

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. OSAB 2002-16
)	Discrimination Complaint
KAY MIURA,)	
)	DECISION NO. 2
Complainant,)	
)	FINDINGS OF FACT, CONCLUSIONS
vs.)	OF LAW, AND ORDER
)	
PACIFIC OHANA HOSTEL,)	
)	
Respondent,)	
)	
and)	
)	
DIRECTOR, DEPARTMENT OF LABOR)	
AND INDUSTRIAL RELATIONS,)	
)	
Appellee.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board) pursuant to a written notice of contest filed March 22, 2002 by Respondent PACIFIC OHANA HOSTEL (Respondent or HOSTEL), from a decision and order issued March 8, 2002 by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), via the Hawaii Division of Occupational Safety and Health (HIOSH), finding Respondent violated Hawaii Revised Statutes (HRS) § 396-8(e) by terminating Complainant KAY MIURA aka Lisa Kay Miura (Complainant or MIURA) because of her safety and health complaint to the Honolulu Police Department.

On March 8, 2002 the Board held an initial conference attended by Respondent's representative and the Director's counsel of record.¹ Pursuant to a Pretrial Order, the issues for hearing are:

1. Whether Respondent violated HRS § 396-8(e) by terminating Complainant for participating in protected activity?

¹Pursuant to a Notice of Initial Conference, the Director filed a Pretrial Statement on April 30, 2002; and Respondent, proceeding pro se, filed an Initial Conference Statement on May 3, 2002. Notices were sent to Complainant, who did not appear and participate in any proceedings before the Board in this matter.

2. Whether the Director properly awarded Complainant approximately \$644.49 in backpay and imposed a \$1,000 penalty on Respondent.

After the requisite time for discovery had been taken, a hearing was held on July 22, 2002. Both the Respondent, proceeding pro se, and the Director, appeared and were given full opportunity to produce evidence, examine and cross-examine witnesses and make argument. Post hearing closing memoranda were filed by Respondent on August 20, 2002, and by the Director on August 22, 2002.

Having reviewed the entire record and provided all parties a full and fair opportunity to be heard, the Board issues the following findings of fact, conclusions of law, and order reversing the Director's decision.

FINDINGS OF FACT

1. On January 28, 2002, Complainant MIURA filed a complaint² dated January 25, 2002 with HIOSH "alleging a violation of Section 396-8(e) of the Hawaii Occupational Safety and Health Law, Hawaii Revised Statutes." Specifically, Complainant alleged that she was "terminated on November 27, 2002 for bringing safety and health concerns regarding exposure to Terroristic Threatening to management's attention."
2. On March 8, 2002, Respondent HOSTEL was cited for violating HRS § 396-8(e), based on a discrimination investigation conducted by HIOSH finding that Respondent terminated Complainant on November 27, 2001 for engaging in protected activity when she called the Honolulu Police Department on November 26, 2001 to report a threat on her life made by a fellow employee/roommate named Armando Cornaglia (Cornaglia).

²The complaint was filed pursuant to HRS § 396-8(e)(4), which provides in part:

(e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

* * *

- (4) Any employee who believes that there has been a discharge or discrimination against the employee by any person in violation of this subsection may, within sixty days after the violation occurs, file a complaint with the director alleging unlawful discharge or discrimination and setting forth the circumstances thereof;

3. HIOSH ordered Respondent to make Complainant whole by: (a) Posting of Notice (enclosed) to Employees in a conspicuous place for convenient access and review by establishment employees in Respondent's facility for a period of sixty (60) days; (b) Full back pay restitution of \$644.49 (less normal payroll deductions) for all monies lost by Ms. Miura from November 27, 2001 to December 27, 2001; and (c) Payment of \$1,000 for violating HRS § 396-8(e) payable to the Director of Budget and Finance.
4. The discrimination investigation conducted by HIOSH investigator Russell Charlton (Charlton), found that:
 - a. Complainant engaged in protected activity when she called the Honolulu Police Department on November 26, 2001, to report a threat on her life made by a fellow employee;
 - b. Respondent had knowledge of Complainant's protected activity;
 - c. Reprisal was shown when Complainant was terminated on November 27, 2001; and
 - d. Although Respondent said that Ms. Miura was terminated because she harassed fellow employees and guests, the example given by Respondent of that harassment was Ms. Miura's call to the Honolulu Police Department. But for Ms. Miura's call to the Honolulu Police Department, she would not have been terminated on November 27, 2001.
5. On March 21, 2002, Respondent timely appealed the Director's discrimination findings and order.
6. The HOSTEL, located at 2552 Lemon Road, Honolulu, Hawaii, opened for business on October 15, 2001, to provide inexpensive single and shared dormitory-style rooms (with two bunk beds per room) to backpacking type of travelers, students and local residents in Waikiki.
7. The HOSTEL is the second of two such operations owned by Kim Voigt (Voigt) who represented Respondent in its appeal before the Board. The first hostel named Island Hostel is located in the same area of Waikiki.
8. Terrence Taylor (Taylor), at all times relevant, was employed by Respondent as its manager. When the HOSTEL first opened, Taylor and one other employee, Brent Iwasaki (Iwasaki), were the only personnel on hand to cover the front desk clerk duties from about 8:00 a.m. to 10:00 p.m.

9. During the last week of October 2001, Complainant arrived as a guest and paid \$105.00 plus a \$20.00 deposit for a one week stay in a dormitory-style room occupying one of the two bunk beds.
10. On or about October 31, 2001, Taylor offered Complainant work after learning she had no place to go and no money; and that she had used her \$20.00 deposit to pay for her last day as a guest. By hiring additional personnel, Taylor was able to expand the hours of operation to 24 hours a day. This informal employment arrangement did not require Complainant to fill out an employment application.
11. On or about November 1, 2001, Complainant began work as a front desk clerk at the HOSTEL. In exchange for working one shift usually from 2:00 p.m. to 8:00 p.m., five days a week with two days off, Complainant received seven days' living accommodations in one of the dormitory-style rooms. This arrangement of work in exchange for one week's rent was typical for workers at the HOSTEL hired by Taylor.
12. After she started working at the HOSTEL, Taylor began hearing complaints about Complainant, who was described as cold, rude and snappy to guests.
13. On or about November 17, 2001, the HOSTEL refunded payment to a customer who had been sent over by Island Hostel. According to Voigt, although the guest had already paid for a reservation at Island Hostel, Complainant who was working the front desk at the time, completely ignored the guest when he arrived at the front gate and did not let him enter. Because of this incident, Voigt spoke to Taylor about ending Complainant's employment because they lost a customer. Taylor then began looking to hire a person to replace Complainant, but did not end her employment immediately because he wanted to keep her on until he could find someone to replace her.
14. A complaint about Complainant was documented on November 18, 2001 in a log maintained by Taylor as a form of communication with the front desk clerks. The entry written in and signed by Taylor for November 18, 2001 states: "LISA PLEASE SEE ME. COMPLAINT FROM A GUEUST (sic) ABOUT YOU. WHY ARE WE CONTINUEING (sic) HAVEING (sic) THIS PROBLEM. Terry." According to Taylor, guests would complain about Complainant's front desk service and rude demeanor that seemed to "rub a lot of people, a lot of guests, paying customers, the wrong way." (Deposition of Terrence Taylor, May 14, 2002, p. 71, Line 3-4).
15. The last complaint about Complainant's rude demeanor was received by Taylor on November 23, 2001 from a guest named Joe Lange who was "very

angry.” Taylor spoke to Complainant about providing better service to the guests.

16. According to Taylor, Complainant did not get along with other employees, gave other staff a “hard time” and was argumentative. Because of Complainant, an employee named John Ereno quit on more than one occasion triggered each time by Complainant fighting with him. Whenever Taylor talked to Complainant about getting along with staff, she denied being the troublemaker and blamed everyone else. According to Taylor, because of a misunderstanding over a room key, Complainant did not get along with another co-worker named Cornaglia who was employed to clean the HOSTEL.
17. Complainant’s employment in exchange for free accommodations at the HOSTEL continued until November 25, 2001, when she worked her last shift from 2:00 p.m. to 8:00 p.m. At the end of the shift, Taylor informed Complainant that he was letting her go “because of the situation with her fighting and arguing with people and just rubbing guests the wrong way.”
18. On November 26, 2001, Complainant was entitled to two days off and was not scheduled to work. She was assigned to share Room 403 with Iwasaki, who was employed at the HOSTEL as a driver and front desk clerk, and Cornaglia.
19. On November 26, 2001, Complainant called the Honolulu Police Department to complain about Cornaglia. According to the incident report, the police arrived at 2:31 a.m. and met Complainant, who “did not appear to be coherent at the time of the interview, she would ramble saying ‘I’m in litigation over other on going case at this time, and do not wish to give out certain information.’”
20. According to the incident report filed by Officer Randall Rivera, the complaint was classified as a “Harassment type case.” The report states that Complainant complained that at 1:11 a.m. while she was asleep on her bunk bed in Room 403 one of her roommates, Cornaglia, entered the room and said: “If you touch my stuff again, I’m gonna slit your throat.” The report states that Complainant left the apartment and called police. Officer Rivera interviewed Cornaglia, who said that “he had come into the room and noticed that his bags had been moved, at this point he said under his breath ‘you all know that you need to quit moving my stuff.’ Another unidentified male sleeping in the room told the officer that he was in the room and “at no time did he hear anyone be threatened.”
21. Iwasaki was working as the front desk clerk on November 25, 2001 beginning at 8:00 p.m. His shift ended on November 26, 2001 at 2:00 a.m. He saw

Cornaglia arrive at the HOSTEL at around 11:00 p.m. Sometime after 1:00 a.m., but before Iwasaki's shift ended at 2:00 a.m., Complainant came downstairs without saying anything to him and left. At the end of his shift, Iwasaki went to sleep in Room 403, where he saw Cornaglia sleeping.

22. Taylor was awakened by the front desk clerk on duty shortly after the police arrived. Taylor saw the police in the process of talking to Cornaglia. The police left without making an arrest. Taylor assigned Complainant to the room next door. Cornaglia continued to stay in Room 403 and continued at the HOSTEL as an employee.
23. Although Complainant was no longer scheduled to work the front desk she remained at the HOSTEL as a guest following her complaint to the police about Cornaglia. On November 28, 2001, Complainant paid \$105.00 for a dormitory room for one week with a check out date of December 4, 2001.
24. Taylor testified he ended Complainant's employment at the HOSTEL on November 25, 2001, because of her inability to get along with co-workers, and to provide customer service without complaints about her rude and cold demeanor. There is un rebutted evidence of Complainant's harassment of fellow workers, including Cornaglia and complaints received in the short time she worked at the HOSTEL about her poor customer service as a front desk clerk.
25. According to the HIOSH investigation report, Taylor terminated Complainant because she harassed employees and guests. From Taylor's point of view, it was Complainant who harassed Cornaglia by calling the police twice on November 26, 2001, and again on November 28, 2001 after she remained at the HOSTEL as a paid guest.³
26. Except for the police incident report obtained by Respondent, the Board received no evidence or testimony from Complainant to support a finding that she was terminated "for bringing safety and health concerns regarding exposure to Terrorristic Threatening to management's attention" as alleged in

³Charlton's investigative findings state in part:

I asked Mr. Taylor why he changed his mind between November 23, 2001 and November 25, 2001 about keeping Ms. Miura on as an employee and he said because she was harassing employees and guests. I then asked him what Ms. Miura did to harass employees and he said she called the police. I asked him if her call to the police was the reason for her termination and he said no. When I pressed Mr. Taylor for the reason why he terminated Ms. Miura he responded that she had a "cold demeanor." Director's Exhibit (Ex.) 3.

the complaint to HIOSH. Based on the fact that Complainant remained at the HOSTEL as a paid guest, while Cornaglia remained as an employee, and that the police took no action against Cornaglia on Complainant's call, the Board is not convinced that Complainant's claimed fear for her safety is more probably true than false.

27. Charlton, at all relevant times, was the HIOSH investigator assigned to investigate the complaint. Charlton did not believe that Taylor had terminated Complainant on November 25, 2001 based on a phone interview with Taylor and the fact that Taylor's last complaint from a guest about Complainant was on November 23, 2001. Because Taylor could not explain what happened between November 23, 2001 and November 25, 2001, Charlton concluded that Complainant was terminated on November 27, 2001 because of her call to the Honolulu Police Department about Cornaglia.⁴
28. The Board finds that even if Complainant was discharged on November 27, 2001 because she called the police to complain about Cornaglia, it was not a substantial factor. Before Complainant's phone call to the police on November 26, 2001, Respondent was already looking to replace Complainant because of an incident on November 17, 2001 when the HOSTEL lost a customer and refunded payment. Between November 17 and 23, 2001, Respondent had received and documented complaints from guests about Complainant. Complainant did not get along with other staff including Cornaglia and caused another staff to quit on more than one occasion.

DISCUSSION

follows: ⁴Charlton's assessment of credibility is provided in the final investigation report as

I find Ms. Miura to be credible based upon her demeanor when being interviewed by me and her willingness to be interviewed and her many written statements. I did not find Mr. Taylor to be credible when he said her (sic) terminated Ms. Miura on November 25, 2001 or when he denied that the reason he terminated Ms. Miura had nothing to do with her phone call to the police. Mr. Taylor declined to be interviewed and did not submit any written statements. Ms. Miura called the police on November 26, 2001 because she believed that her life had been threatened by fellow employee Armando Cornaglia. Mr. Taylor was aware of Ms. Miura's call to the police and berated her for several hours on November 26, 2001 because of it. On November 27, 2001 Mr. Taylor terminated Ms. Miura because of her call to the police. Director's Ex. 3.

The issue in the instant appeal filed by Respondent is whether Complainant was terminated in violation of HRS § 396-8(e), for having called the Honolulu Police Department on November 26, 2001 to report a threat on her life by a co-worker.

The purpose of the Hawaii Occupational Safety and Health Law, Chapter 396, HRS, is to encourage employee efforts at reducing injury and disease arising out of the workplace and to prevent retaliatory measures taken against those employees who exercise these rights.

HRS § 396-8 provides, in part:

(e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

* * *

(3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter;

The burden of proof is the Director's and/or Complainant's to establish by a preponderance of evidence⁵ a prima facie case of discrimination.

“Proof of a prima facie case of retaliatory discharge requires a showing that (1) plaintiff engaged in a protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link exists between the protected activity and the adverse employment action. (Citation omitted.) Like disparate treatment claims, the evidence necessary to establish a prima facie case of retaliatory discharge is minimal. (Citation omitted.) A plaintiff may satisfy the first two elements by demonstrating that she was fired, demoted,

⁵The Director/Complainant have the burden of proof as well as the burden of persuasion. The degree or quantum of proof is by a preponderance of evidence. HRS § 91-10(5). The preponderance of the evidence has been defined as “that quantum of evidence which is sufficient to convince the trier-of-fact that the facts asserted by a proponent are more probably true than false.” Ultimate Distribution Systems, Inc., 1982 OSHD § 26.011 (1982).

transferred or subjected to some other adverse action after engaging in protected activity. The causal link may be inferred from circumstantial evidence such as the employer's knowledge that the plaintiff engaged in protected activity and the proximity in time between the protected action and the allegedly retaliatory employment decision." Marcia Linville v. State of Hawaii, et al., 874 F.Supp 1095, 1110 (D. Haw. 1994).

In the instant case, Respondent does not dispute that Complainant engaged in protected activity under HRS Chapter 396 when she called the police on November 26, 2001 alleging a threat on her life made by a fellow employee. There is also no dispute that Respondent knew of Complainant's protected activity and terminated Complainant. However, Respondent does dispute that Complainant was discharged after Complainant engaged in protected activity.

The Board finds that Respondent made the decision to replace Complainant and look for a replacement after November 17, 2001 when the HOSTEL lost a customer and refunded a room payment because Complainant refused to let the guest check in when she was a front desk clerk. There is unrebutted testimony from Taylor that he informed Complainant after her last shift on November 25, 2001 that he was letting her go. As a result of Complainant's failure to show by a preponderance of evidence that she was terminated on November 27, 2001, after calling the police on November 26, 2001, the Board cannot conclude that Complainant established a prima facie case of discrimination.

The Director asserts that the burden of proof analysis the Board should adopt is whether Complainant was engaged in protected activity and whether the protected activity was a substantial factor in the employer's decision to discharge the complainant/employee.⁶

Even if Complainant proved that she was discharged on November 27, 2001 because she called the police alleging a threat on her life by a co-worker, the record does not support a finding that the exercise of a protected activity was a substantial factor in Respondent's decision to terminate Complainant. Before Complainant's phone call to the police on November 26, 2001, Respondent was already looking to replace Complainant because of an incident on November 17, 2001 when the HOSTEL lost a customer and refunded payment. Between November 17 and 23, 2001, Respondent had received and documented complaints from guests about Complainant. Complainant did not get along with other staff including Cornaglia and caused another staff member to quit on more than one occasion. Consequently, Complainant was terminated because of her inability to get along with staff and guests and poor customer service.

⁶The Director's discrimination findings applied a "but for" test, which the Board found too conclusory and without any basis in fact.

Assuming arguendo, a prima facie case of discrimination was established, the burden shifts to Respondent “to articulate a legitimate, nonretaliatory explanation for its decision.” Similarly, the Director asserts, assuming arguendo, the protected activity was a substantial factor in the Respondent’s decision to terminate Complainant, then the burden shifts to the employer to establish by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Marshall v. Commonwealth Aquarium, 469 F.Supp. 690, 692 (Mass. 1979). If the [Respondent] carries this burden satisfactorily, the burden shifts back to the [Director/Complainant] to show that the alleged explanation is a pretext for impermissible retaliation.” Marcia Linville v. State of Hawaii, et al., supra, at 1110.

Based on Complainant’s record of problems on the job, the Board concludes that Respondent had legitimate, nondiscriminatory reasons for discharging Complainant. First, Taylor began looking to hire a person to replace Complainant after an incident on November 17, 2001, when the HOSTEL refunded payment to a customer because Complainant completely ignored the guest when he arrived at the front gate and did not let him enter. Because of this incident, Voigt spoke to Taylor about ending Complainant’s employment because they lost a customer. Second, between November 18 to November 23, 2001, Taylor received and documented several complaints from customers about Complainant’s rude and cold demeanor. Based on the complaints received in the short time that Complainant worked, the Board finds that her customer service as a front desk clerk was poor. Third, Taylor testified that Complainant did not get along with other employees, gave other staff a “hard time” and was argumentative. Whenever Taylor talked to Complainant about getting along with staff, she denied being the troublemaker and blamed everyone else. According to Taylor, Complainant did not get along with the co-worker Cornaglia because of a misunderstanding over a room key.

Consequently, Taylor testified that at the end of the shift on November 25, 2001, Complainant was informed that she was being let go “because of the situation with her fighting and arguing with people and just rubbing guests the wrong way.”

Based on un rebutted testimony of Taylor and Voigt, the Board concludes that Respondent demonstrated by a preponderance of evidence that Complainant was discharged for legitimate, nonretaliatory reasons. The burden again shifts to Director/Complainant to show that the alleged explanations are a pretext for impermissible retaliation. The Complainant may succeed in this burden either directly, by persuading the trier-of-fact that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer’s proffered explanation is unworthy of credence. Id., at 1109.

In the instant case, the Board credits Respondent’s proffered explanation. First, there is un rebutted evidence Taylor terminated Complainant because of her inability to get along with co-workers and poor customer service based on complaints from guests.

Second, except for the police incident report, the Board received no evidence or testimony from Complainant to support a finding that she was terminated “for bringing safety and health concerns regarding exposure to Terroristic Threatening to management’s attention” as alleged in the complaint to HIOSH. Based on the fact that Complainant remained at the HOSTEL as a paid guest, while Cornaglia remained as an employee, and that the police took no action against Cornaglia on Complainant’s call, the Board is not convinced that Complainant’s claimed fear for her safety is more probably true than false.

Third, the HIOSH investigator assigned to investigate the complaint did not believe that Taylor had terminated Complainant on November 25, 2001 based on a phone interview with Taylor and the fact that Taylor’s last complaint from a guest about Complainant was on November 23, 2001. Because Taylor could not explain what happened between November 23, 2001 and November 25, 2001, Charlton concluded that Complainant was terminated on November 27, 2001 because of her call to the Honolulu Police Department about Cornaglia. The Board is not persuaded by Charlton’s assessment of credibility. The record does not support HIOSH’s finding that “[b]ut for Ms. Miura’s call to the Honolulu Police Department, she would not have been terminated on November 27, 2001.”

Based on the foregoing, the Board concludes that Respondent did not unlawfully terminate Complainant in violation of HRS § 396-8(e).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant contest pursuant to HRS § 396-11.
2. The Director and Complainant failed to prove by a preponderance of evidence that the Respondent terminated Complainant after she engaged in protected activity under HRS Chapter 396.
3. The Director and Complainant failed to prove by a preponderance of evidence that Complainant’s exercise of protected activity, i.e., the November 26, 2001 phone call to police alleging a threat on her life by a co-employee, was a substantial factor in Respondent’s decision to terminate Complainant.
4. The Respondent proved by a preponderance of evidence that it had legitimate, nonretaliatory reasons for terminating Complainant and that the decision to terminate Complainant was made prior to Complainant’s exercise of a protected activity.
5. The Board concludes that Complainant was not terminated for engaging in the exercise of a protected activity under HRS § 396-8(e) by calling the police to report a threat on her life on November 26, 2001.

6. The Board concludes that Respondent did not violate HRS § 396-8(e) by terminating Complainant.

ORDER

The Director's decision, dated March 8, 2002 is reversed in accordance with the foregoing and the corresponding backpay award and penalty assessed against the HOSTEL are vacated.

Dated: Honolulu, Hawaii _____ October 4, 2002_____.

HAWAII LABOR RELATIONS BOARD

/s/BRIAN K. NAKAMURA
BRIAN K. NAKAMURA, Chair

/s/CHESTER C. KUNITAKE
CHESTER C. KUNITAKE, Member

/s/KATHLEEN RACUYA-MARKRICH
KATHLEEN RACUYA-MARKRICH, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Decision at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this order to a duly recognized representative of the employees.

Copies sent to:

Kay Miura
Kim Voigt
Herbert B.K. Lau, Deputy Attorney General