proposed Findings of Fact that Wallace made racial slurs to Complainant Eric White ("White").

White, an avid fan and member of the booster club, attended a University of Hawaii vs. University of Utah basketball game on February 18, 1995, with his wife and young child. Proposed Findings of Fact ("Fact") 14 and 17. During the game, White, who was sitting near the team, made many comments about the coaching[1]. Fact 18. The arena manager, who heard the comments, believed that although irritating, they were not offensive[2], so he did not ask White to quiet down. Fact 19.

Wallace, a student manager of the team, is the son of U.H. basketball coach, Riley Wallace. Fact 8. As part of his duties, Wallace sat near the team, about eight feet from White, and heard his comments. Fact 17. Wallace became irritated by the criticism of the coaching and believed that the comments were attacks on his father. Fact 19.

---

[1]During the first half of the game, White yelled comments about the referees and opposing players. During the second half as the team was trailing, White became frustrated and yelled comments such as, "You're a dinosaur coach!" "You're blowing it!" "You don't know what you're doing!" "Stupid move!" "Play your bench!" "Put Woody [Woodrow Moore] in!" "You gotta use Woody, Woody can do it!" "You can't coach talented players!" "Play your best players!" Fact 18.

[2]U.H. disagrees with the characterization of White's remarks. See, Exceptions to Factual Findings, infra.

Near the end of the game, Wallace turned to White and said, "Shut up you fucking nigger! I'm tired of hearing your shit! Shut your mouth or I'll kick your ass!" Fact 20. White replied, "Oh yeah, punk, come over and try it! You see me all the time, what's the problem? Fact 22. Wallace moved within a few feet of White and said, "Just shut up, nigger or I'll kick your ass!" Fact 23. An assistant arena manager intervened to end the encounter. Id.

After the game, White tried to file a complaint with U.H. Fact 27. The arena manager would not accept his complaint and told him to file a police complaint. Id. White tried to file with the police department but was refused because the incident was considered to be a civil matter. Facts 30 and 35. Ultimately, White complained to the U.H. athletic director, and Wallace was suspended as a result. Fact 40. Later, White filed a timely administrative complaint with the Commission alleging discrimination in public accommodations because of his race.

II. STATE PUBLIC POLICY AGAINST DISCRIMINATION:

The Hawai'i Constitution, Art. I, Sect. 5, provides: "No person shall ... be denied the enjoyment of the person's civil rights or be discriminated in the exercise there of because of race, religion, sex, or ancestry." Racial discrimination in public accommodations is against the public policy of the State. H.R.S. § 368-1. The Hawai'i Supreme Court has stated that the State's "public policy against racial discrimination is beyond question." Hyatt Corp. v. Honolulu Liquor Commission, 69 Haw. 238, 244, 738 P.2d 1205 (1987).

In construing the public accommodations law, H.R.S. Chapter 489, the Commission must carry out the mandate of H.R.S. § 489-1:

> (a) The purpose of this chapter is to protect the interests, rights, and privileges of all persons within the State with regard to access and use of public accommodations by prohibiting unfair discrimination.
> (b) This chapter shall be liberally construed to further the purposes stated in subsection (a).

In addition to the clear statutory mandate, the law is remedial legislation which must be liberally construed, Flores v. United Air Lines, Inc., 70 Haw. 1, 757 P.2d 641 (1988), in order to protect "the general public as customers, clients or visitors of a place of public accommodations." H.R.S. § 489-2 (definition of place of public accommodations).

III. EXCEPTIONS TO FACTUAL FINDINGS:

U.H. takes exception to Facts 16 and 37. U.H. contends that Fact 16 is clearly erroneous because the Hearings Examiner should have found that White cursed, swore, and used profanity in his comments about the coaching. The record reflects, however, that both Wallace, Tr. at 83, and the arena manager, who heard the comments, Exh. 21. at 11, testified that White did not use profanity. Other nearby witnesses testified that White did not use profanities prior to the incident with Wallace. Tr. at 303-04, 365. Based upon the record, the Commission adopts Fact 16 because it correctly describes White's comments before the incident.

U.H. contends that Fact 37 which states that Wallace was not disciplined as of February 19, 1995, suggests that he was favored over an African American player, who had previously been

disciplined for swearing. U.H. claims that it would be inconsistent with due process for it to take disciplinary action against Wallace by that date. Based on the record, the Commission determines that the finding is correct because it recounts what happened on that date, regardless of any suggestion of favoritism, and adopts Fact 37.

The Executive Director takes exception to Facts 41 and 42, which state that Wallace was terminated from his position as student manager. The Executive Director contends that Wallace was merely suspended from his duties and continued to receive a monthly payment under his athletic scholarship. U.H. notes that Wallace was suspended. U.H. Exceptions at 11. Based on the record and U.H.'s position on the matter, the Commission modifies Facts 41 and 42 to state that Wallace was suspended, not terminated.

The Commission finds that the record supports the entirety of the Proposed Findings of Fact, with the modification regarding Wallace's suspension, and incorporates them in the Final Decision.

IV. CONCLUSIONS OF LAW:

1. JURISDICTION OVER U.H.

The Hearings Examiner concluded that U.H. as the owner and operator of the Special Events Arena, is a place of public accommodations and is subject to the provisions of H.R.S. Chapter 489. U.H. takes exception and argues: 1) that it has sovereign immunity and cannot be sued for monetary damages for civil rights or constitutional violations under Figueroa v. State, 61 Haw. 369, 604 P.2d 1198 (1979); and 2) that under the State Tort Liability

Act ("STLA"), H.R.S. Chapter 662, if applicable, the State has immunity for intentional torts, such as occurred here, and the Commission cannot decide the case because circuit courts have original jurisdiction under the STLA.

The Executive Director argues: 1) that Figueroa and the other cases cited for immunity deal with monetary damages for violations of the State Constitution and are not applicable where State law violations are claimed; and 2) under H.R.S. 661-1(1), the State has agreed to be sued for claims "founded upon any statute of the State[,]" and that because the claim arises under H.R.S. Chapters 368 and 489, the State has waived its sovereign immunity for violations of the public accommodations law.

The Commission believes that the statutory scheme supports a conclusion that U.H. is liable for monetary damages under H.R.S. Chapter 489. "Place of public accommodation" is defined to include: "sports arena, stadium, or other place of exhibition or entertainment." H.R.S. § 489-2. The Executive Director argues that coverage of the State was envisioned by the Legislature because government rather than the private sector normally operates such facilities. Supportive of coverage is the definition of "person" in H.R.S. § 489-2 which includes "the State, or any governmental entity or agency[,]" and H.R.S. § 489-8, which provides, in part: "It shall be unlawful for a person to discriminate unfairly in public accommodations." Emphasis added. When read in para materia, it is clear that the law envisions coverage of places of public accommodations operated by the State.

Thus, the Commission adopts Conclusion of Law A,1, that U.H. as the owner and operator of the Special Events Arena is subject to H.R.S. Chapter 489[3] for the acts of its employees or agents under the doctrine of respondeat superior.

2. Wallace's Status as Employee or Agent:

The Hearings Examiner concluded that "[p]ursuant to H.R.S. § 498-3, this Commission has jurisdiction over Respondent Wallace only if he is an owner, operator, employee or agent of a [place] of public accommodations[,]" and that Wallace was an agent of U.H. but not an employee. In so concluding, the Hearings Examiner relied upon a Commission declaratory ruling, In re Santiago/Iolani Swim Club, DR No. 92-007 (March 5, 1993). In that case, the Commission adopted the economic realities test to determine if an individual is an employee, covered by the employment discrimination law, H.R.S. Chapter 378, part I, rather than an independent contractor. The test requires a case by case consideration of numerous factors relevant to employment status, with no single factor being controlling, in order to best reveal the work relationship.

Under H.R.S. § 489-8, it is unlawful for "a person" to engage in unfair discrimination. This suggests that the distinction between employee and independent contractor status is not as critical under the public accommodations law. So the factors in the economic realities test indicating that an individual is more akin to an independent contractor than an employee need not be

---

[3]Because the Commission has jurisdiction under Chapters 368 and 489, U.H.'s arguments regarding the STLA are not applicable.

given as much weight. This view is consistent with the liberal construction requirement, H.R.S. § 489-1(b), and case law indicating that employee status for the purposes of social legislation should be construed "in light of the mischief to be corrected and the end to be obtained." Bailey's Bakery v. Tax Commissioner, 38 Haw. 16, 27-28 (1948).

Wallace was one of two student managers of the basketball team. The duties of a student manager are contained in a U.H. job description, Exh. 28, which lists an extensive range of services that must be performed by a student manager prior to, during, and after the season, including, sweeping floors before practice, issuing and keeping track of equipment, working with players on drills, cleaning the locker rooms, setting up the locker rooms and equipment on game days, working on the bench during games, packing travel bags and going on road trips, working with visiting teams (gym set up, practice, and laundry), working with the equipment room manager, and monitoring post season weight training. In return for these services, a student manager receives an athletic scholarship consisting of a tuition waiver, book loans, and money for housing and meals ($580.00 per month). However, U.H. considers a student manager to be a student athlete rather than an employee, despite the obvious differences between the services provided by a student manager and the athletic performance of a student athlete.

Wallace argues that a student athlete should not be considered an employee of the university and cites several cases for this proposition. However, the cited cases deal with whether a student

athlete, not a student manager, is considered an employee or agent for the purposes of coverage under workers' compensation statutes[4] or tort law. Thus, they have no relevance for deciding whether a student manager is an employee under the public accommodations law.

Although U.H. had significant control over the means and manner of Wallace's performance of his duties and made monthly payments for room and board and waived tuition costs, the Hearings Examiner gave greater weight to how U.H. classified and disciplined student managers; how it compensated them; and how the parties viewed their relationship. Of significance were: 1) the "Athletic Agreement", which did not mention creation of an employment relationship or payment of salary or wages; 2) the fact that student managers did not receive annual leave, workers' compensation, or medical benefits, as did other employees; 3) the fact that they were subject to disciplinary policies under the Student-Athlete Handbook, not the employee personnel manual; 4) U.H.'s failure to assign an employee number or withhold taxes; and 5) the view of both U.H. and Wallace that he was a student athlete, not an employee.

---

[4]The Commission notes that under certain State employment laws, services performed by a student at a university, who is enrolled and regularly attending classes, for money or the provision of board, lodging, or tuition is specifically excluded from the definition of employment. See, H.R.S. § 386-1 (subparagraph (3) of definition of services not considered "employment" in workers' compensation law); H.R.S. § 383-7(9)(B) (unemployment benefits); H.R.S. § 392-5(9)(B) (temporary disability benefits). Thus, under these laws, a student performing services would not be considered an employee. The exclusions indicate that the students performing services would fall under the definition of employment but for the exemptions. Chapter 489 does not contain an exemption for students.

The Commission does not give the Athletic Agreement great weight for determining Wallace's employment status because of the transitory nature of a student's work relationship and U.H.'s control in creating the agreement. Higher education prepares a student for future employment. Working at a university helps to pay for a student's education and is not intended to be a career path. For most students, it is unimportant whether one is called an "employee" as long as payment is received for services rendered. The Athletic Agreement allows U.H. to create a special relationship with selected students, who are paid to provide services to or play for its athletic teams, call them something other than an employee, and designate their reimbursement as something other than wages or salary. But the labels used by U.H. should not control the analysis. See, Locations, Inc. v. Hawai'i Dept. of Labor and Industrial Relations, 79 Hawai'i 208, 211, 900 P.2d 784 (1995) ("employment relationship may exist even in situations where parties have 'agreed' not to label themselves as employer and employee.")

Under the public accommodations law, it is not significant that the Athletic Agreement classified Wallace as a student athlete, rather than an employee, or gave him an athletic scholarship (consisting primarily of money and other financial considerations) for his services, rather than wages or salary. Nor is it significant that U.H. did not provide certain fringe benefits (annual leave, workers' compensation, or medical care), assign an employee number, or withhold taxes as it would for its employees.

The non-existence of such factors, while helpful in discerning independent contractor status under the employment law, need not be given as much weight under the public accommodations law. For similar reasons, it is not significant that a student manager is subject to discipline under the Student-Athlete Handbook rather than an employee personnel manual or the parties' agreement that Wallace was not an employee. Locations Inc., supra.

"An 'employee' is commonly and ordinarily defined as 'one who works for a salary or wages under directions.'" Lai v. St. Peter, 10 Haw. App. 298, 304 (1994) (citation omitted). Under the job description, Exh. 28, a student manager provides a wide range of services to the basketball team at the direction of the coaching staff and receives financial payments. A student manager does not perform as an athlete. U.H. could pay an employee to perform a student manager's duties but could not do the same with a student athlete. This difference highlights the Commission's belief that Wallace should be considered an employee of U.H. for the purposes of the public accommodations law. When he made the racial slurs, which denied White the full and equal enjoyment of the basketball game, Wallace was providing services to U.H. and being paid. He was not at the arena as a member of the general public or the coach's son. Thus, the Commission concludes that under Chapter 489, Wallace was an employee of U.H. acting within the scope of this employment and reverses Conclusion of Law A,2,a.

In the alternative, the Commission concludes that Wallace, if he was not an employee, was an agent of U.H. The Hearings Examiner

concluded that Wallace was an agent because U.H. had delegated to him, as a student athlete and member of the basketball team, the authority to provide entertainment to and interact with the public on its behalf at basketball practices, games, and fund-raisers.

Wallace contends that there was no agency relation created because there was no meeting of minds between him and U.H. that he was to act on U.H.'s behalf with regard to spectators, and the normal usage of the term "student manager" does not connote any authority to deal with spectators. U.H. contends that there was no agency relationship because the facts do not establish that Wallace was authorized to deal with the public at basketball games or use racial slurs. U.H. notes that other employees were responsible for dealing with spectators and that student athletes are prohibited from making racial slurs.

Respondents' arguments overly constrict the scope of a student manager's authority to act on behalf of U.H. A student manager's job description envisions providing a wide range of services to assist the basketball team. A student manager is specifically required to "[w]ork on the bench during the game." Exh. 28. Thus, at a minimum, there was a meeting of the minds that Wallace was authorized to do things to assist the basketball team during games. Whether acting to quiet down a loud spectator during the game would fall within such authority is the question. Put another way, if, during a timeout with ten seconds left in a tie game, a spectator's loud voice makes it difficult for the team to hear a coach's instructions, would it be within a student manager's scope of

authority to try to quiet the spectator down?

The Commission believes that a student manager trying to quiet down a loud spectator would be acting within the scope of his authority to do things to assist the team if done in a non-racist, non-threatening manner. However, the problem in this case is the manner in which Wallace carried out his authority. The record indicates that Wallace viewed White's comments as being critical of the coaching staff and his father, in particular. Fact 19. He wanted to stop those comments because he told White several times to "shut up." That he used expletives, racial epithets[5], and threatened White with immediate bodily harm is the problem. However, Wallace's actions do not fall outside the scope of his authority simply because of the language he used. It would be inconsistent with the liberal construction requirement of H.R.S. § 489-1(b) to find that an agent's actions go beyond the scope of his or her authority because of the offensiveness of the manner in which the actions were carried out. Thus, the Commission adopts Conclusion of Law A,2,b, that Wallace was an agent of U.H. and subject to H.R.S. Chapter 489 for the reasons expressed in the Recommended Decision and as expanded upon herein.

---

[5]U.H. argues that the Student Athlete Handbook precludes student athletes from using obscene and indecent language thereby making Wallace's statements outside the scope of his authority. This argument ignores the meeting of minds that Wallace was to do things to assist the team. As long as he was acting within the scope of that authority, U.H. cannot avoid being bound by his actions carrying out that authority just because he may have violated the Handbook.

3. FIRST AMENDMENT ISSUES:

Both U.H. and Wallace raise First Amendment free speech concerns. They claim that under the First Amendment Wallace cannot be punished for his statements because he was acting as the son of the coach, not as an employee or agent of U.H. In other words, Wallace was acting as a private individual when he made the racial slurs. However, the Commission has concluded that Wallace was acting as an employee or agent of U.H. when he made the racial slurs, and the record does not support the claim that he was acting as a private individual.

Racial slurs can be proscribed under the public accommodations law. Consistent with the First Amendment, a State can regulate conduct, i.e., racial discrimination in public accommodations, even though there is an incidental limitation on speech, if the regulation furthers important governmental interests; the interest is unrelated to the suppression of speech; and the restriction on expression is no greater than essential for furtherance of that interest. O'Brien v. United States, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968). In the instant case, H.R.S. Chapter 489 furthers the Hawai'i Constitution and the legislative public policy declaration against discrimination by regulating race-based conduct which interferes with "the interests, rights, and privileges of all persons with the State with regard to access and use of public accommodations", H.R.S. § 489-1(a), is unrelated to the suppression of speech, and furthers these interests with minimal impact upon speech.

In addition to using racial epithets[6] and expletives, Wallace threatened twice to "kick [White's] ass!" Facts 20 and 23. The Commission believes that such threats, in conjunction with the racial epithets and expletives, can be viewed as speech which by their very utterance inflict injury or tend to incite an immediate breach of peace. Chaplinsky v. New Hampshire, 315 U.S. 568, 86 S.Ct. 1031 (1941). As such, Wallace's speech does not fall within any First Amendment protection.

It is unfortunate that Wallace used such language. As the coach's son, it is understandable that he would want to defend his father. However, the words he used are inexcusable. In the heat of the moment, he lost his self-control[7], and the record clearly reflects that now he deeply regrets the incident. Fact 46. It is unfortunate that the Commission must publicly decide this case where it is clear that racial slurs were made to a spectator at a U.H. sporting event by a person working for the university. Regardless of whether Wallace was an agent or employee, U.H. must bear some responsibility for what happened. This is not a case where a U.H. student, with no other ties to the university, acts in a racially offensive manner to a spectator at a sporting event in a U.H. facility.

---

[6]Wallace used the term "nigger" because it was the "ugliest thing he could say to hurt [White] at the time." Fact 21.

[7]"Wallace knew that the word 'nigger' was a racist and derogatory term for black people. Respondent Wallace was taught to respect people of all races and did not believe that African Americans were 'niggers' or inferior." Fact 21.

4. LIABILITY AND REMEDIES

In this case, the public accommodations law is designed to protect a member of the general public from being denied the full and equal enjoyment of watching a basketball game at the Special Events Arena because of his or her race. H.R.S. § 489-3. It is clear that Wallace's racial slurs denied White the full and equal enjoyment of watching the game. The Commission upholds Conclusion of Law B that the public accommodations law prohibits single isolated instances of discriminatory conduct, Re Smith/MTL et al., Docket No. 92-003-PA-R-S (November 9, 1993), and that the Executive Director has shown by a preponderance of the evidence that Wallace's actions violated H.R.S. § 498-3.

The Commission upholds Conclusion of Law C,1, that U.H. is liable for Wallace's actions under the doctrine of respondeat superior. The Commission upholds Conclusion of Law C,2, that Wallace is personally liable as an agent for his discriminatory practices and modifies it to add that he is also personally liable as an employee.

The Commission upholds Conclusion of Law D,1, to the extent that it finds Wallace and U.H. to be jointly and severally liable for $10,000.00 in compensatory damages for the racial slurs for the reasons in the Recommended Decision. The Commission modifies Conclusion of Law D,1, regarding the compensatory damages against U.H. for not taking immediate, appropriate, corrective action after Wallace's racial slur and increases the amount from $10,000.00 to $20,000.00.

As outlined in Facts 27-43, the record shows that U.H. staff treated White rudely when he complained and did not follow normal procedures for dealing with complaints. The arena manager's reaction to the incident insinuated that White was at fault, questioned whether the word "nigger" was used, and declined any responsibility for dealing with the matter. Fact 27. No written complaint was accepted by U.H., and White was referred to the police. Id.

The key point is that U.H. knew that Wallace had made a racial slur shortly after White complained to the arena manager because Wallace had admitted doing so. Fact 29. Despite this knowledge, U.H. treated the matter differently because of Wallace's relationship to the coach. White felt uncomfortable and intimidated during the meeting with the Wallace family because no other U.H. representative was present. Fact 33. Wallace was not suspended in accordance with the Student Athlete Handbook despite previous disciplinary action taken against an African American player for swearing at a coach. Fact 37. The team was instructed not to talk to White any more. Id. Several of White's co-workers, who saw the incident or learned about it in the media, questioned him about it. Id. As a result, White became more upset and embarrassed about the incident and how it was handled. Fact 38.

White had to persevere in order to obtain redress. He tried to talk to the coach a few days later. Fact 39. The coach said that no further action would be taken because his son had "suffered enough" and advised White to "do what you have to do." Id. Then

White and his family spoke to the athletic director, who told White that he thought the matter had been resolved and that no disciplinary action had been taken against Wallace. Fact 40. However, the athletic director agreed to discuss the matter with the coach. Id. After doing so, it was decided that Wallace would be suspended. Id. The athletic director then directed the arena manager and assistant manager to submit written reports. Id. Although Wallace was disciplined and no longer had to perform his team manager duties, he continued to receive his athletic scholarship. Fact 41. Thus far, U.H. has not publicly apologized to White. Fact 45. Aside from a brief discussion of the incident with arena staff and to treat people with respect, U.H. has not conducted any training with coaches, student athletes, or arena staff about public accommodations laws or procedures for handing discrimination complaints. Fact 43. Because of the incident, White is no longer involved with the basketball team as before (attending practices, giving advice to players, inviting them home for meals, or helping with their homework), Facts 9 and 14, and continues to feel sad, hurt, and withdrawn. Fact 45. In light of U.H.'s actions after the incident, which constitute failure to take immediate and appropriate corrective action, the Commission believes that White should receive compensatory damages of $20,000.00 for the emotional distress he has suffered.

The Commission upholds the civil penalties in Conclusion of Law B,2, and the equitable remedies in Conclusion of Law B,3, and adopts and incorporates herein the Recommended Order as its Final

Order with the exception of paragraph 2, which is modified to increase the damages against U.H. for emotional injuries resulting from its failure to take immediate and appropriate corrective action after Wallace's racial slur.

DATED: Honolulu, Hawaii May 19, 1998

CLAUDIO SUYAT
Chairperson

ALLICYN HIKIDA TASAKA
Commissioner

FAYE KENNEDY
Commissioner

JACK LAW
Commissioner

HARRY YEE
Commissioner

Notice: Under H.R.S. § 368-16(a), a complainant and respondent shall have a right of appeal from a final order of the Commission by filing an appeal with the circuit court within thirty (30) days of service of an appealable order of the Commission.