

3, 1997, at 1:30 p.m. Gary Chang, Esq., appeared for Respondent Luana Kai AŌAO ("LUANA KAI"). LUANA KAI opposed the petition, relied upon its memoranda filed in Docket No. 96-006-PA-D, and presented oral argument. After the hearing, LUANA KAI submitted additional information at the request of the Commission. Karl K. Sakamoto appeared for the Executive Director, presented oral argument, and filed a supplemental memorandum. Kirk Cashmere, Esq., representing the Estate of John Doe on the employment discrimination claim, was present and made oral representations regarding the case.

II. FACTUAL STATEMENT:

For the purposes of the Petition, the undisputed facts are:

1) LUANA KAI is an association consisting of the owners of condominiums in the Luana Kai Resort condominium located on Maui. A majority of the units are rented to guests by a management company hired by LUANA KAI.

2) LUANA KAI entered into an agreement with, Eyes of Maui, whose President was Complainant John Doe ("DOE"), to operate a tourist activity desk on the premises. Under the agreement, the tourist activity desk was required to provide the following services to the guests: information about tourist-related activities, pool equipment and supervision, and live entertainment at weekly pupu parties. Eyes of Maui paid LUANA KAI \$400.00 per month for the opportunity to operate the activity desk on the premises. It sold activity packages, such as helicopter and boat tours, to the guests and received commissions from the activity

providers, not LUANA KAI.

3) LUANA KAI accepted unsolicited proposals from persons interested in operating a tourist activity desk on the premises. A representative of LUANA KAI reviewed the proposals and its Board of Directors would decide whether to accept the proposal.

4) LUANA KAI did not advertise, or solicit persons to operate the activity desk. LUANA KAI claims that it did not offer or otherwise make available to the general public an opportunity to operate the activity desk.

III. STATUTORY FRAMEWORK:

Chapter 489, Discrimination in Public Accommodations, is written in broad terms. H.R.S. § 489-1 provides:

- (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).

(Emphasis added.) A place of public accommodation is broadly defined. H.R.S. § 489-2 provides:

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. . . ."

(Emphasis added.) The definition sets forth twelve examples of places of public accommodations and provides that the examples are not limitations on the definition. H.R.S. § 489-3 prohibits discrimination in public accommodations and provides:

Unfair discriminatory practices which deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, color, religion, ancestry, or disability are prohibited.

IV. PLACES OF PUBLIC ACCOMMODATIONS:

LUANA KAI is a place of public accommodations. It rents condominium units to the general public for lodging. Under the definition of "place of public accommodations" in H.R.S. § 489-2(2), "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests[]" is specifically listed as an example of a place of public accommodations.

The tourist activity desk was also a place of public accommodations under H.R.S. § 489-1. It primarily served the guests of the Luana Kai condominium. Its goods and services were extended, offered, sold, and otherwise made available to the general public because the guests of Luana Kai were members of the general public. In addition, the activity desk falls within the statutory example of "[a]n establishment that is physically located within the premises of an establishment otherwise covered by this definition, . . . and which holds itself out as serving patrons of the covered establishment." H.R.S. § 489-2(12).

The Examiner dismissed the Chapter 489 claim because LUANA KAI was not a place of public accommodations with respect to allowing DOE to operate the activity desk. The Examiner concluded that the opportunity to operate the tourist activity desk did not meet the "otherwise made available to the general public" portion of the definition based upon LUANA KAI's claim that it did not advertise,

solicit, offer or otherwise make available to the general public an opportunity to operate the activity desk. However, LUANA KAI acknowledged in an affidavit that it accepted and considered unsolicited proposals to operate the activity desk.

V. DISCUSSION

The Legislature has broadly defined "place of public accommodations" to encompass "a business . . . facility of any kind whose . . . privileges [and] advantages are extended, offered . . . or otherwise made available to the general public as customers, clients, or visitors." H.R.S. § 489-2. Statutes which define a place of public accommodations have done so in order "to depart from the ordinary sense of the term. Thus, there is a presumption that we are not to substitute the literal, ordinary meaning of 'place of public accommodation' for the definition that the legislature has provided." United States Jaycees v. McClure, 305 N.W.2d 764, 766 (Minn. 1981) ("McClure").

The statutory definition in H.R.S. § 489-2 is almost identical to the Minnesota statute in McClure, id. In that case, the Minnesota Supreme Court noted that

[w]hile the older statute concentrated on the kinds of sites where discrimination would be prohibited, the new statute focuses on conduct in which discrimination would be prohibited and thus speaks not of a business facility where goods and privileges are offered, but rather, of "a business * * * facility of any kind * * * whose goods * * * [and] privileges are * * * offered, sold, or otherwise made available to the public."

(Quotation marks, emphases, and asterisks in original, and citation omitted.) As in H.R.S. § 489-1, the Minnesota statute, Minn. Stat. § 363.12 (1980), required a liberal construction of the law. Thus,

the definition of place of public accommodations in H.R.S. § 489-2 must be liberally construed to focus on the discriminatory conduct prohibited in H.R.S. § 489-3 which is the "den[ial], or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation."

The Examiner dismissed the Chapter 489 claim because LUANA KAI did not meet the "extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitor" portion of the definition. For the purpose of the decision, it was assumed that the remainder of the definition was met. Order of January 15, 1997, at 5. However, the Commission believes that accepting unsolicited proposals from anyone in the general public who wanted to operate the activity desk and considering such proposals to determine if the applicant should be selected as the operator falls within a liberal construction of the phrase "otherwise make available to the general public as customers, clients, or visitors." The "full and equal enjoyment" of operating the tourist activity desk was determined by considering such unsolicited proposals.

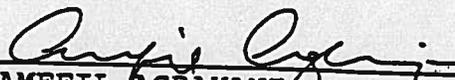
LUANA KAI contends that under Miss Greater New York City Scholarship Pageant v. Miss New York Scholarship Pageant, 526 F.Supp. 806 (S.D. NY 1981), it is not a place of public accommodations with respect to the activity desk. The case was decided under the federal public accommodations law, 42 U.S.C. § 2000a(b), which does not have a definition similar to H.R.S. § 489-

2. State law is broader and more expansive than federal law. The case does not deal with the issue of whether the opportunity to operate a beauty pageant was otherwise made available to the general public.

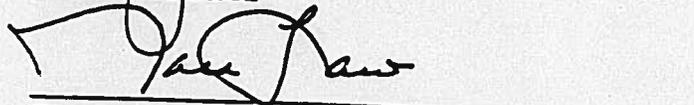
The Commission hereby declares that accepting and considering unsolicited proposals submitted by members of the general public falls within a liberal construction of the definition of "otherwise mak[ing] available to the general public as customers, clients, or visitors" the opportunity to operate the activity desk. However, the Commission does not decide whether the other parts of the definition of "place of public accommodations" have been met. The Hearings Examiner will make additional findings on the matter as part of the administrative hearing in Docket No. 96-006-PA-D.

The stay of proceedings is hereby dissolved and the administrative hearing will proceed. The Commission hereby extends the hearing deadline by the number of days that the stay was in effect.

DATED: Honolulu, Hawaii April 9, 1997


AMEFIL AGBAYANI
Chairperson


ALLICYN HIKIDA TASAKA
Commissioner


JACK LAW
Commissioner

Faye Kennedy

FAYE KENNEDY
Commissioner

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