CIVIL RIGHTS COMMISSION

STATE OF HAWAII

LINDA C. TSEU, Executive Director, on behalf of the complaint filed by DIANE DAVIS, v. VOLCANO ISLAND FARMS, INC. dba THE HAWAIIAN HEMP COMPANY, and DWIGHT KONDO, Respondents.	Docket No. 94-003-E-R FINAL DECISION AND ORDER

'95 FEB -8 P2:49

FINAL DECISION

This case involves the alleged use of racial slurs by an employer against a female caucasian employee. Complainant Diane Davis, a caucasian, was allegedly called "fucking haole", "fucking haole bitch", and "haole bitch" by Respondent Dwight Kondo, President of Respondent Volcano Farms, Inc. The case does not involve the use of the term "haole" by itself. The Commission hereby adopts and quotes in full footnote 9 of the Hearings Examiner's Findings of Fact, Conclusions of Law and Recommended Order:

> In Hawaii, the word "haole" is a non-derogatory term used to denote a person of the caucasian race. However, the phrase "fucking haole" which Kondo [allegedly] said in harsh tones when he was angry with caucasian persons is a racial slur. Kondo admitted that "bitch" is a derogatory term for women. Therefore the phrases "haole bitch" and "fucking haole bitch" are racial and sexist slurs.

At 12, fn. 9 (emphasis and bracketed word added). Respondent Kondo's use of such phrases is alleged to constitute racial harassment in violation of H.R.S. § 378-2.

I hereby certify that this is a true and correct copy of the original on file at the HAWAII CIVIL RIGHTS COMMISSION.
Jane Sun Ashiba
for John Ishihara
CHIEF COUNSEL

On January 10, 1995, at 12:00 o'clock noon, Commissioners Amefil Agbayani, Daphne Barbee-Wooten, Josephine Epstein, Jack Law, and Richard Port heard oral argument in the above-entitled case. Present were Calleen J. Ching, Esq., representing the Executive Director, Dana Ishibashi, Esq., representing the Respondents, and Dwight Kondo, Respondent. Mr. Kondo ("Kondo") was allowed to present argument to the Commission. By stipulation of the Parties, Jack Davis, husband of Complainant Diane Davis ("Complainant"), deceased, heard the arguments through a telephone conference call but did not address the Commission.

The Hearings Examiner's Findings of Fact, Conclusions of Law and Recommended Order ("Recommended Decision") was filed on November 2, 1994. Both parties filed timely written Exceptions to the Recommended Decision and requested an opportunity to present oral argument. The Executive Director's Exceptions included a Statement in Support of portions of the Recommended Decision but did not address Respondent's Exceptions. The parties did not file any Statements in Support of the Decision[1] as authorized by the rules. Hawaii Administrative Rules ("H.A.R.") § 12-46-54.

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[1]The purpose of the Statement in Support of the Decision is to give a party the opportunity to provide reasons why the Commission should adopt in whole or part the Recommended Decision. Because they are to be filed fifteen days after the receipt of the other party's Exceptions, Statements in Support provide an opportunity to respond to the other party's Exceptions. By giving reasons why the Commission should adopt that portion of the Recommended Decision which their opponent takes exception to, a Statement in Support sharpens the issues and assists the Commission in decision making. The Commission urges all parties to file Statements in Support to respond to Exceptions.

I. PROCEDURAL HISTORY OF THE CASE

No exceptions were taken to the procedural history of the case contained in Appendix A of the Recommended Decision. The Commission hereby adopts Appendix A.

II. FINDINGS OF FACT

Respondents take exception to Finding of Fact No. 5 which found that Complainant met Kondo "sometime around November 1991", and Finding of Fact 6 which found that "Complainant began to work for the Company in January 1992." Respondents contend that Complainant met Kondo sometime after New Years 1992 and did not begin work until February 1992.

The Decision of the Department of Labor and Industrial Relations, Employment Security Appeals Office, Exhibit G at 1, found that Complainant was employed from February 1992 to June 3, 1993. There was no finding as to when Complainant met Kondo. The Commission hereby adopts Finding of Fact No. 5. The first sentence of Finding of Fact No. 6 is hereby modified to state that "Complainant began to work for the Company in February 1992." The remainder of Finding of Fact No. 6 is hereby adopted.

Respondents take exception to Finding of Fact No. 15 which found that

> On company premises, Kondo often called or referred to certain caucasian employees, caucasian volunteers and caucasians in general as "fucking haole(s)", "haole bitch" or "fucking haole bitch" when he was angry or disappointed in them. Kondo said these words in a harsh or angry tone of voice. Complainant heard about a dozen of these remarks.

Respondents' Closing Brief, at 2, filed on October 10, 1994, acknowledged that the words "fuck(ing)", "haole", and "fucking haole" were part of Kondo's vocabulary and used. However, Kondo denied using the words "bitch", "haole bitch", and "fucking haole bitch". Kondo's girlfriend, Patricia Borton, testified that Kondo said "haole", "fucking", and "fucking haoles" on company premises but did not direct them towards any person in particular and denied that he said "haole bitch". Id. at 17. However, other witnesses testified to hearing Kondo make racial slurs on company premises. Thomas Rathburn and Leslie Christensen testified that Kondo said "fucking haole" on several occasions and that Kondo told Rathburn that Christensen was a "fucking haole whore." Complainant testified that she heard Kondo make racial statements such as "fucking haole", "fucking haole bitch", and "haole bitch" on twelve occasions. Based upon the record, the Commission finds it more likely than not that Kondo referred to certain caucasian employees, caucasian volunteers and caucasians in general as "fucking haole(s)", "haole bitch" or "fucking haole bitch" when he was angry or disappointed in them. The Commission hereby adopts Finding of Fact 15.

Respondents take exception to Finding of Fact No. 16 which found that Kondo called Complainant a "fucking haole", "haole bitch" or "fucking haole bitch" on four occasions. Respondents' basic contention is that the incidents never happened, Complainant made them up, and Kondo never made such statements to her. Essentially, Respondents' exception is based upon the credibility

of Complainant. The Hearings Examiner had the opportunity to observe the demeanor of the witnesses, hear their testimony, viewed the videotape of Complainant's deposition, and read the depositions and exhibits. By finding that there were four incidents where Kondo made racial slurs towards Complainant, the Hearings Examiner has concluded that Complainant was more credible than Kondo.

The Hawaiian Hemp Company was in financial difficulty at the time of the stairwell incident. Complainant's persistence in seeking medical coverage and having payroll taxes withheld and paid by the employer angered Kondo who was personally financing the company. Given the Commission's adoption of Finding of Fact No. 15 that Kondo made statements such as "fucking haole(s)", "haole bitch", and "fucking haole bitch" when he was angry with or disappointed in other caucasian persons, the Commission finds that it is more likely than not that Kondo made similar statements to Complainant. The Commission hereby adopts Finding of Fact No. 16.

The Commission hereby adopts the remaining Findings of Fact in their entirety.

III. CONCLUSIONS OF LAW

A. JURISDICTION

Respondents do not take exception to the Commission's jurisdiction over Volcano Island Farms, Inc., and Dwight Kondo, individually. Therefore, the Commission adopts Conclusion of Law A, 1 and A, 2.

B. RACIAL HARASSMENT TEST

Respondents take exception to Conclusion of Law B which establishes a three part test to determine if racial harassment has taken place. The test was adapted from Commission rules on sexual harassment, H.A.R. § 12-46-109, and ancestry harassment, H.A.R. § 12-46-175(b), Commission precedent, and case law. The test requires proof that:

> 1) Complainant was subjected to racial slurs or other verbal or physical conduct relating to her race;
> 2) The conduct was unwelcome in the sense that the Complainant did not solicit or incite it and in the sense that the Complainant regarded the conduct as intimidating, hostile, or offensive; and
> 3) The conduct was sufficiently severe or pervasive to alter the conditions of employment, such as having the propose of effect of creating an intimidating, hostile or offensive work environment, of unreasonably interfering with Complainant's work performance, or by otherwise adversely affecting Complainant's employment opportunity.

The Commission concludes that the three part test to determine racial harassment was properly adopted by the Hearings Examiner as part of the adjudicatory process, and this test is hereby adopted by the Commission. The Commission also adopts the objective standard contained in the Recommended Decision to determine racial harassment in this case--if a reasonable caucasian woman would consider such conduct sufficiently severe and pervasive to alter the conditions of employment.

C. WHETHER THE CONDUCT WAS UNWELCOME

Respondents contend that the Hearings Examiner did not determine whether any of the "racial" comments were "solicited" or "incited" by the Complainant's conduct. By concluding that Respondents' had engaged in racial harassment of Complainant, the

Hearings Examiner has rejected the contention that Complainant solicited or incited the racial slurs. The Commission agrees and hereby concludes that Kondo's racial slurs were not solicited or incited by Complainant.

D. WHETHER THE CONDUCT WAS SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER THE CONDITIONS OF EMPLOYMENT

Respondents contend that the "sufficiently severe or pervasive standard" is vague and ambiguous. The test provides that the sufficiently severe or pervasive standard may be met by showing that the conduct either a) had the purpose and effect of creating an intimidating, hostile, or offensive work environment; b) unreasonably interfered with Complainant's work performance; or c) otherwise adversely affected Complainant's work opportunities. If anyone of these is established, the conduct will be deemed sufficiently severe or pervasive to alter the conditions of work.

An employee is entitled to work in an environment free from racial harassment. While a stray, isolated racial remark may not constitute racial harassment because it is not sufficiently severe or pervasive to alter the conditions of employment, a series of racial slurs may create an abusive work environment and constitute racial harassment. Each situation must be decided on a case by case basis. A similar standard has been adopted in sexual harassment cases, see, e.g. Harris v. Forklift Systems Inc., 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), and the Commission concludes that the standard is not vague or ambiguous.

Respondents also contend that no finding was made that

Respondents' conduct had the "purpose or effect" of creating an intimidating, hostile or offensive work environment. The Hearings Examiners concluded:

> Given the context, number of times and tone in which Kondo used the slurs "fucking haole", "haole bitch", and "fucking haole bitch", I also conclude that a reasonable caucasian would consider Kondo's conduct sufficiently severe and pervasive to create a hostile, intimidating and offensive work environment.

Recommended Decision, at 14 (citation omitted). In essence, the Hearings Examiner's conclusion is that Kondo's conduct had the "effect" of creating such an environment.

Finding of Fact No. 17 provides that the racial comments upset Complainant, made her cry, feel depressed, demoralized, and degraded, and that she felt she was being treated "like a piece of dirt" and a "non-person." Based upon the findings, the Commission concludes that the racial slurs created a hostile, intimidating and offensive work environment, that a reasonable caucasian woman would consider Kondo's conduct sufficiently severe and pervasive to alter the conditions of employment, and that such conduct constitutes a violation of H.R.S. § 378-2.

E. WHETHER COMPLAINANT WAS CONSTRUCTIVELY DISCHARGED

The Executive Director takes exception to the conclusion that Complainant was not constructively discharged in June 3, 1993. The Executive Director contends that under the totality of the circumstances a reasonable person would feel forced to quit because of intolerable and discriminatory working conditions. The Hearings Examiner found that Complainant quit because of Borton's presence in the sewing room and the new production demands which were not

linked to any racially discriminatory motives. Recommended Decision, at 16. The new production demands and Borton's presence were part of a legitimate attempt to make the company profitable. Complainant did not quit after the stairwell incident despite her fears of Kondo. Although imposed shortly thereafter, the Commission could not determine that the new production demands were part of a pattern of racial harassment or a pretext to get Complainant to quit. The Commission adopts the conclusion that Complainant was not constructively discharged.

F. COMPENSATORY DAMAGES

The stairwell incident in May 1993 had the most serious impact upon Complainant's emotional well being. After the stairwell incident, she began to dread work and avoided Kondo. The amount of time Complainant worked after the stairwell incident was between two to four weeks.[2] She quit her job on June 3, 1993.

The record reflects that Complainant also suffered from serious health problems related to a thyroid condition and ultimately the cancer from which she died. Complainant lived near a geothermal well and complained of illness and distress from the fumes. There is no evidence that these medical conditions were caused by the racial harassment at work. Without minimizing the offensiveness, hostility, and intimidation resulting from Kondo's racial slurs, the Commission believes that a significant portion of Complainant's emotional distress was related to these other health

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[2]The Executive Director's Exceptions, at 10, refer to Investigator's Intake Notes, Exhibit 16 at 1, indicating that the stairwell incident happened on May 14, 1993.

conditions.

The Hearings Examiner determined that Complainant should be awarded compensatory damages of $25,000 for her emotional distress because she was very offended, upset, shocked, and felt degraded by the racial slurs towards herself and others. Given the limited time that Complainant worked after the stairwell incident and the existence of other health factors, the Commission believes that a reduction in compensatory damages is warranted. Based upon the evidence, the Commission concludes that $2,500 is an appropriate amount of compensatory damages for the emotional distress suffered by Complainant.

G. OTHER RELIEF

The Commission hereby adopts the remaining portions of the Recommended Decision including the conclusions regarding the joint and several liability of both Respondents, the denial of back pay, the denial of deposition costs, and the recommended equitable relief. The recommended equitable relief includes an order that Respondents 1) immediately cease and desist from racially harassing all present and future employees; 2) develop and adopt a written non-discrimination policy after receiving the comments of the Executive Director; 3) conduct training for all employees after finalizing the policy; 4) post notices about the policy in conspicuous places on the premises; and 5) publicize this decision and its non-discrimination policy through the publication of the Public Notice, Attachment 1 to the Recommended Decision, in a newspaper of general circulation in the City and County of Honolulu

and the County of Hawaii.

IV. ORDER

With the exception of the correction to Finding of Fact No. 6, and the reduction in the amount of compensatory damages, the Commission hereby adopts and incorporates the Proposed Findings of Fact, Conclusions of Law and the Recommended Order as part of its Final Decision and Order.

DATED: Honolulu, Hawaii FEB 8 1995

Amefil Agbayani, Chairperson

Daphne Barbee-Wooten, Commissioner

Josephine Epstein, Commissioner

Jack Law, Commissioner

Richard Port, Commissioner

Note: Pursuant to H.R.S. § 91-14 any person aggrieved by a final decision and order in a contested case is entitled to judicial review by instituting a proceeding for judicial review within thirty days after service of the certified copy of the final decision and order.