

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

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WILLIAM D. HOSHIJO, )  
 Executive Director, on behalf )  
 of the complaint filed by DEL )  
 M. SCOTTO )  
 )  
 vs. )  
 )  
 JANENE CARACAUS, )  
 )  
 Respondent. )  
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DOCKET NO. 06-001-H-D

CIVIL RIGHTS COMMISSION  
HONOLULU, HAWAII

FINAL DECISION AND ORDER

The Hearings Examiner filed Findings of Fact, Conclusions of Law and Recommended Order on March 13, 2007 ("Hearings Examiner's Decision"). The Executive Director and Respondent Janene Caracaus ("Caracaus") filed timely Written Exceptions. The Executive Director requested oral argument.

The Hawaii Civil Rights Commission ("Commission") heard oral argument on May 25, 2007. Participating were Acting Chair Lisa Wong and Commissioners Sara Banks, Leslie Alan Ueoka, and Mark G. Valencia. Frank Kim, Esq., and David Forman, Esq., represented the Executive Director. Janean McBrearty represented Caracaus. Acting Chair Wong, Ms. McBrearty, Caracaus and Complainant Del M. Scotto ("Scotto") were unable to attend the hearing in person and participated via telephone conference bridge. Sara Banks, as the senior commissioner

attending the hearing, presided.

Chairperson Coral Wong Pietsch was not present due to her work with the Iraqi Reconstruction Authority and will not participate in the case.<sup>1</sup>

I. HEARINGS EXAMINER'S DECISION

The Hearings Examiner made the following salient findings of fact and conclusions of law. Scotto rented a room in a house at 150 Chong Street in Hilo owned by Caracaus in February 2005. During Scotto's tenancy, Caracaus did not reside in the house because of her work as a traveling nurse in Los Angeles (from February to July 2005) and Honolulu (from July to November 2005). From July to November 2005, Caracaus would visit the house from 1 or 2 times a month and stay in one of the bedrooms.<sup>2</sup>

In early October 2005 during a visit, Scotto showed Caracaus the results of a PSA test and said that he thought he had

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<sup>1</sup>In light of Chair Pietsch's decision not to participate in the case, Caraucus' Motion to Recuse her is moot. Because Caraucus' Motion was based in part on Chair Pietsch's military service, prior to commencing oral argument the Commission advised Caraucus and McBrearty that Commissioner Valencia had served in the military and that the Commission would entertain an oral motion to recuse him, should she desire to do so. McBrearty advised that Caraucus' Motion was based on their understanding that Chair Pietsch is an active member of the military and, therefore, she had no objection to Commissioner Valencia sitting on the case.

<sup>2</sup>Beginning in November 2005, Caracaus did not visit the house because she began attending medical school in Mexico.

prostate cancer. Caracaus, a registered nurse, also believed that Scotto had prostate cancer. Caracaus told Scotto that he would get weaker and needed someone to care for him. She suggested that he move back to California to be closer to his family or that he hire a home health nurse to care for him. Scotto told Caracaus that he did not want to move back to California and could not afford to hire a nurse.

During visits in July through October 2005, Caracaus observed Scotto using marijuana while drinking alcohol and taking prescription medications for a back injury from a motorcycle accident. Scotto told Caracaus that he had a medical marijuana permit from California.<sup>3</sup> Scotto did not get a Hawaii permit to use medical marijuana until November 30, 2005. Caracaus was concerned that Scotto was abusing prescription and illegal drugs, which affected his ability to care for himself. She felt that she could lose her nursing license if authorities discovered illegal drug use on the premises.

On October 16, 2005, Caracaus wrote a letter to Scotto terminating his tenancy:

I have done a lot of thinking about your recent tests and considering the fact that you will be needing further treatment, I think it best that you return to California or somewhere where there will be someone to

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<sup>3</sup>The California permit would not authorize Scotto to use marijuana in Hawai'i.

help you through whatever treatment you decide on.

Of course, this is your decision but effective December 1, I will have to rent the apartment to another family. I appreciate all you have done for me and I like you very much, but there is still quite a bit of work needing to be done and I should not expect you to be able to tackle this monumental job.

You must take my word for it that you will get weaker and you will then be in a situation where you cannot do anything. I have seen many cases of cancer in my experience as a nurse.

The letter was left in Scotto's room where he found it.

Based on the Findings of Fact, the Hearings Examiner made the following Conclusions of Law:

The Commission has jurisdiction over this case. Caracaus does not qualify for the exception in HRS § 515-4(a)(2), which provides: "Section 515-3 does not apply ... [t]o the rental of a room or up to four rooms in a housing accommodation by an individual if the individual resides therein." Caracaus was a traveling nurse during Scotto's tenancy. Although Caracaus would visit the house for 1-2 days per month during July to November 2005, she did not live in the house.

Caracaus terminated Scotto's tenancy because of his "disability" as defined in HRS § 515-2:

[H]aving a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment. The term does not include current illegal use of or addiction to a controlled substance or alcohol or drug use that

threatens the property or safety of others.

Scotto had cancer. He was tired, fatigued and slept most of the day. Scotto was disabled because his cancer substantially limited his ability to stand, walk, take care of himself and work.

It is an unlawful discriminatory practice for a landlord to evict a person because of disability. HRS § 515-3<sup>4</sup> provides in relevant part:

It is a discriminatory practice for an owner or any other person engaging in a real estate transaction ... because of disability ...

- (1) To refuse to engage in a real estate transaction with a person;
- (2) To discriminate against a person in the terms conditions, or privileges of a real estate transaction ....

Caracaus knew of Scotto's cancer when she sent him the eviction notice. The eviction notice shows that Caracaus was terminating Scotto's tenancy because of his cancer and concerns that he would not be able to care for himself. This constitutes direct evidence of disability discrimination.

Caracaus also believed that Scotto was abusing prescription drugs and using illegal drugs. The Hearings Examiner found that Caracaus "credibly testified that she felt Complainant's illegal drug use would hinder him from taking care of himself, and that

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<sup>4</sup>HAR § 12-46-305 is essentially the same as HRS § 515-3.

she did not want to lose her nursing license because of illegal drug use in her house." This constitutes a legitimate, nondiscriminatory reason for the eviction.

The Hearings Examiner found that there are both discriminatory and nondiscriminatory reasons for the eviction. Under HAR § 12-46-317(2), if a protected basis is any part of the reason for the adverse action, a discriminatory practice has occurred. The Hearings Examiner concluded that Caracaus is liable for violating HRS § 515-3 and HAR § 12-46-305.

The Hearings Examiner did not award any damages and ordered equitable and injunctive relief requiring Caracaus to: 1) cease and desist from discriminating against all other tenants and persons on any protected basis, including disability; 2) adopt a written nondiscrimination policy within 90 days of the final decision; and 3) post such policy in a conspicuous place at 150 Chong Street and at any rental unit owned and operated by her in the State of Hawaii.

## II. EXCEPTIONS OF THE PARTIES

In the exceptions and oral argument, the Executive Director argued that Caracaus did not evict Scotto for legitimate nondiscriminatory reasons, damages should be awarded to Scotto for Caracaus' disability discrimination, and Caracaus should be required to publish legal notice of her violation of the law.

The Commission accepts the determination that Caracaus' reasons for evicting Scotto included concern for his use of illegal drugs because the Hearings Examiner had opportunity determine Caracaus' credibility on the matter. The Commission also agrees that Hearings Examiner's Recommended Order granting the injunctive and declaratory relief is appropriate and proper under the facts of this case.

In the exceptions and oral argument, Caraucus argues that Scotto was not disabled because his cancer was not terminal. Although the diagnosis that his prostate cancer was terminal did not come until after the eviction, a person does not have to have terminal cancer in order to be considered disabled under the law. Cancer is a physical impairment which can substantially limit one or more major life activities. The Hearings Examiner found that Scotto was disabled because he was substantially limited in his ability to stand, walk, take care of himself, and work. The Commission accepts the determination that Scotto was disabled.<sup>5</sup>

#### IV. ORDER

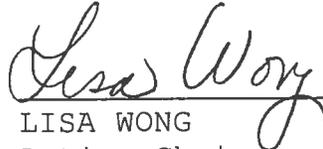
Accordingly, after reviewing the written exceptions, the

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<sup>5</sup>Caracaus' termination letter also shows that she regarded Scotto as having an impairment which substantially limited one or more major life activites. HRS § 515-2. Based upon his diagnosis of cancer, Caracaus felt that Scotto needed help in caring for himself, which is a major life activity.

oral argument and the entire record herein, the Commission hereby adopts the Hearing's Examiner's Findings of Fact and Conclusions of Law and Recommended Order.

DATED: Honolulu, Hawaii, June 22, 2007.



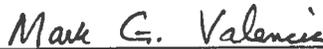
LISA WONG  
Acting Chairperson



SARA BANKS  
Commissioner



LESLIE ALAN UEOKA  
Commissioner



MARK G. VALENCIA  
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 in the circuit court for the circuit in which the alleged violation occurred or where the person against whom the complaint is filed, resides, or has the person's principal place of business.

Under H.R.S. § 91-14(b), proceedings for review shall be instituted in the circuit court within thirty days of service of a certified copy of the final decision and order of the agency.