IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ALOHA ISLANDAIR, INC., Appellant, vs. WILLIAM D. HOSHIJO, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE HAWAII CIVIL RIGHTS COMMISSION; and BRUCE A. PIED, Appellees.	CIVIL NO. 00-1-3779-12 (EEH) (Agency Appeal) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REVERSING FINAL DECISION AND AWARD OF HAWAII CIVIL RIGHTS COMMISSION; NOTICE OF ENTRY ORAL ARGUMENT Date: MAY 21, 2001 Time: 1:30 P.M. Judge: HONORABLE EDEN ELIZABETH HIFO

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REVERSING FINAL DECISION AND AWARD OF HAWAII CIVIL RIGHTS COMMISSION

This matter is before the Court on an appeal filed by Aloha Islandair, Inc. (Island Air) from the Final Decision and Order of the Hawaii Civil Rights Commission (HCRC) issued on November 22, 2000 in Hoshijo and Pied v. Aloha Islandair, Inc., Docket Nos. 98-007-E-D and 98-008-E-D RET. Briefs were filed on behalf of Island Air, the HCRC, and Pied. Oral argument was held on May 21 and 24, 2001. Appearing for Island Air were James Kawashima and Richard Rand. Appearing for the HCRC was John Ishihara, and David Simons appeared for Bruce Pied. The Court having reviewed the briefs, the record on appeal and having received argument from the parties, now enters its Findings of Fact, Conclusions of Law and Order.

I. FINDINGS OF FACT

1. The Complainant Bruce Pied has been monocular since he was a teenager. Pied's monocular status is a result of a virus he caught during his youth. Pied subsequently obtained his private pilot license and then his commercial pilot license. He was first employed as a pilot and flight instructor for a Big Island tour company. In 1990 he flew for Air Samoa, a regularly scheduled commuter airline. The Federal Aviation Administration (FAA) requires that commercial pilots have 20/20 corrected vision in both eyes, and Pied had to obtain a waiver of that requirement in order to be a commercial pilot. He also was qualified by the FAA to fly the DHC-6, a plane flown by both Air Samoa and Island Air, among others.

2. Pied testified that his monocular status does not interfere with his ability to perform day-to-day life activities. Pied testified that due to his monocular status the only activities he cannot perform are using 3-D goggles, very close work such as threading a needle, and other minor activities. Pied did not testify that he was limited in any significant way due to his monocular status.

3. In 1990, Pied had contact with representatives of Island Air about a possible position as a first officer. Island Air hired a class of pilots that began on August 31, 1990.

4. Pied testified and claimed that after being offered a position in the August 1990 class, he disclosed his monocular status and the offer was then rescinded.

5. Pied did not file a Charge of Discrimination with the HCRC in 1990.

6. In February 1991, Pied went to the HCRC and completed a Pre-Complaint

Questionnaire (PCQ). Pied indicated to the HCRC investigator, Tony Rogers, that he did not wish to pursue filing a complaint at that time. No complaint was drafted at that time for Pied to sign.

7. In 1990, William Ernst was the chief pilot for Island Air, Webb Dickey was the director of operations, and James Williamson was the president of Island Air.

8. By early 1991, Williamson had passed away. Dickey had retired at the end of 1990. Ernst, in April 1991, was replaced as chief pilot and did not return to that position until February 1998. Ernst was not involved in hiring pilots for the July 1991 class.

9. Island Air hired another class of pilots commencing on July 25, 1991. By that time Hans Linschoten and Dave McCarty, and a panel of pilots other than Ernst were involved in hiring pilots beginning with that class. Linschoten testified without contradiction that only pilot applicants who had walked in their resumes and had a recommendation from some known, trustworthy pilot or applicants who had previously been an Island Air pilot were considered, thus creating a "priority pool" from which hires were made. Pied's resume was not among those considered for the July 1991 class.

10. Linschoten credibly testified that he did not receive resumes from Ernst for the July 1991 class. The Court specifically finds that Pied's testimony to the contrary regarding a conversation in which Linschoten allegedly said that he took the resumes from Ernst is not credible. Pied's credibility is diminished by his admissions of deceit in other contexts (stole flight safety training records containing negative comments about him; lied about the whereabouts of

these records and demanded they be recreated; falsely overstated his flight hours on an FAA type rating application). The court finds that the testimony of Linschoten, who at the time of hearing was employed by the Federal Aviation Administration, is more credible than Pied.

11. The Hearing Examiner found that for classes after July 1991, this priority pool system was exclusively utilized by Linschoten and his committee. The Hearings Examiner found that Pied would not have been considered for subsequent classes because of this priority pool system and the fact that he did not have a recommendation from an Island Air pilot or from someone known to Linschoten.

12. After learning that he had not been hired for the July 25, 1991 class, Pied filed a Charge of Discrimination with the HCRC on August 22, 1991. This was the first Charge of Discrimination that Pied had filed with the HCRC.

13. The 1991 charge only referred to events that had occurred in 1991. There was no reference in the 1991 charge to the alleged refusal to hire in August 1990.

14. Pied filed a subsequent charge in 1994 concerning another alleged refusal to hire.

15. The proceedings were consolidated before Hearings Examiner Livia Wang. Hearings were held in 1999 and 2000. The Hearings Examiner issued her first decision on May 28, 1999, her second decision on November 29, 1999, and a third decision on August 21, 2000.

16. In those decisions as affirmed by the Commission, the Hearings Examiner and the Commission found as follows: That Pied was disabled because of his monocular vision and that

his disability status should be determined without regard to any mitigating measures; that even if Pied was not disabled that Island Air regarded him as disabled; that Island Air improperly rejected Pied for its August 1990 class based upon his disability and/or perceived disability, and that his first charge of discrimination filed on August 22, 1991 was timely for events in 1990 under the continuing violation doctrine. In addition, the Hearings Examiner found that Island Air improperly refused to hire Pied for the July 1991 class because although Linschoten had set up a priority pool system, the Hearings Examiner found that he could not have established the pool system in time to hire for the July 1991 class.

17. The Court notes that Linschoten testified he took over hiring after Ernst left (the chief pilot position to return to regular piloting duties) which on questioning by the Hearings Examiner he estimated was in July 1991. The testimony of Ernst was that he left in the Spring of 1991, estimating April. This Court finds the testimony of Ernst to be accurate on this point in part because his recall was more specific and in part because it involved his own change in title. This Court further finds there was sufficient time to establish the priority pool system and that Linschoten credibly testified it was the only way he selected all the classes he hired.

18. The Hearings Examiner awarded and the Commission affirmed that had Pied been hired by Island Air in 1990, that he would have remained with Island Air for approximately eight years and then he would have obtained a job with Aloha Airlines as a first officer in 1998. The Hearings Examiner calculated back pay based upon Pied's career path at Island Air and then a career path at Aloha Airlines. The Hearings Examiner awarded Pied both back pay for the time

period up until the time of her third decision, front pay and ordered that Pied be instated. In addition, the Hearings Examiner awarded Pied attorney's fees and costs.

19. The Hearings Examiner also awarded Pied punitive damages but held he could receive only punitive damages or attorney's fees and awarded him the larger of the two.

20. In its final decision, the HCRC changed the label of front pay to lost earnings capacity. In addition, the Commission affirmed the Hearings Examiner's award of compensatory damages in addition to the punitive damages and other relief ordered.

21. In its final decision, the HCRC also rejected Island Air's procedural arguments, specifically that a remand back to the Hearings Examiner after exceptions had been filed and oral argument heard was improper.

22. In its final decision, the HCRC affirmed the Hearings Examiner's ruling that Pied's submission of the PCQ in February 1991 was not a "timely filed complaint."

23. The HCRC found that Island Air had a policy of not hiring monocular pilots and that this policy had been in effect since 1990 and was used to reject Pied both in 1990 and 1991.

24. Island Air has admitted that it had such a policy since September 1991 when its then president, Lawrence Cabrinha who did not start until then, adopted it.

25. The Court finds that based upon Island Air's responses to discovery requests during the course of the proceeding before the Hearings Examiner that there is circumstantial evidence that Island Air had a policy of requiring corrected 20/20 vision in 1989. The Court applies the presumption under H.R.E. 303(15) that the policy existed in 1989 and continued

through July 1991 which is the only relevant date.

26. In analyzing the claim, the Hearings Examiner and the HCRC did not use the applicable burden-shifting analysis of McDonnell Douglas Corp. v. Green, but instead used its own analysis announced by the HCRC in its Treehouse decision, Docket No. 95-002-E-A-D-RET (HCRC May 2, 1996). Under Treehouse, once a presumption of discrimination is created, the burden is shifted to the respondent to prove that it did not discriminate. This is different from the burdens of proof outlined in McDonnell Douglas where once a *prima facie* case is established the burden is on the respondent employer merely to articulate a legitimate non-discriminatory reason for its actions and the plaintiff thereafter must prove the non-discriminatory reason is pretextual. Furukawa v. Honolulu Zoological Society, 58 Hawaii 7, 12-13 (1997).

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over Island Air's appeal pursuant to H.R.S. 368-16. In addition, the Court finds that it has jurisdiction under H.R.S. §91-14.

2. Initially, the Court must consider the appropriate standard of review. The Court finds that the specific language of H.R.S. §368-16(a) requiring *de novo* review would control over the general language of H.R.S. §91-14(g). In addition, the Court notes that there was an effort to change H.R.S. §368-16(a) to eliminate *de novo* review but that the amendment did not pass. Under *de novo* review, the current court does not take new evidence but generates independent findings of fact and conclusions of law without deference to the agency's findings. See HRS § 91-14(f).

3. In holding that *de novo* review is appropriate, the Court acknowledges the Hawaii Supreme Court decisions in Sam Teague Ltd. v. Hawaii Civil Rights Commission, 89 Haw. 269 (1999) and Steinberg v. Hoshijo, 88 Haw. 10 (1998) which imply that the standard of review is under H.R.S. §91-14(g). The Court believes that *de novo* review is appropriate notwithstanding those decisions because neither of them address the applicability of H.R.S. §368-16(a). However, in order to avoid remand if this Court's conclusion be erroneous, this Court employs a two-tier analysis applying both H.R.S. §91-14(g) to the HCRC decision and also conducting *de novo* review, therefore incorporating independent findings including credibility determinations in the Findings of Fact supra.

4. Addressing the issue of the statute of limitations and specifically whether Pied's 1991 Charge of Discrimination was timely for acts which occurred more than 180 days prior to the filing of the charge on August 22, 1991, the Court finds that federal law, which has generally been imported to interpretations of Chapter 368 by the Hawaii Supreme Court, holds that discrete acts, including significantly refusals to hire, are not continuing violations. Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1981), found that continuing violations occur in the context of promotions and placement but not regarding hiring decisions. See also London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir. 1981).

5. The language of H.R.S. §368-11(c) regarding continuing violations is consistent with those federal interpretations of law and applies to situations, for example, where an employee who is continuously not promoted or whose placement is continuously affected by discrimination.

The Court finds no basis, however, to establish a continuing violation exception to the statute of limitations for discrete acts of nonhire and/or firing particularly since the Hawaii Supreme Court has instructed that there should be a "bright line" rule as to when the time to file a complaint of discrimination is triggered. Ross v. Stouffer Hotel Co., 76 Hawai'i 454 (1994).

6. Based upon this analysis, the Court finds that only the July 1991 class is at issue because the Charge of Discrimination filed on August 22, 1991 did not cover the 1990 classes. The Court further finds that because there was no cross appeal on the statute of limitations issue, that Pied has waived his right to argue that the HCRC's conclusion that the filing of the PCQ in February 1991 did not constitute a charge which would have been otherwise timely for events in 1990.

7. The Commission did not err as a matter of law in allowing the amendment to the charge albeit late. That notwithstanding, the amendment does not cure Pied's problem because the continuing violation theory is of no avail to him in this case.

8. Applying H.R.S. §91-14(g), the Court finds that the HCRC decision should be reversed because the law does not support a conclusion that Pied was disabled. The Court finds the HCRC's argument that Hawaii has a broader definition of disability under state law than there is under the identical language under the federal Americans with Disabilities Act (ADA) because of Article I, Section 5 of the Hawaii State Constitution unpersuasive. Article I, Section 5 of the Hawaii State Constitution prohibits discrimination on the basis of race, religion, sex and ancestry and does not mention disability. Justice Ginsburg in her concurring opinion in Sutton v. United

Airlines, 119 S.Ct. 2139, 2152 (1999), observed that there was no provision of the United States Constitution implicated by that ADA case. This Court finds likewise here. There is no article I, section 5 state constitutional component, and the interpretation of H.R.S. §378-1 relating to disability is strictly a matter of statutory construction. (Sutton is a 7-2 decision upholding Rule 12(b)(6) dismissal of ADA claims brought by applicants for commercial airline pilot jobs who did not meet the minimum qualification of uncorrected 20/20 vision.)

9. While federal law construing the ADA is not binding as to our similar state law, it provides guidance. In this case, the Court finds the applicable Supreme Court analysis persuasive regarding the issues on this appeal. Thus, this Court concludes that H.R.S. Chapter 368, with respect to disability, requires that the individual's ability to mitigate be considered and that each person be considered on a case-by-case basis. See Sutton, supra; Albertson's, Inc. v. Kirkingburg, 119 S.Ct. 2162 (1999). HCRC's failure to take mitigating factors into consideration in its analysis and its determination that monocular vision was *per se* a disability under Hawaii law constitute reversible error pursuant to HRS § 91-14(g)(1), (4). The evidence in the record regarding the extent of Pied's limitation in terms of his own experience as in loss of depth perception and peripheral vision did not establish that he had a substantial limitation of any major life activity.

10. The HCRC decision also did not employ the McDonnell Douglas analysis which the Hawaii Supreme Court recently definitively adopted in Shoppe v. Gucci, 94 Haw. 368, 378 (2000) (discussing requirements of McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973)).

The Court finds that it is reversible error in violation of HRS § 91-14 (g)(1), (4) for the HCRC not to have utilized the McDonnell Douglas analysis.

11. Under *de novo* review, the Court utilizes the McDonnell Douglas analysis. The Court finds that under McDonnell Douglas there is insufficient evidence of a *prima facie* case of discrimination based on disability status because the record is devoid of any facts that would establish a substantial limitation on a major life activity of the Complainant. To the contrary, Complainant did not contend that he was substantially limited in any major life activity of seeing and the evidence in the record was just the opposite. Any limitations that were shown did not constitute substantial limitations. When taking into consideration Pied's ability to mitigate his monocular vision, the Court finds that he is not disabled as a matter of law.

12. Addressing the issue of whether Island Air perceived Pied to be disabled, i.e. whether Island Air perceived him to have a substantial limitation of the major life activity of seeing, the Court notes that Island Air does not dispute that it established a policy as of August 1991 requiring corrected 20/20 vision. The Court finds this consistent with Island Air's interrogatory answers regarding 1989. Therefore, the Court applies the presumption under H.R.S. §303(15) to establish that the policy which existed in 1989 continued through July 1991, the pertinent date herein.

13. The Court has considered whether that policy is proof by a preponderance of the evidence that Island Air perceived Pied to be substantially limited in a major life activity of seeing. The Court finds that such a policy does not alone establish a *prima facie* case. Corrected vision

to less than 20/20 (e.g. 20/25 or 20/30 or 20/40) would disqualify an applicant under the policy, but there is no evidence that less than perfect corrected vision substantially limits the major life activity of seeing or that Island Air so perceived.

14. Testimony of Ernst who was the chief pilot in 1990 reflected his point of view as to classes before 1991. However, Ernst's testimony is not sufficient together with the evidence of the policy to prove by a preponderance of the evidence that in July 1991 Island Air viewed a monocular person as substantially limited in the major life activity of seeing. Such testimony and the policy might be evidence that Island Air would regard Pied to be limited to some extent in the major life activity of working (as a pilot) but the parties agree that analysis is different and is not at issue on this appeal. Therefore, the Court finds insufficient evidence to show that Island Air in July 1991 perceived Pied to be substantially limited in the major life activity of seeing.

15. The Court finds, therefore, that there is insufficient evidence to establish a *prima facie* case of discrimination based upon either disability or perceived disability. The analysis could end there, but on this de novo review, the Court also will make a finding on the issue of whether pretext was shown, as discussed by the Hawaii Supreme Court in Shoppe v. Gucci, supra. The Court finds that as of July 1991 it is undisputed that Hans Linschoten, not Ernst, was the person in charge of selecting pilots. This Court further determines there was no credible evidence to establish that the selection of pilots for the July 1991 class was done differently from the process Linschoten testified he used to select all other classes, the priority pool system.

16. Therefore, the Court concludes that with respect to the July 1991 pilot class there

was a legitimate nondiscriminatory basis for the Complainant's not being hired, the priority pool system, and that the HCRC and Pied have failed to show that that reason was a pretext for discrimination.

17. Appellees asserted that Island Air must be found to have rejected Pied in 1991 specifically because he was monocular on the basis of concessions to that effect made in the federal preemption case, decided on summary judgment. Aloha Island air Inc. v. Tseu, 128 F.3d 1301 (9th Cir. 1997) (reversing 1995 WL 549319 (D. Hawaii 1995)). The authority cited for this proposition is Smith v. New England Mutual Life Ins. Co., 72 Haw. 531 (1992), regarding the effect to be given an undisputed fact on summary judgment. This Court finds, consistent with representations made by counsel for the airlines, that such admissions were made only for the purpose of summary judgment motion as set forth by the federal district court decision, 1995 WL 549319. The Hawaii Supreme Court analysis in Smith would not preclude the parties from litigating that issue, as was done extensively, in this case. Smith, supra, 72 Haw. at 542 ("In this case, Smith placed no condition on her representation that the facts were undisputed only for the purpose of her motion for summary judgment. Moreover, she does not assert on appeal that such concessions of facts were erroneous admissions. Nor do we find that they were erroneous.") The Smith court recognized such concessions may be legitimate tactical legal moves, id. Here, the federal action was limited to the FAA preemption argument designed to obviate the need to litigate the highly contested fact that would otherwise become dispositive of the pending HCRC claim. Clearly, Smith does not bar that litigation once the airline's preemption argument failed.

18. In its brief to this Court, Island Air has raised the issue of whether Chapter 368 is unconstitutional because it denies Island Air a right to a jury trial. The Court declines to reach this issue based upon its resolution of this appeal. Likewise, with respect to issues regarding damages, the Court declines to reach them at this time based upon its resolution.

19. Pursuant to either H.R.S. section 91-14(g) or sections 368-16(a) and 91-14(f), the Court reverses the HCRC's decision.

Therefore, it is hereby ordered, adjudged and agreed that the Final Decision and Order of the Hawaii Civil Rights Commission filed on November 22, 2000, is REVERSED.

DATED: Honolulu, Hawaii, AUG 9 2001.

FIRST CIRCUIT COURT SEAL STATE OF HAWAII

EDEN ELIZABETH HIFO
JUDGE OF THE ABOVE-ENTITLED COURT

NOTICE OF ENTRY

The foregoing Findings of Fact, Conclusion of Law, and Order Reversing Final Decision and Award of Hawaii Civil Rights Commission has been entered and copies thereof served on all parties by placing the same in the attorney's court jacket on August 9, 2001.

DATED: Honolulu, Hawaii, August 9, 2001

FIRST CIRCUIT COURT SEAL STATE OF HAWAII

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