

DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS

HAWAII CIVIL RIGHTS COMMISSION  
State of Hawaii  
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1ST CIRCUIT COURT  
STATE OF HAWAII  
FILED

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N. ANAYA  
CLERK

JOHN ISHIHARA 1456-0  
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and Hawaii Civil Rights Commission

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, UNIVERSITY OF)	CIVIL NO. 98-2810-06 <sup>649</sup>
HAWAII; and ROB WALLACE,	)
)	) (Agency Appeal)
Appellants,	)
)	) ORDER AFFIRMING IN PART AND
vs.	) REVERSING IN PART FINAL
)	) DECISION OF HAWAII CIVIL
WILLIAM D. HOSHIJO, Executive )	) RIGHTS COMMISSION
Director, on behalf of the )	)
complaint filed by Eric White, )	)
and the CIVIL RIGHTS )	)
COMMISSION, STATE OF HAWAII, )	)
)	)
Appellees.	)
)	)
)	)

ORDER AFFIRMING IN PART AND REVERSING IN PART FINAL DECISION OF HAWAII CIVIL RIGHTS COMMISSION

On November 19, 1998, 9:45 a.m., oral argument on the above-entitled case was held before the Honorable B. Eden Weil. Appellant University of Hawaii, State of Hawaii, was represented by Deputy Attorney General Russell A. Suzuki, Esq.; Appellant Rob Wallace was represented by Jeffrey S. Portnoy, Esq.; and Appellees William D. Hoshijo and the Hawaii Civil Rights Commission were represented by John Ishihara, Esq. After reading the briefs, reviewing the record on appeal, and hearing oral argument, the

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N. Anaya  
Clerk, Circuit Court, First Circuit

court makes the following Findings of Fact and Conclusions of Law:

I. STANDARD OF REVIEW

The Court finds that there is an apparent conflict between the standard in H.R.S. § 368-16 (de novo review) for reviewing final decisions of the Hawaii Civil Rights Commission ("Commission") and the standard contained in H.R.S. § 91-14(g) for reviewing agency appeals. The Court does not believe that Steinberg v. Hoshijo, 88 Hawai`i 10, 960 P.2d 1218 (1998), expressly addresses the issue of what standard should be used for reviewing a Commission final decision. The Court believes that a specific statutory provision governs the general and concludes that the appropriate standard should be de novo review. However, for the purposes of appellate review, the Court will decide this appeal under both de novo and Section 91-14(g) standards.

Under de novo review, the Court will look at the evidence in the record with a fresh eye and without relying upon any of the presumptions regarding findings of fact and conclusions of law that are used in a Section 91-14(g) review. In a de novo review, the Court will not take additional evidence.

II. THE INCIDENT

Under de novo review and Section 91-14(g) review, the Court finds that Eric White, his wife, and young child attended a UH basketball game on February 18, 1995, at the U.H. Special Events Arena. During the game, White, who was sitting near the team, made comments about the coaching. The arena manager heard the comments but did not ask White to quiet down because the comments, though

irritating, were not offensive.

Wallace, a team manager and son of the U.H. basketball coach, sat on the bench about eight feet from White and heard his comments. Wallace became irritated by White's comments about the coaching and believed that they were attacks on his father. Near the end of the game, Wallace turned to White and yelled, "Shut up you fucking nigger! I'm tired of hearing your shit! Shut your mouth or I'll kick your ass!" White replied, "Oh, yeah punk, come over and try it! You see me all the time, what's the problem?" Wallace moved to within a few feet of White and said, "Just shut up, nigger or I'll kick your ass!" An assistant arena manager intervened to end the encounter.

When White complained, the arena manager did not accept his complaint. White was told to file a complaint with the police department. White tried to file with the police department but was ultimately refused because the incident was considered to be a civil matter. Later White met with Wallace and Wallace's father and mother to discuss the incident. No impartial U.H. officials were present. After the meeting, no disciplinary action was taken against Wallace although U.H. officials knew of his actions. A few days later after White complained to the U.H. athletic director, Wallace was suspended for his conduct. U.H. took no action to train its personnel on how to prevent or handle discrimination complaints.

### III. WALLACE'S STATUS AS EMPLOYEE OR AGENT

Under de novo review, the Court determines that Wallace was

not an employee. The indicia of employee status are not present under the facts because Wallace received a scholarship and performed work as a student manager in order to maintain the scholarship and his position. Thus, under de novo review, the Conclusion of Law that he was an employee is erroneous.

Under Section 91-14(g) review, the Court concludes that the determination that Wallace was an employee is in error. To the extent that it constitutes a Finding of Fact, the Court determines that such fact is clearly erroneous and not supported by the reliable, probative, and substantial evidence in the record.

Appellants conceded during oral argument, and the Court agrees on de novo review, that Wallace was an agent of U.H. at the time of the incident. The issue is whether the scope of his authority included contact with spectators at games, such that Wallace was acting within the scope of his authority when he yelled racial insults at Eric White during the basketball game, thereby binding the State, as his principal.

An agency relationship can be created by express or implied contract or by operation of law. Thus, the existence of an agency relationship may be implied by the conduct of the parties. The Court determines that under a de novo review, U.H. expected that Wallace would have contact with the public. Record at 1130-1215 (especially 1143, 1145, 1147-48), 1845, 1851-53, 1881, 1883-86, 1894-95, 1935-36 (Wallace's understanding of the scope of U.H.'s expectations of him). U.H. gave Wallace an athletic scholarship for working. Record at 1423-32, 1874-81. Wallace's behavior is

governed by the Student Athlete Handbook. Record at 1092-94, 1128-1215, 1408-09, 1845, 1882-83, 1935-36. The Handbook has entries governing interaction with spectators and recognizes that athletes, including team managers, would be in the public eye. Record at 1143. It prohibits obscene and inappropriate language by athletes. Record at 1145, 1147-48. It is undisputed and the Court finds as a fact that U.H. suspended Wallace for his conduct toward Mr. White because of his violation of the Handbook. Record at 1431-32, 1915-18, 1932-34. The express language in the Handbook and the facts under a de novo review demonstrate that it was anticipated that during a U.H. basketball game, Wallace would have contact with the public and that such contact would be within the scope of his authority as an agent. Thus, the Court concludes that the incident on February 18, 1995, was within the scope of Wallace's authority as an agent.

Under Section 91-14(g) review, the Court finds that the facts in the Final Decision are not clearly erroneous regarding Wallace's status as agent and the scope of his authority. Thus, the Commission's Conclusions of Law finding U.H. liable for Wallace's conduct are not contrary to law.

#### IV. FIRST AMENDMENT

The Court's conclusion that Wallace was an agent acting within the scope of his authority means that contrary to his claim Wallace was not a private individual acting entirely in a private capacity, but a public employee or agent for the purposes of First Amendment analysis. The Court's use of the public employee standard does not

change its determination that Wallace was not an employee under Hawaii law. Under de novo review, the First Amendment issues analytically rest upon whether Wallace as a public agent was speaking on a matter of public concern, such as, a political, social, or other issue of community interest. Connick v. Meyers, 461 U.S. 138 (1983). The Court concludes that Wallace's use of the word "nigger" did not involve a matter of public concern. Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995); Wright v. Glynn Cty. Bd., 932 F.Supp. 1456 (S.D. Ga. 1996). Therefore, the words spoken by Wallace to Eric White on February 18, 1995, were not entitled to First Amendment protection. Thus, as a matter of law, the Commission's actions were not prohibited by the First Amendment, and Wallace is liable for his conduct.

Under Section 91-14(g) review, the Court concludes that the Final Decision was not in violation of the State or Federal constitutions. The Court finds that the First Amendment in the State Constitution is not analytically different from the Federal Constitution. Thus, the Commission could hold Wallace liable for his conduct despite the First Amendment.

V. SOVEREIGN IMMUNITY

U.H. claims that it is not liable because of sovereign immunity for Wallace's conduct or for its failure to take immediate and appropriate corrective action when Mr. White complained. Even though the claim is brought under Chapter 489, U.H. contends that Wallace's actions constituted an intentional tort under the State Tort Liability Act, Chapter 662, and sovereign immunity has not

been waived for intentional torts.

Under de novo review, the Court concludes that Wallace did not commit an intentional tort when he made racial insults to Eric White. The Court finds that although Wallace intended to speak the words he used, he did not speak them with the intent to discriminate against Mr. White. The Court understands that choosing the words and speaking them involve some intentionality. However in this case, the record shows that Wallace negligently, not intentionally, uttered the racial epithets at Mr. White. Record at 1932-33, 1898-90 (Wallace's state of mind), and 1923-25, 1990-91 (spontaneity of the utterance). Thus, there was no intentional tort committed by Wallace, and sovereign immunity was waived.

Under Section 91-14(g) review, the Court concludes that the reliable, probative, and substantial evidence in the record support the Findings of Fact that Wallace's actions were not intentional. The Court therefore finds that there is no error of law in concluding that there was no intentional tort committed, to the extent that such issue is dispositive of this appeal, and sovereign immunity was waived. Although the Court concludes that Wallace did not intend to discriminate for the purposes of addressing the State's intentional tort sovereign immunity defense, it is in no way condoning Wallace's unlawful conduct.

In the alternative, the Court concludes that even if Wallace's conduct was intentional, neither the State Tort Liability Act (H.R.S. Chapter 662), nor H.R.S. Chapter 661 regarding statutory

claims against the State preclude an award of money damages for actions prohibited by law. Pursuant to H.R.S. § 661-1(1), the State has agreed to be sued for claims "founded upon any statute of the State[.]" This constitutes a waiver of sovereign immunity for statutory actions that can be brought against the State. Jacober v. Sunn, 6 Haw. App. 160, 715 P.2d 813 (1986).

Chapter 489 is a statute which allows claims ~~to~~ against the State. H.R.S. § 489-1 provides that Chapter 489 shall be liberally construed to carry out its purpose of preventing unlawful discrimination in public accommodations. H.R.S. § 489-3 prohibits discriminatory practices which deny the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, particularly unfair discrimination because of race. H.R.S. § 489-8 provides that "[i]t shall be unlawful for a person to discriminate unfairly in public accommodations." (Emphasis added.) H.R.S. § 489-2 includes the State within the definition of "person," and the State acts through its employees or agents. Thus under H.R.S. § 489-8, it is unlawful for the State to discriminate unfairly in public accommodations. Additional support is found in H.R.S. § 489-2(6) which lists as examples of "places of public accommodations" a sports area and stadium, which are facilities normally operated by the State, thereby indicating legislative intent to waive sovereign immunity whenever the State operates such facilities.

H.R.S. § 489-7.5, allowing suits by persons injured by an unlawful discriminatory practice, when read in conjunction with the

enforcement provisions of Chapter 368 also support a conclusion that sovereign immunity has been waived. It would eviscerate the ability of the Civil Rights Commission to enforce Chapter 489 if the law is read to disallow monetary damages and only limit the remedies to injunctive relief, as urged by U.H. When discriminatory practices under H.R.S. § 489-3 are committed by a State employee or agent, it would be inconsistent with the purpose of H.R.S. § 489-1 to limit the power of the Civil Rights Commission to grant only injunctive relief. When the State violates essential constitutional and statutory provisions against discriminatory conduct, it is not appropriate for a court to narrowly construe the law especially when Chapter 489 requires a liberal construction. Thus, the Court concludes that the Legislature, by enacting Chapters 368 and 489 after Chapters 661 and 662, has effectively waived sovereign immunity for actions taken on behalf of the State in violation of H.R.S. § 489-3.

U.H. in its Reply Brief and oral argument claimed that Act 115, S.L.H. 1998, which grants autonomy to the University of Hawaii carves out for U.H. a singular exception to the Court's analysis regarding liability under Chapters 368 and 489. The Court finds the argument unpersuasive. The Legislature did not intend to grant U.H. autonomy to violate the State and Federal constitutions and laws with impunity.

#### VI. CONCLUSION

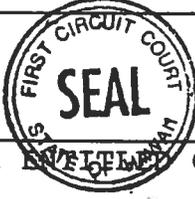
Based upon the foregoing, the Court hereby affirms the Hawaii Civil Rights Commission Final Decision and Order, with the

exception of the Conclusion of Law regarding Wallace's status as an employee and reverses only that portion of the Final Decision and Order. Under de novo review and Section 91-14(g) review, the Court adopts the remaining Findings of Fact and Conclusions of Law in the Commission Final Decision and Order which are consistent with the Findings of Fact and Conclusions made by the Court in this Order.

DATED: Honolulu, Hawaii

FEB 24 1999

BAMBI E. WEIL

JUDGE OF THE ABOVE  COURT

APPROVED AS TO FORM:

\_\_\_\_\_  
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