CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO, Executive Director, on behalf of the complaint filed by BRUCE PIED, and BRUCE PIED, Complainant-Intervenor, vs. ALOHA ISLANDAIR, INC., Respondent.	Docket No. 98-007-E-D HEARINGS EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER; APPENDIX "A"; ATTACHMENT "1".
WILLIAM D. HOSHIJO, Executive Director, on behalf of the complaint filed by BRUCE PIED, and BRUCE PIED, Complainant-Intervenor, vs. ALOHA ISLANDAIR, INC., Respondent.	Consolidated with Docket No. 98-008-E-D-RET

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HEARINGS EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER

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I. INTRODUCTION

A. Chronology of Case

The procedural history of this case is set forth in the attached Appendix A.

B. Summary of the Parties' Contentions

Complainant Bruce Pied (hereinafter "Complainant") and the Executive Director allege that: 1) Complainant was a qualified person with a disability (monocular vision); 2) from August 1990 through July 1994 Complainant applied for a pilot position with Respondent Aloha IslandAir, Inc. (hereinafter "IslandAir"); 3) from at least August 1990 to the present Respondent IslandAir has maintained a policy of not hiring monocular pilots; and 4) from August 1990 through July 1994 Respondent IslandAir refused to hire Complainant because of his disability.

Respondent IslandAir contends that: 1) the complaints in this case were not timely filed and should be dismissed; 2) Complainant is not a person with a disability; 3) Complainant failed to timely apply for a pilot position; and 4) Respondent IslandAir did not hire Complainant for other legitimate, non-discriminatory reasons.

Having reviewed and considered the evidence and arguments presented at the hearing together with the entire record of these proceedings, the Hearings Examiner hereby renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT[1]

1. Complainant Bruce Pied is a 46 year old white male who presently resides in Los Angeles, California. (Tr. at 14, 200)[2]

2. Complainant was born with binocular vision (sight in both eyes). When Complainant was 18 years old, he contracted a virus and became blind in his left eye. Since that time, Complainant sees in a manner that is substantially different from when he was binocular and from other binocular people. For instance, to center his vision, Complainant must cock his head to the left. When so centering his vision, Complainant has 15% less peripheral vision and must constantly move his head to see these areas. More importantly, Complainant lacks stereopsis, or the ability to see objects three-dimensionally[3]. He cannot perceive the depth of objects that are very close and has difficulty threading needles, building small models and cannot do other types of close work such as jewelry making or computer chip assembly. Complainant also cannot use binocular microscopes, night goggles, watch 3-D movies or play virtual reality games. After he first became monocular, Complainant also could not judge the distance of objects a few feet in front of him, and could not play ping pong, hit baseballs, shoot

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[1] To the extent that the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

[2] Unless otherwise indicated, "Tr." preceding a page number refers to the transcript of the contested case hearing held on February 16-19, 22-23, 26, March 2 and May 10, 1999; "Ex." followed by a number refers to the Complainant and Executive Director's joint exhibits; "Ex." followed by a letter refers to Respondent IslandAir's exhibits.

[3] Beyond 150 feet, persons with two eyes also lose stereopsis. (Tr. at 17, 264)

baskets or parallel park. However, he has since taught himself to judge such distances and depth. Because of his monocular vision, Complainant has been rejected for police officer, fire fighter, pilot, bus driver and certain truck driver jobs and was not accepted into any branches of the military. (Tr. at 14-19, 23-25, 243-248, 264-265; Ex. 77 p. 001)

3. Since he was a young boy, Complainant has wanted to become a pilot. In 1985, when he was 32 years old, Complainant began to train as a professional pilot, with the goal of flying with a major airline[4]. In 1987 Complainant obtained his first class medical certificate with a waiver for his monocular vision[5]. This certificate demonstrates that Complainant meets the Federal Aviation Administration (FAA) medical requirements set for captains (or pilots in command "PIC") on commercial airlines. Complainant's vision waiver demonstrates that although Complainant does not meet

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[4] Airline companies may be categorized into three main groups: major airlines (those with gross revenues of over $1 billion/year), national air lines (those with gross revenues of $100 million to $1 billion/year) and regional airlines (those with gross revenues of under $100 million/year). (Tr. at 163-164) Respondent IslandAir is considered to be a regional airline. Aloha Airlines is considered to be a national airline. Examples of major airlines are: United Air Lines, American, TWA, Northwest and Delta. (Tr. at 129-130, 162-163)

[5] First class medical certificates must be renewed every 6 months. If not renewed, first class medical certificates lapse and become second class medical certificates, which may be used to fly as first officers, (or second in command "SIC"). After one year, second class medical certificates lapse and become third class medical certificates which allows pilots to fly on a private (as opposed to commercial) basis. Since 1987 Complainant has been able to obtain a first class medical certificate whenever he needed one for a pilot job. (Tr. at 22-23, 44-48; Ex. 72)

In a related case, the Ninth Circuit Court of Appeals held that because Complainant had received full FAA medical approval to fly, his disability did not affect his ability to safely pilot airplanes. Therefore, Complainant's disability discrimination claims under H.R.S. Chapter 378 were not preempted by the federal Airline Deregulation Act. Aloha IslandAir, Inc. v. Tseu, 128 F.3d 1301, 1303 (9th Cir. 1997) (Ex. 43)

certain FAA vision criterion, he can perform the duties of a PIC without endangering air commerce. In 1988, Complainant completed a professional pilot course, received his Air Transport Pilot (ATP) license[6] and worked as a flight instructor for Aztec Air Academy. From 1988-1989 Complainant attended Long Beach City College and received a two year Associate of Science degree in aeronautics and professional pilot training. (Tr. at 22-23, 26-27, 64-65, 202, 268; Exs. 43, 55, 70, 71, 72, Ex. 77 p. 146, 149)

4. After obtaining his ATP license, Complainant was hired in November 1989 by Big Island Air to fly tour planes. He was also a flight instructor and a member of the Hawaii Civil Air Patrol, Kona Squadron. In January 1990 Complainant obtained a job with Samoa Aviation and was trained and certified to fly DHC-6 passenger planes[7]. In June 1990 Complainant was hired by Hawaii Pacific Air and was trained and certified to fly as a first officer on DC-4/ATL98 cargo planes[8]. Complainant sought this position because he wanted to work in Hawaii where his family lived. (Tr. at 26-31, 34-36, 64-65; Exs. 2, 18, 55, 65, 67, 69, 70, 71, 77 p. 147-148)

5. Respondent Aloha IslandAir, Inc. is a wholly owned subsidiary of Aloha Airgroup, Inc. IslandAir is a regional air line which flies DHC-6 passenger planes. Since 1995, IslandAir also flies DHC-8 passenger planes. (Exs. 46, 48, 87)

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[6] An ATP license enables a pilot to fly as a captain on a commercial airline. (Tr. at 26)

[7] Also known as Dash-6 or Twin Otter planes.

[8] This plane is larger and more complicated than the DHC-6. (Tr. at 60-61; Exs. 18, 67, 69)

6. From 1989 through December 1990 William Williamson was the president, Riley "Webb" Dickey was director of operations and Bill Ernst was the chief pilot of Respondent IslandAir. All three were responsible for hiring pilots. Pilots were hired in groups, or "classes". Dickey and Ernst accepted resumes that were either mailed or walked in, reviewed the resumes and informally interviewed the applicants they felt were the best qualified[9]. Dickey scheduled applicants who passed the interview to take a pilot response test[10] and determined which applicants passed. Ernst then gave applicants who passed the test an Aloha IslandAir Application Form and asked them to provide copies of their licenses and certificates so he could conduct background checks. Final selections were made by Ernst and Williamson, and finalists were invited to attend the next ground school class. If the number of finalists exceeded the number of vacant positions, the non-selected finalists were offered positions in the next ground school class. Ernst also retained the resumes of the top applicants for future classes. (Tr. at 580-582, 604-605, 609-611, 617-620, 643-650, 667-670, 678-681, 684-685; Ex. 16, Ex. 80 p. 8-20, 33-39, 68-73, 82, 84)

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[9] These interviews were conducted in person or by telephone. Often, if an applicant walked in a resume, and if Dickey or Ernst were free, the applicant was immediately interviewed. (Tr. at 609-610)

[10] This test determines whether an applicant under stress can still perform in the cockpit. The test was administered by Charles Ray King, manager of flight operations for Aloha Airlines, at a cost of over $100 per test. (Tr. at 584, 610)

7. Some time in June 1990, while attending the Hawaii Pacific Air ground school, Complainant heard that IslandAir was hiring pilots[11]. Complainant decided to apply for a pilot position with IslandAir because it was an established company, and because he wanted to fly passenger planes and eventually advance to a national or major airline. Complainant telephoned IslandAir and spoke with Ernst about applying for a pilot job. Complainant informed Ernst that he had flown DHC-6 planes for Samoa Aviation and was currently certified to fly that plane. Ernst thought that Complainant "sounded like someone they would want to hire" and asked Complainant to speak to Dickey. Complainant had a short interview with Dickey, who scheduled Complainant to take a pilot response test. Complainant took this test on June 26, 1990. Dickey determined that Complainant passed the test. Complainant, however, was not hired in the July 1990 class. Some time prior to August 25, 1990 Complainant again telephoned Ernst. Ernst offered Complainant a position in the August 31, 1990 ground school class and sent Complainant an application form. Ernst also asked Complainant to send copies of his Samoa Aviation records, ATP license and medical certificates. (Tr. at 31-32, 36-38, 516-517, 582-583, 617-620, 647-648, 666-670; Exs. 1A, 37, 73, Ex. 80 p. 24, 36-37)

8. Complainant was very happy to be offered a position in Respondent's August ground school class. However, he became

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[11] The record shows that IslandAir hired two pilots in June 1990 and a class of four pilots in July 1990. (See, Exs. 46, 48)

concerned that if he quit his Hawaii Pacific Air job to accept the IslandAir position, IslandAir might rescind its offer upon learning that he was monocular, and he would be out of a job altogether. Complainant decided to inform Ernst that he was monocular. On or about August 26, 1990 Complainant telephoned Ernst and stated that he was monocular. Ernst was surprised that Complainant was monocular and still able to fly planes. Ernst had never heard of a monocular pilot and felt that such pilots did not have adequate field vision to see air traffic at night or in bad weather. Ernst told Complainant that he would have to speak to other IslandAir officials about Complainant's "condition", and rescinded the offer to attend the August 31, 1990 ground school. (Tr. at 37, 42, 203, 269, 517-519, 652; Ex. 80 p. 25-27, 29-31, 63-64)

9. Ernst then met with Dickey and Williamson. Ernst stated that he thought it was very unusual for a monocular person to be a pilot. Williamson decided that IslandAir should not hire monocular pilots for insurance liability reasons. Ernst telephoned Complainant and told him that IslandAir's insurance would not allow them to hire monocular pilots, and that they would not "pursue pilots with [such] condition at this time". Upon hearing this, Complainant became very disappointed and discouraged. He felt IslandAir didn't give him a chance to demonstrate his abilities as a pilot. (Tr. at 49, 272-273, 281-282, 519-520, 523, 655-656, 677-678, 684-685; Exs. 5, 46, 48, Ex. 80 p. 27)

10. IslandAir hired 6 pilots in its August 31, 1990 ground school class. At least one of these pilots, Keith Kamemoto, was

less qualified than Complainant[12]. Kamemoto had no experience as a commercial pilot, did not have a 2 or 4 year college degree, took the response test later than Complainant and scored lower on this test. (Exs. 38, 39, 46, 48, 70, 73)

11. In November 1990 IslandAir hired another class of 6 pilots. Although Ernst retained Complainant's resume, he and Williamson did not offer Complainant a position in this class because Complainant was monocular. However, IslandAir hired at least two pilots, David Vincent and Camm Willener, who were less qualified than Complainant. Vincent, a former colleague of Complainant's at Samoa Aviation, was 19 years old, did not have an ATP license[13], did not have a two or four year college degree and had less flight time than Complainant. Vincent also scored lower than Complainant on the pilot response test. Willener also did not have a college degree, had experience only as a flight instructor, and took the response test later and scored lower than Complainant. (Tr. at 50-52; Exs. 38, 39, 46, 48, 73, Ex. 80 p. 44-53, 61)

12. In December 1990 Dickey resigned from IslandAir. Ernst and Williamson became solely responsible for hiring pilots. (Tr. at 604; Ex. 80 p. 74-75, 82)

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[12] Although required by H.A.R. § 12-46-21, IslandAir did not retain and could not produce the resumes of most of the pilots hired from 1990 - 1991. Therefore it is difficult to compare those pilots' flight times and aircraft experience to Complainant's.

[13] A person must be at least 23 years old to obtain an ATP license. However, a person can fly as a first officer without having an ATP license. (Tr. at 50, 661)

13. Some time around December 1990 or early January 1991, Complainant heard that IslandAir had hired Vincent. Complainant became upset because he felt he was more qualified than Vincent and believed that IslandAir had discriminated against him because he was monocular. (Tr. at 52-53, 209, 341-342, 351-352)

14. Some time in January 1991 Complainant telephoned Ernst and asked if IslandAir still would not consider him because he was monocular. Ernst told Complainant that Williamson had decided not to hire monocular pilots. Complainant asked to speak with Williamson. Ernst informed Complainant that Williamson had passed away and that Lawrence Zimmerman, vice president of operations, was in charge. Ernst gave Complainant Zimmerman's telephone number. Ernst also informed Complainant that he [Ernst] was transitioning back to being a line pilot and that Dave McCarty would be the new chief pilot. (Tr. at 48-49, 277, 370-372; Ex. 77 p. 092)

15. Some time in early February 1991, Complainant contacted the Hawaii Civil Rights Commission. He was sent a pre-complaint questionnaire ("PCQ") form, which he filled out on or about February 11, 1991. On or about March 12, 1991 HCRC investigator Tony Rogers conducted an intake interview with Complainant. Rogers instructed Complainant to confirm whether IslandAir still would not hire monocular pilots. (Tr. at 52-54, 783-785; Ex. 5)

16. Some time in mid-March 1991 Complainant telephoned Zimmerman and asked if IslandAir still would not consider his application. Zimmerman stated that Williamson had made the decision not to hire Complainant, but that he would look into the

matter. Later Zimmerman called Complainant and stated that although Complainant was a good candidate, IslandAir would not hire him or any other monocular pilot. (Tr. at 55, 279-280)

17. Complainant then informed Rogers of the above. Complainant also asked Rogers to delay the filing of his complaint because he still wanted to try to resolve the matter with IslandAir by himself and because he was afraid that IslandAir and other local airlines might blacklist him. (Tr. at 535-540, 771-773; Ex. 77 p. 131-132)

18. After May 1991 Ernst became a line pilot. McCarty became the new chief pilot in charge of hiring pilots. In July 1991 Respondent IslandAir formed a hiring committee consisting of McCarty, Hans Linschoten (the new assistant chief pilot) and two other pilots. Ernst gave the resumes he retained to McCarty, but did not include Complainant's resume because Complainant was monocular. Some time in mid-July 1991 the committee selected a class of 9 pilots based on the resumes given to them by Ernst. (Tr. at 55-56, 663-664, 710-711; Ex. 16, Ex. 77 p. 085, 086, 092, 142, Ex. 80 p. 9)

19. Some time in July 1991 Complainant heard that IslandAir was again hiring pilots. On or about July 25, 1991 Complainant telephoned IslandAir and spoke to Linschoten about being considered for a pilot position. Linschoten stated that IslandAir had just hired a class[14], but that Complainant's resume was not among those given to him by Ernst. Complainant then informed Rogers that he

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[14] This class started on July 29, 1991.

wanted to file his complaint against IslandAir. The complaint was filed on August 22, 1991. (Tr. at 55-56, 280; Ex. 8, Ex. 77 p. 085, 086, 092, 142)

20. Throughout this period (June 1990 - July 1991), Complainant mailed updated resumes to IslandAir, but IslandAir did not consider him because he was monocular. (Tr. at 54; Exs. 15, 25)

21. Some time after July 1991 IslandAir's hiring committee devised a new procedure to screen and hire pilots because the number of resumes it received far exceeded the number of vacant positions. The committee created a "priority pool" consisting of applicants who submitted resumes in person and listed current IslandAir employees or other pilots known by the committee as references. Resumes which were mailed in, or did not contain such references were put in a separate file, which was periodically thrown out. From some time after July 1991 through August 1994, the committee only hired from this "priority pool" and did not review resumes or hire from the other file. (Tr. at 712-713, 716-719, 721-722; Exs. 28, T, EE, Ex. 77 p. 015, Ex. A to Respondent's Motion for Summary Judgment as to 1994 claims filed on February 5, 1999)

22. In September 1991 Lawrence Cabrinha became president of IslandAir. Cabrinha became aware of Complainant's discrimination charge and conducted an internal investigation of it. He spoke to Ernst, McCarty and Linschoten about the charge. In late September 1991 Cabrinha established a formal policy of not hiring monocular pilots because he felt that a person who was monocular could not

see as well as a binocular person. However, Cabrinha did not conduct any tests or obtain any documentation to verify this. Cabrinha notified McCarty and Linschoten about this policy. IslandAir has maintained this policy to the present. (Tr. at 459-473, 485, 495; Ex. 40)

23. From June 1990 until it closed in February 1993, Complainant flew as a first officer with Hawaii Pacific Air. From August 1993 to June 1994 Complainant was hired by Empire/Mahalo Air Lines and was trained and certified to fly as a first officer on its F-27 passenger planes[15]. In June 1994 Mahalo Air Lines took over that company and decided to fly ATR-42 passenger planes. Mahalo offered to upgrade Complainant to a captain position if he successfully completed training on the ATR-42. (Tr. at 59-63, 67-74, 81-82, 266-297; Exs. 66, 69, C)

24. In September 1994, Mahalo sent Complainant to Flight Safety Inc. to train as ATR-42 captain. The training consisted of three parts: ground school, simulator training, and a flight test. The flight test consisted of two parts: approximately 85% covered emergency procedures, was conducted in a simulator and was known as a "SIM check". Approximately 15% of the flight test was conducted in the actual aircraft and was known as a "flight check". Flight checks had to be taken within 30 days of a SIM check. Complainant completed the ground school and simulator training. However, he failed the SIM check twice and was scheduled to retake certain

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[15] This plane is also larger, more complicated and carries more passengers than the DHC-6. (Tr. at 73; Ex. 69)

portions of that test in November 1994. Mahalo decided not to allow Complainant to retake the PIC SIM check. Instead, it offered Complainant a position as first officer and asked him to take the SIC flight test. Complainant, however, felt that one of the Flight Safety instructors had been biased against him and had written derogatory comments in his training records. Complainant stole his training records and claimed he did not have them. He then accused the school of losing his records and demanded to have them reconstructed. The school complied, but the reconstructed records contained lower ratings than the original records. Complainant then hired an attorney, who arranged with Mahalo and Flight Safety to have Complainant complete the ATR-42 PIC training. After completing the training, Complainant feared that he might again fail the PIC flight test and instead took the SIC flight test. Complainant passed the SIM check for the SIC position, but failed the flight check. Upon failing the SIC flight check, Mahalo terminated Complainant. (Tr. at 83-102, 312-332, 523-524, 529-530; Exs. B, C, D, E, F, G, AA, BB, CC, FF, GG, HH, II, JJ, KK, LL, MM)

25. After July 1991, IslandAir subsequently hired the following classes of pilots: November 22, 1991 (8 pilots); January 15, 1992 (4 pilots); March 28, 1992 (2 pilots); May 23, 1992 (3 pilots); August 8, 1992 (3 pilots); May 4, 1994 (4 pilots); July 1, 1994 (2 pilots) and November 18, 1994 (6 pilots). Throughout this period (post July 1991 - August 1994), Complainant continued to mail updated resumes to Respondent IslandAir, but did not list references. IslandAir did not hire him because it only hired from

its "priority pool". (Tr. at 74, 77-78; Exs. 25, 26, 28, 46, 48, T, EE; Ex.77 p. 015-018, 022-026; Ex. A to Respondent's Motion for Summary Judgment as to 1994 claims filed on February 5, 1999)

26. On August 9, 1994 Complainant telephoned IslandAir and again spoke to Linschoten, who was then chief pilot. Linschoten informed Complainant that IslandAir had few open pilot positions and only hired pilots who walked in their resumes and had references. (Tr. at 78, 333-335, 339-340; Exs. 28, T, EE, Ex. 77 p. 015; Ex. A to Respondent's Motion for Summary Judgment as to 1994 claims filed on February 5, 1999)

27. On October 12, 1994 Complainant filed a second complaint alleging that Respondent IslandAir failed to hire him because of his disability and had retaliated against him. (Tr. at 78-79; Ex. 29)

28. After his termination from Mahalo Air Lines, Complainant had a difficult time securing pilot positions. From June 1995 to July 1995 Complainant was hired by Alpha Air for its ground school class, but the company filed for bankruptcy and shut down. From September 14, 1995 to September 1, 1996, Complainant was hired by Rich International Airways and was trained and certified to fly as a flight engineer[16] on an L-1011 passenger plane. Complainant accepted this position because Rich International appeared to be a stable company, Complainant wanted to fly jets, and he hoped to upgrade to a first officer position. In September 1996 the FAA

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[16] A flight engineer, or second officer, is a third reserve pilot required on certain larger airplanes. Unless the PIC or SIC becomes incapacitated, the flight engineer normally does not pilot the plane.

shut down Rich International. From April 1997 to April 1998 Complainant periodically worked for Orient Thai Airlines as a flight engineer on a L-1011 passenger plane. From March 1998 to November 1998 Complainant worked for Air Atlantic as a flight engineer on an L-1011. In between these flying jobs, Complainant worked a variety of odd jobs to help support his family. (Tr. at 21, 103-110; 196; Ex. 55)

29. Life as an itinerant pilot has been stressful for Complainant and his family. Because he worked periodically, Complainant did not have a steady income and his family had to depend on his ex-wife's salary. This hurt Complainant's self-esteem and created a financial strain on his family. Complainant also saw many of his old colleagues advance to jobs with national or major airlines, and became frustrated that he was not. Complainant's pilot jobs on the mainland and abroad also created strains on his marriage. He and his ex-wife separated in September 1996 and divorced in March 1998. (Tr. at 200-206, 520-522)

30. The career path for national or major airline pilots who do not have military backgrounds typically progresses as follows: flight instructor (to build up flight time); first officer for a small regional airline (to obtain and build up turbo prop time); upgrade from first officer to captain (moving from "right" to "left" seat); and after building up another 1,000 flight hours as captain, one may then be qualified to apply for a pilot position with a national or major airline. Such progression is normally accomplished in 5-8 years. (Tr. at 132-135; Ex. 50)

31. Of the 22 pilots hired by IslandAir between August 1990 and July 1991, 4 are still flying with IslandAir, 11 have advanced to positions with national airlines, and 4 have advanced to positions with major airlines. Of the 3 pilots who were less qualified than Complainant, Kamemoto and Vincent have advanced to positions with national airlines and Willener has advanced to a position with a major airline. Christopher Gardett, a pilot who was hired in July 1991, is the same age as Complainant, has no college degree and had comparable flight experience and response test scores, is presently employed by a national airline. (Tr. at 714, 720-721; Exs. 39, 46, Ex. 80 p. 78-79)

32. The ideal candidate for a pilot position with a major airline is: 30-40 years old; has an ATP license with a type rating[17]; has 3,000 - 6,000 hours total flight time; 1,000+ hours of turbine time; and has a four year college degree. 92% of the pilot applicants for major airlines have 4 year college degrees; and 77% are under the age of 39. The major airlines also prefer to hire pilots who have military training, or who are women or minorities. (Tr. at 162, 165-169, 174; Exs. 50, 53)

33. The likelihood of Complainant being hired by a major airline is very slight. Complainant does not have a 4 year college degree, military training or a type rating. He is a white male. In addition, if Complainant had been hired by IslandAir in 1991

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[17] Airlines may require pilots to obtain "type ratings" in order to fly as captains on aircraft over 12,500 pounds. A type rating is a certification by the FAA that the pilot can operate a particular aircraft as a captain. (Tr. at 167, 207)

(at the age of 38), he would be approximately 46 years old by the time he qualified to apply for a position with a major airline. Because the mandatory retirement age for pilots flying major airlines is 60 years old[18], Complainant would only be able to fly for 14 years. Most major airlines will not hire and train pilots who are able to fly for such a short period of time. (Tr. at 140-142)

34. Although Complainant failed his ATR-42 training, he previously and subsequently passed training and obtained certification for all other pilot positions he was offered. If Complainant had been hired by IslandAir in August 1990, November 1990 or July 1991, he most likely would have been upgraded to captain in 5 years and advanced to a first officer position with a national airline in another 3 years. (Tr. at 98, 185-186, 720-721; Exs. 2, 18, 46, 66, 67)

III. CONCLUSIONS OF LAW[19]

A. JURISDICTION

1. Timeliness of the Complaint

During the investigation of this case and the contested case hearing, Respondent IslandAir moved to dismiss the complaint as untimely. Specifically, Respondent argues that the complaint was

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[18] Pursuant to FAA regulations.

[19] To the extent that the following conclusions of law also contain findings of fact, they shall be deemed incorporated into the findings of fact.

filed on August 22, 1991, more than 180 days after Complainant was denied a pilot position in August and/or November 1990.

H.R.S. § 368-11(c) states that:

> No complaint shall be filed after the expiration of one hundred eighty days after the date:
> (1) Upon which the alleged unlawful discriminatory practice occurred; or
> (2) Of the last occurrence in a pattern of ongoing discriminatory practice.

Complainant and the Executive Director argue that the complaint was filed within 180 days of the last occurrence of a continuing violation. Alternatively, they argue that the pre-complaint questionnaire, which Complainant filed on February 11, 1991, constitutes a complaint pursuant to H.A.R. § 12-46-6(b) and was filed within 180 days of Respondent's first refusal to hire Complainant in August and/or November 1990.

a) whether Respondent committed a continuing violation

A refusal to hire may be a continuing violation if such refusal is part of a series of discriminatory acts or part of an ongoing policy or practice of discrimination. Mack v. Great Atlantic and Pacific Tea Co., Inc., 871 F.2d 179, 49 EPD 38,882 (1st Cir. 1989) (continuing violations may be serial [succession of related acts emanating from same discriminatory animus] or systemic [continuing illegal policy or practice]); Roberts v. North American Rockwell Corp., 650 F.2d 823, 26 EPD 31,885 (6th Cir. 1981), Taylor v. USAir, Inc., 61 EPD 42,105 (W.D. Pa. 1991). For instance, in Roberts, the Sixth Circuit concluded that a plaintiff who submitted an application in December 1972 and was repeatedly

told, from December 1972 through August 1973, that she would not be hired because she was a woman, was subjected to an ongoing policy of discrimination. 26 EPD 31,885 at 20,956-20,959. The court stated:

> First, by definition, if there is a continuing violation, the company is continually violating Title VII so long as its discriminatory policy remains in effect. An applicant for employment . . . will, in many circumstances, be interested in any suitable position which opens up. As job openings become available, the applicant will automatically be rejected because of his/her race, sex or national origin. . . . We do not think that Title VII requires that suit be filed when the applicant is initially discriminated against. If an ongoing discriminatory policy is in effect, the violation of Title VII is ongoing as well.

Id. at 20,958. The court found that plaintiff made a number of oral inquiries about her application (which showed that she was continually applying for a position at the plant), and was continually rejected because of her sex. In Taylor, the district court of Pennsylvania held that USAir's ongoing practice of refusing to hire a Black pilot applicant amounted to a continuing violation where the pilot's application remained on file with USAir from 1978 through 1988, was regularly updated by the him, and USAir never called him for an interview, though it interviewed and hired less qualified white applicants. 64 EPD 42,105 at 74,418, 74,425.

Like Roberts and Taylor, the evidence in the present case shows that the August 22, 1991 complaint was filed within 180 days after the last occurrence of an ongoing discriminatory practice. Complainant credibly testified, and the record shows, that he continuously mailed his updated resume at least once every three months (and sometimes more often) to Respondent from June 1990

through June 1994. (Tr. at 54, 74, 77-78; Exs. 15, 25, 26, Ex. 77 p. 016-018, 022-026, 040, 090) Ernst testified that from at least August 1990 through May 1991 (prior to the formation of the hiring committee) Complainant's resumes were accepted as applications and were retained. (Ex. 80 p. 44-45, 61)

The weight of the evidence also shows that at least through July 1991 Respondent IslandAir repeatedly refused to hire Complainant because he was monocular. Complainant and Tana Pied (Complainant's ex-wife) testified that Ernst called Complainant and rescinded the offer to attend the August 1990 ground school after Complainant disclosed his monocular vision. (Tr. at 37, 519) Complainant credibly testified that he spoke to Ernst again in January 1991, after hearing that Vincent had been hired. The record shows that Vincent was hired on November 26, 1990. (Exs. 46, 48) Complainant testified that during this January 1991 discussion, Ernst reiterated that IslandAir would not hire monocular pilots. Complainant then asked to speak to someone in management; Ernst informed him that Williamson had passed away and Zimmerman was in charge. The record shows that Williamson passed away in November 1990 and Zimmerman thereafter took over the day to day operations of IslandAir. (Tr. at 633-634) Complainant also informed Rogers of this conversation some time in 1991. (Ex. 77 p. 092) In addition, Complainant credibly testified that he spoke to Zimmerman in March 1991, and that Zimmerman confirmed that IslandAir would not hire him [Complainant] because he was monocular. Zimmerman testified that he was the vice president in

charge of the day to day operations of IslandAir in March 1991. (Tr. at 633-634) The conversations were also noted in Complainant's log, and were reported to Rogers. (Ex. 77 p. 014, 131, 136) Finally, the evidence shows that after May 1991 Ernst did not forward Complainant's resume to the hiring committee because Complainant was monocular. (Tr. at 56, 663; Ex. 77 p. 092, 142)

IslandAir argues that Complainant lacks credibility because: 1) his accounts of his interactions with Ernst, Dickey, Zimmerman and Linschoten were inconsistent; 2) his testimony that King, Ernst and Dickey made favorable comments about his response test scores were clearly refuted by those persons; 3) he stole his Flight Safety Inc. training records and lied about and concealed them until the day of the hearing; and 4) he inflated his flight times on his resumes and Airman Certificate forms. While Complainant's theft and concealment of his training records are serious transgressions, I find that his testimony regarding the general sequence and content of his interactions with IslandAir to be credible. This is because those portions of his testimony are consistent with other undisputed factual events and IslandAir's hiring practices during the period between June 1990 and July 1991. (see, discussion above and in section III.B.2., infra.) Although at times Complainant became confused, embellished and guessed at certain dates and specific events, this is understandable, given

they occurred almost 10 years ago.[20] Other witnesses such as Ernst, Dickey, Zimmerman and Linschoten also could not recall dates and events.

Respondent IslandAir also argues that there is no continuing violation because: a) it had no formal policy against hiring monocular pilots until September 1991; and b) Complainant and the Executive Director abandoned all claims based on the 1990 events because: (i) the complaints do not mention any events which occurred in August or November 1990; (ii) the HCRC did not investigate any events which occurred in August or November 1990; and (iii) IslandAir received no notice that the complaints encompassed the August and/or November 1990 events.

These arguments lack merit. Regardless of whether IslandAir had a formal policy of not hiring monocular pilots, the evidence shows that prior to September 1991, IslandAir had a continuing discriminatory **practice** of refusing to hire and consider Complainant's applications because he was monocular. In addition, the record shows that the HCRC Enforcement Section did view the complaints to include allegations of a continuing violation. By December 4, 1992 an HCRC investigator informed IslandAir's counsel that the Enforcement Section considered the complaint to be a continuing harm from the date Complainant sent in his first resume.

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[20] While it is clear that King and Ernst would not and did not comment on Complainant's response test scores, Dickey could have. Dickey determined whether applicants passed the test and would so notify them. At the contested case hearing, he confirmed that Complainant's scores were "good scores". (Tr. at 615, 621) Finally, the record shows that when writing resumes or filling out forms Complainant estimated and rounded off his flight hours, which were both higher and lower than his actual times. (Tr. at 214-228)

(Ex. 77 p. 101) The second complaint, filed on October 12, 1994, makes reference to events which occurred in August 1990 and also alleges that Complainant applied several times for a pilot position. (Ex. 78 p. 056-057) The pleadings in the related federal court case contain allegations relating to events which occurred in August 1990 (Exs. 42, 87, OO, PP) and the notices of Finding of Reasonable Cause filed on November 19 and 21, 1997 allege a "continuing harm". (Exs. 35, 36) Furthermore, IslandAir has raised and litigated the issue in these proceedings. See, Respondent's Motion for Summary Judgment on the issue of timeliness of charge, filed on February 5, 1999; Respondent's Motion to Dismiss, Tr. at 552-575) IslandAir therefore had notice of the continuing violations claim and was not prejudiced by any failure to explicitly state such claim in the complaints.

I therefore conclude that Respondent's refusal to hire Complainant because of his monocular vision was an ongoing discriminatory practice which continued from at least August 1990 through July 1991. The August 22, 1991 complaint was filed within 180 days of July 1991. The Commission therefore has jurisdiction over this complaint.

b) whether the pre-complaint questionnaire was a timely complaint

H.A.R. § 12-46-6(b) states:

> Notwithstanding the provisions of subsection (a), a complaint is deemed filed if the commission receives from an individual a written statement sufficiently precise to identify the parties and describing with reasonable accuracy the action or practices alleged to be unlawful.

Complainant and the Executive Director alternatively argue that Complainant's PCQ, which was filed on February 11, 1991 satisfies the requirements of H.A.R. § 12-46-6(b) and constitutes a complaint filed within 180 days after Complainant was denied a job in August and/or November 1990.

Federal courts have held that the filing of an EEOC intake questionnaire may constitute the filing of an EEOC charge where there is evidence that a complainant intended to activate the investigative process, or where the EEOC treated the questionnaire as a charge. Philbin v. General Electric Capital Auto Lease, Inc., 929 F.2d 321, 56 EPD 40,674 at 66,515-66517 (7th Cir. 1991) (intake questionnaire may constitute a charge where information contained therein was sufficient, plaintiff intended to activate the investigative process with the filing of the questionnaire and EEOC treated questionnaire as charge); Casavantes v. California State University, Sacramento, 732 F.2d 1441, 34 EPD 34,384 (9th Cir. 1984) (plaintiff's intake questionnaire, filled out 248 days after his notice of termination, was a timely filed charge when EEOC sent formal charge document more than 300 days after plaintiff's notice of termination and EEOC treated questionnaire as a filed charge).

In the present case, Complainant's PCQ contains sufficient information to meet the requirements of H.A.R. § 12-46-6(b). However, the weight of the evidence shows that Complainant did not intend to activate the HCRC investigative process when he filed the PCQ, and the Enforcement Section did not treat the PCQ as a complaint. Instead, the evidence shows that Complainant

deliberately delayed the filing of his complaint until July 1991. Rogers testified that Complainant wanted to keep trying to resolve the matter himself. (Tr. at 772-773) Tana Pied testified that Complainant agonized over whether he should file a formal complainant because he feared that word would get out among the local airlines and he would be blacklisted. (Tr. at 535-540) Furthermore, the first page of Complainant's PCQ contains a box titled "For Office Use Only" with a section labeled "ACTION TAKEN". Rogers and HCRC investigator Charles Nation testified that if a complaint was to be filed, they would fill in the words "accepted" or "taken" in that section. (Tr. at 754-755, 786) However, Complainant's PCQ contains the notation "pending". (Ex. 5) Rogers specifically noted that the case was a "Pending Complaint will call in June if I don't hear from Cp". (Ex. 77 p. 131).

Because Complainant did not intend to activate the investigative process with the filing of his PCQ and the HCRC Enforcement Section did not view his PCQ as a complaint, I conclude that the PCQ does not constitute a timely filed complaint pursuant to H.A.R. §§ 12-46-5 and 12-46-6(b).

2. Respondent IslandAir

H.R.S. § 378-1 defines "employer" to mean

> . . . any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States.

Respondent IslandAir is a corporation which has one or more employees. I therefore conclude that Respondent is an employer

under H.R.S. § 378-1 and is subject to the provisions of H.R.S. Chapter 378.

B. DISABILITY DISCRIMINATION

H.R.S. § 378-2(1)(A) makes it an unlawful discriminatory practice for any employer to refuse to hire, discharge or otherwise unequally treat an individual because of that individual's disability.

In the case of Tseu on behalf of the complaint filed by Aho vs. Department of Parks and Recreation, Docket No. 94-002-E-D (December 20, 1994) this Commission held that its disability rules (H.A.R. subchapter 9, §§ 12-46-181 through -196), which were adopted on August 18, 1994, would not be applied to discriminatory conduct which occurred prior to that date. Instead, the Commission looked to case law under both the Rehabilitation Act of 1973 (29 U.S.C. § 701 et. seq.)[21] and Title VII (42 U.S.C. § 2000e et. seq.) to interpret the disability provisions of H.R.S. Chapter 378.

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[21] The Rehabilitation Act of 1973 addresses disability discrimination in employment by the federal executive branch and targeted private employers. Section 501 of the Act requires federal departments and agencies to develop affirmative action plans for the employment of qualified individuals with disabilities. The EEOC is charged with review of such agency affirmative action plans. Section 503 of the Act requires parties contracting with the United States to take affirmative action in the employment of the disabled. The Department of Labor (DOL) through its Office of Federal Contract Compliance Programs (OFCCP) enforces this section. Section 504 prohibits discrimination against disabled individuals by programs or activities which receive federal funds or which are managed by certain federal agencies. Recipients are not required to adopt affirmative action plans. The coordinating body for the implementation of § 504 is the Department of Justice (DOJ), and each agency is required to issue implementing regulations consistent with those of the DOJ. See, Lex K. Larson, Employment Discrimination 2nd Ed. §§ 160-164 (1998). Because the purposes of § 504 are more similar to H.R.S. 378-2, I find regulations implementing this section instructive.

1. Direct Evidence of Disability Discrimination

Discrimination under H.R.S. Chapter 378 may be established by direct evidence of discriminatory intent. In Re Smith / MTL, Inc. et. al., Docket No. 92-003-PA-R-S (November 9, 1993) (bus driver's use of the terms "nigger" "Black thing" and "mama" were direct evidence of driver's intent to discriminate against Black female passenger); EEOC v. Alton Packaging Corp., 901 F.2d 920, 53 EPD 39,932 at 62,558 (11th Cir. 1990) (manager's statement that if it were his company "he wouldn't hire any black people" was direct evidence of discrimination in failure to promote Black plaintiff). In disability discrimination cases, the Executive Director and/or complainant are required to show: a) that Complainant is a qualified person with a disability; and b) direct evidence of discriminatory intent.

Once the Executive Director/complainant presents the above, the burden of proof shifts to the respondent to either: a) rebut such evidence by proving that it is not true; b) establish an affirmative defense; or c) limit, but not avoid, liability by showing mixed motives for the adverse action (i.e., proving by a preponderance of the evidence that it would have acted as it did without regard to the complainant's protected status). See, Smith, supra; Vaughn v. Edel, 918 F.2d 517, 55 EPD 40,455 at 65,237 (5th Cir. 1990); EEOC v. Alton Packaging Corp., supra.

a) whether Complainant has a disability

H.R.S. § 378-1 defines disability to mean

> the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded a having such an impairment.[22]

Department of Justice (DOJ) regulations implementing § 504 define "physical or mental impairment" to mean

> (i) Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affection one or more the following body systems: Neurological; musculoskeletal; special sense organs; . . .
>
> (iii) The term physical or mental impairment includes but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairments . . .

28 CFR 41.31(b)(1)(i) (1978)

DOJ regulations also define "major life activities" to mean

> . . . functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

28 CFR § 41.31(b)(2) (1978)

The DOJ regulations do not define the term "substantially limits".[23] I therefore will interpret these terms according to

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[22] The Rehabilitation Act similarly defines "individual with a disability to mean ". . . any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment . . ." 29 U.S.C. 706B.

[23] Although Department of Labor regulations implementing § 504 contain a definition of these terms, they are defined only in the contexts of being a beneficiary or working. 29 CFR § 32.3 (1980) states in relevant part:

> Substantially limits means the degree that the impairment affects an individual becoming a beneficiary of a program or activity receiving Federal financial assistance or affects an individual's employability. A handicapped individual who is likely to experience difficulty in securing or retaining benefits or in securing, or retaining, or advancing in employment would be considered

their ordinary meanings. Webster's Ninth New Collegiate Dictionary (1991) defines "substantial" to mean: consisting of or relating to substance; important, essential. It defines "limit" to mean: to curtail or reduce in quantity or extent. Therefore, in order to be "substantially limiting", a physical or mental impairment must curtail or reduce the quantity or extent to which a person performs a major life activity in an important or essential way.

Given the above, I conclude that Complainant Pied was and is a qualified person with a disability. Complainant testified that he lost sight in his left eye when he was eighteen years old. This is an anatomical loss of a special sense organ and constitutes a physical impairment. The evidence also shows that such impairment curtails Complainant's major life activity of seeing in an important or essential way. Complainant testified that he has to cock his head to the left to center his vision, he lacks 15% peripheral vision on both sides, and does not have stereopsis, or three-dimensional vision. He cannot perceive the depth of objects that are very close to him and perceives depth of other objects without stereopsis.[24]

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substantially limited.

The DOL regulations therefore do not define "substantially limits" in the context of other major life activities such as seeing. In addition, the cases cited by IslandAir analyze impairments only in the context of working, and not in regards to other major life activities. See, Cecil v. Gibson, 820 S.W.2d 361 (Tn. App. 1991); E.E. Black v. Marshall, 497 F.Supp 1088 (D. Haw. 1980).

[24] Recently several federal courts have held that persons with monocular vision see in a manner which substantially different from binocular people and are therefore disabled under the ADA. See, Kirkingburg v. Albertson's, Inc., 143 F.3d 1228 (9th Cir. 1998), cert. granted, 119 S.Ct 791 (1999) (monocular truck driver disabled under the ADA); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997) (monocular police officer disabled for purposes of ADA); EEOC v. Union Pacific Railroad, 6 F.Supp.2d 1135 (D. Idaho. 1998) (monocular driver disabled

b) whether IslandAir regarded Complainant as disabled

Alternatively, Complainant and the Executive Director argue that Respondent IslandAir regarded Complainant as being disabled.

DOJ regulations define the phrase "is regarded as having an impairment" to mean

> (i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation;
>
> (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (iii) Has none of the impairments defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment.

28 CFR § 41.31(b)(4).

The weight of the evidence also shows that IslandAir regarded Complainant as being substantially limited in the major life activity of seeing. Ernst was surprised that a person with monocular vision could even fly an airplane. (Tr. at 655-656, 719-720) He believed that a monocular person had a more limited "field

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under the ADA); Coleman v. Souther Pacific Transportation Co., 997 F.Supp 1197 (D. Ariz. 1998) (train switchman applicant with monocular vision disabled under the ADA).

Furthermore, as pointed out in the Executive Director's post-hearing brief, the "handicapped" or "disabled" status of monocular plaintiffs in Rehabilitation Act and other state civil rights commission cases has not been questioned. See, Holly v. City of Naperville, 603 F.Supp. 220 (N.D. Ill. 1985); Wright v. Columbia University, 520 F.Supp. 789 (E.D. Pa. 1981); Kampmeier v. Nyquist, 553 F.2d 296 (2nd Cir. 1977); In the Matter of Maliszewski and Illinois Dept. of Transportation, 1996 WL 534392 (Illinois Human Rights Commission July 29, 1996); In the Matter of Chevalier and the Toledo Edison Co., 1990 WL 656355 (Ohio Civil Rights Commission, February 28, 1990); In the Matter of the Accusation of the Dept. of Fair Employment and Housing v. City of Merced Police Dept., 1988 WL 242649 (California Fair Employment and Housing Commission, December 15, 1988); Jones v. Bohn Aluminum & Brass Co., Case No. 43740-E7 (Michigan Civil Rights Commission, December 16, 1980); Reimers v. New York City Dept. of Personnel, 1977 WL 52808 (New York Commission on Human Rights, December 13, 1977).

of vision" than a binocular person and would have difficulty seeing air traffic at night or in bad weather, and would not be able to assist or relieve a pilot in command should the captain become incapacitated. (Ex. 46, Ex. 80 p. 29-31, 63-64)

c) whether Complainant was qualified

Complainant was qualified for the IslandAir pilot position. He had an ATP license and a first class medical certificate with a vision waiver. (Ex. 72) When he was employed with Samoa Aviation, Complainant became certified in and flew the exact same plane IslandAir utilized. In addition, he has been certified and has flown as a first officer on larger and more complex passenger planes. (Tr. at 60-61, 72-74; Exs. 18, 66, 67, 69)

d) direct evidence of discriminatory intent

In August 1990, Ernst invited Complainant to attend IslandAir's August 31, 1990 ground school class. The weight of the evidence shows that after Complainant disclosed his monocular vision, Ernst told Complainant that IslandAir's insurance would not allow them to hire monocular pilots and that IslandAir would not pursue pilots with such "condition at this time". In January 1991 Ernst informed Complainant that Williamson made the decision not to hire monocular pilots. In March 1991 Zimmerman informed Complainant that IslandAir was continuing such practice. These statements to Complainant constitute direct evidence of discriminatory intent.

e) Respondent's defenses

IslandAir denies that Ernst and Zimmerman made such statements and argues that Complainant is not credible. However, for the reasons discussed in Section III.A.1.a. above, I find that Complainant and Tana Pied's testimonies regarding these statements credible. IslandAir did not present any affirmative defenses or mixed motives for its actions.[25] Thus, I conclude that there is direct evidence of IslandAir's intent to discriminate based on Complainant's disability.

2. Circumstantial Evidence of Disability Discrimination

Discrimination under Chapter 378 may alternatively be established by circumstantial evidence. In the present case, if the Commission concludes that there is no direct evidence of discriminatory intent, the Complainant and Executive Director must establish a prima facie case of disability discrimination by proving that:

a) Complainant is a qualified individual with a disability;

b) Complainant applied for a job with Respondent;

c) Respondent used medical criteria which screened out or otherwise denied employment to Complainant based on his disability.

Aho, supra; Prewitt v. United States Postal Service, 662 F.2d 292, 27 EPD 32,251 at 22,822 (5th Cir. 1981); Bey v. Bolger, 540 F.Supp.

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[25] IslandAir does not claim that Complainant poses a direct threat to the health or safety of himself or others and did not present evidence showing that binocular vision is a bona fide occupational qualification (BFOQ). (Tr. at 473-474; Ex. 45)

910, 33 EPD 33,967 at 31,576 (E.D. Pa. 1982).

The burden then shifts to Respondent IslandAir to prove: a) that it had a non-discriminatory reason for not hiring Complainant; or b) some other affirmative defense. H.R.S. § 378-3; Aho, supra; Tseu on behalf of the complaint filed by Cole vs. Treehouse Restaurant, Docket No. 95-002-E-A-D-RET (May 2, 1996); Prewitt, supra; Bey, supra.

a) prima facie case

Complainant and the Executive Director met their burden of establishing a prima facie case of disability discrimination. As discussed above, Complainant was and is a qualified person with a disability. The record also shows that from June 1990 through July 1991 Complainant continuously sent in his resumes and applied for pilot positions with IslandAir and that, at least through May 1991, IslandAir retained his resumes. (See discussion in section III.A.1.a, supra.) The weight of the evidence also shows that Ernst offered Complainant a position in the August 1990 class. Complainant timely applied for that class in June 1990, and successfully passed the interview and pilot response test by June 26, 1990. (Exs. 37, 73; see also discussion in section III.B.2.b., below.) Ernst sent Complainant an application form and asked for copies of Complainant's licenses on or about August 25, 1990. (Ex. 1A) Ernst testified that this was usually done at the end of the hiring process and the record shows that many new hirees completed and submitted this application at the time they started ground school. (Tr. at 667-668; Ex. 39, Ex. 80 p. 17-18, 71-72) Tana

Pied testified that Complainant stated that IslandAir offered him a position. (Tr. at 517)

Finally, Complainant and the Executive Director have shown that Complainant was rejected because he was monocular. Complainant and Tana Pied testified that after Complainant disclosed his monocular vision to Ernst, Ernst rescinded the offer to attend ground school. (Tr. at 37, 519) Thereafter, although Complainant continued to submit resumes, he was not hired by IslandAir. IslandAir continued to hire pilots who were not monocular, and hired as least three pilots (Kamemoto, Vincent and Willener) who were not as qualified as Complainant. (Exs. 38, 39, 46, 48)

b) whether Respondent had a legitimate, non-discriminatory reason for not hiring Complainant

i. 1990 - July 1991 (first period)

Respondent IslandAir did not meet its burden proving that it had a legitimate, non-discriminatory reason for not hiring Complainant during the period from August 1990 through July 1991.

IslandAir argues that it had already selected the members of the August 1990 class by the time Complainant applied for that class. However, the record shows that Complainant took the pilot response test on June 26, 1990. Thus, Complainant must have submitted his resume and passed the initial interview prior to June 26, 1990. The record also shows that all the members of the July

1990 class submitted their application forms[26] after June 26, 1990, as did all but one of the members[27] of the August 1990 class. Therefore, IslandAir did not select the August 1990 class at the time Complainant first applied in June 1990.

In addition, Complainant's application was timely for the November 1990 class. The record shows that the resumes of two members of the November 1990 class were received after Complainant's. Correspondence from Darcy Vernier indicates that Vernier submitted his resume on or near October 12, 1990; Vincent's resume contains a handwritten notation indicating that it was received on September 14, 1990. (Ex. 39) Ernst agreed that Complainant had timely applied for the November 1990 class. (Tr. at 687; Ex. 80 p. 44-45, 61) Ernst could not state a reason why Complainant was not interviewed or selected for this class. (Tr. at 686-687; Ex. 80 p. 47-48) Cabrinha, who as President of IslandAir later conducted an investigation of Complainant's discrimination charge, testified that he could not determine why Complainant was not hired or interviewed for this class. (Tr. at 461-463)

IslandAir also contends that Complainant was not selected in the August and November 1990 classes because he did not interview favorably with Dickey. However, Dickey testified that he was the

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[26] Because IslandAir did not retain the resumes of most of the pilots hired in 1990-1991, it is difficult to determine exactly when these pilots submitted their resumes. However, it is undisputed that resumes were usually submitted prior to the completion of IslandAir applications forms.

[27] John Ross submitted his application on May 14, 1990. (Ex. 39)

sole person responsible for scheduling pilot response tests, and would not have IslandAir pay for an applicant to take such test unless he was interested in that applicant. (Tr. at 618-620) Ernst confirmed that IslandAir would not have sent Complainant to take the response test unless it was interested in hiring him. (Tr. at 685-686) It is undisputed that Complainant took the pilot response test on June 26, 1990 at the request of IslandAir. Ernst also testified that he would not have sent anyone an application form unless he and Dickey discussed and approved that applicant. (Tr. at 667-668) It is undisputed that Ernst sent Complainant an application form on August 25, 1990. (Ex. 1A) Therefore, Complainant must have interviewed favorably with Dickey.

Finally, IslandAir argues that Complainant was not hired in the July 1991 class because the newly formed hiring committee only selected pilots from a "priority pool" (i.e., applicants who had walked in their resumes and named IslandAir employees or pilots known by the committee as references). However, the weight of the evidence shows that the committee, at least initially for the July 1991 class, did not follow this procedure and instead hired from the resumes given to them by Ernst. Ernst testified that he gave the resumes he retained to McCarty. (Tr. at 664) Linschoten testified that he and the committee were not involved in hiring until July 1991. (Tr. at 711-712) The record shows that the July 1991 class consisted of 9 pilots and commenced ground school on July 29, 1991. (Exs. 46, 48) Therefore, the July 1991 class must have been selected around mid-July 1991. Linschoten testified that

the committee did not use any of the resumes on file with Ernst. (Tr. at 714, 716) However, if the committee did not use the resumes retained by Ernst, it would have had to recruit, interview, test, and select walk-in applicants with recommendations within a period of two weeks, which is highly unlikely. In fact, the record shows that two of the July 1991 class members, Christopher Gardett and Kathy O'Brien, submitted their applications (and thus, their resumes) prior to July 1991 (May 15, 1991 and June 7, 1990, respectively). (Ex. 39) These applications do not list any references, and Linschoten could not recall any. (Tr. at 714; Ex. 39) Complainant also testified and informed Rogers that Linschoten stated he was not considered for the July 1991 class because Ernst didn't forward his resume to the committee. (Tr. at 56; Ex. 77 p. 092) Finally, IslandAir's October 21, 1991 response to the complaint makes no mention of a "priority pool" or that the hiring committee only selected from such pool. (Ex. 16) For these reasons, I conclude that Respondent's reason for not hiring Complainant in the July 1991 class is not credible.

ii. post July 1991 - July 1994 (second period)

The weight of the evidence shows that some time after July 1991 IslandAir's pilot hiring committee adopted new hiring procedures and only selected applicants from its "priority pool". During the August 9, 1994 telephone conversation between Linschoten and Complainant (which Complainant tape recorded) Linschoten mentioned these new procedures. (Exs. T, EE; Ex. A to Respondent's Motion for Summary Judgment as to 1994 claims filed on February 5,

1999) Shortly afterwards, Complainant also reported this to Rogers. (Ex. 28, Ex. 77 p. 015) Therefore, some time after July 1991, Respondent did not consider Complainant's application because Complainant was not in the "priority pool" (i.e., he did not walk in his resume or list IslandAir employees or pilots known to the committee as references).

c) other affirmative defenses

As stated in Section III.B.1.e. above, IslandAir did not present any other affirmative defenses. IslandAir therefore failed to rebut the presumption of discrimination raised by Complainant's and the Executive Director's prima facie case, and I conclude that there is circumstantial evidence of IslandAir's intent to discriminate based on Complainant's disability.

C. LIABILITY

Because Respondent IslandAir refused to hire Complainant Pied as a pilot during the period August 1990 - July 1991 solely because of his disability, I conclude that it is liable for violating H.R.S. § 378-2.

D. REMEDIES

1. Placement of Complainant Pied in a Pilot Position

Complainant and the Executive Director seek placement of Complainant into a first officer pilot position. Because Complainant is a qualified person with a disability, I determine

that Respondent should be ordered to place Complainant in the next IslandAir ground school class that includes first officer pilots.

2. Back Pay

Back pay encompasses the amount Complainant would have earned if he had been hired by IslandAir. Respondent has the burden to prove any offsets to Complainant's expected earnings.

The evidence shows that Complainant would have been hired as a first officer with IslandAir on August 31, 1990. The evidence also shows that Complainant would have advanced to captain in 5 years, and to a first officer position with a national airline in another 3 years. Christopher Gardett, a pilot hired by IslandAir in July 1991, who is the same age as Complainant, has no college degree or military experience and has comparable flight experience and response test scores, is presently employed by Hawaiian Air Lines. (Tr. at 720, Ex. 48, Ex. 80 p. 79)

I therefore determine that Respondent should be ordered to pay Complainant back pay in the amount he would have earned as a first officer for the period beginning August 31, 1990 through August 31, 1995; as a captain from August 31, 1995 through August 31, 1998; and first officer with a national airline from August 31, 1998 until his placement in an Islandair ground school class. This amount should include the value of any benefits Complainant would have received and should be reduced by the amounts Complainant earned and the value of any benefits he received from August 31, 1990 to his placement. This loss amount should be adjusted to account for any income taxes assessed. Complainant should also be

awarded prejudgment interest on this loss amount at the rate of 10% per year until the date of the Commission's final decision in this matter.

IslandAir argues that Complainant failed to mitigate his damages when he refused to accept a first officer position with Mahalo Air Lines in June 1994. However, the record shows that Complainant attempted to pass both the PIC and SIC ATR-42 training but failed his SIC flight check, which caused his termination. Subsequently, he accepted and successfully completed training for every pilot position he was offered. I therefore conclude that Complainant made reasonable efforts to mitigate his damages.

3. Front Pay

Because I find that Complainant would have become a first officer with a national airline by August 31, 1998, I determine that Respondent should be ordered to pay Complainant the difference between what he would have earned as a first officer with a national airline and what he earns as a first officer with IslandAir until Complainant obtains a first officer position with a national airline or until he reaches age 60.

4. Compensatory Damages

Complainant and the Executive Director request that Respondent be ordered to pay Complainant compensatory damages in the amount of $270,000 ($30,000/year for 9 years) for the emotional distress he suffered.

Pursuant to H.R.S. § 368-17(a)(8), the Commission has the authority to award compensatory damages for emotional distress Complainant suffered as a result of Respondent IslandAir's actions. Complainant and the Executive Director must demonstrate the extent and nature of the resultant injury and Respondent must demonstrate any bar or mitigation to this remedy.

The evidence shows that Complainant was very disappointed after Ernst rescinded the offer to attend the August 31, 1990 ground school. Complainant was also upset after he heard that IslandAir had hired Vincent, who had less experience than Complainant. Since June 1994, for approximately 5 years Complainant has struggled to find work as a pilot and has had to live away from his family to accept jobs on the mainland and in Thailand and England. This also caused serious financial stress, a loss of self-esteem, frustration and contributed to the break up of his marriage. Considering these circumstances, I determine that $150,000 is appropriate compensation for injury to Complainant's feelings, emotions and mental well-being.

5. Punitive Damages

H.R.S. § 378-17(a) also authorizes the Commission to award punitive damages. Punitive damages are assessed in addition to compensatory damages to punish a respondent for aggravated or outrageous misconduct and to deter the respondent and others from similar conduct in the future. See, Tseu on behalf of the complaint filed by Gould, v. Dr. Robert Simich et. al., Docket No. 950-12-E-SH (October 29, 1996); Masaki v. General Motors Corp., 71

Haw. 1, 6, 780 P.2d 566 (1989). Complainant and the Executive Director are required to show, by clear and convincing evidence, that Respondent acted wantonly, oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or that there has been some wilful misconduct or entire want of care which would raise the presumption of a conscious indifference to consequences. Id.

In Title VII cases, federal courts have found reckless indifference to a plaintiff's civil rights and awarded punitive damages in cases where defendants deliberately gave false reasons or attempted to cover up their discriminatory conduct. Merriweather v. Family Dollar Stores of Indiana, Inc., 103 F.3d 576, 69 EPD 44,479 at 87,699 (7th Cir. 1996) (district court could infer reckless indifference to plaintiff's civil rights and award punitive damages because defendant deliberately gave false reasons for firing plaintiff); EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 77 BNA 1611, 1614-1615 (9th Cir. 1998) (evidence regarding managers' attempts to cover up their discriminatory conduct supports claim of reckless indifference to plaintiff's federal protected rights and issue of punitive damages should have been submitted to jury); see also, EEOC Policy Statement No. 915.002, Compensatory and Punitive Damages Under Section 102 of the Civil Rights Act of 1991, EEOC Compliance Manual, Section 603 par. 2062 (July 14, 1992) (evidence that a respondent planned and/or attempted to conceal or cover-up discriminatory practices or conduct can support a finding that respondent acted with malice or

reckless indifference). I therefore conclude that this Commission may similarly find an "entire want of care which would raise the presumption of a conscious indifference to consequences" and award punitive damages in cases where respondents deliberately give false reasons or attempt to cover up their discriminatory conduct.

In the present case, there is clear and convincing evidence that Respondent IslandAir attempted to cover up its discriminatory practices by concocting various reasons for not hiring Complainant. Up until January 1999, IslandAir admitted it had a policy of not hiring monocular pilots from at least August 1990 through the present, and that it rejected Complainant because he was monocular. In the related federal case, the Executive Director alleged that Complainant applied for and was denied a position from August 1990 through July 25, 1991 and from May 1994 through August 9, 1994. (see, Defendant Tseu's Concise Statement, attached as Ex. 10 to Complainant's Motion for Summary Judgment filed on February 5, 1999) IslandAir did not dispute these allegations and submitted an affidavit from Cabrinha stating, inter alia, that he was President of IslandAir from September 1, 1991 through March 31, 1995 and that "[a]t all times while I was President at Islandair, Islandair would not hire monocular . . . pilots." (see, Plaintiff Aloha Islandair, Inc.'s Concise Statement attached as Ex. 11 to Complainant's Motion for Summary Judgment filed on February 5, 1999; Ex. 40). Based on these allegations and the affidavit, the District Court, in an order drafted by IslandAir's counsel, found, inter alia,

> It is undisputed for the purposes of this Motion that Pied applied to Islandair in 1991 and 1994. Islandair had at all relevant times[28] a policy of not hiring monocular pilots". (Ex. H)

In its answers to Complainant's First Request for Admissions dated December 9, 1998, IslandAir admitted that "Pied did not meet Aloha Islandair's minimum pilot qualifications of having 20/20 corrected vision in both eyes" and "Aloha Islandair's policy in August 1991[29] was not to hire pilots who did not have 20/20 corrected vision in both eyes or did otherwise not meet Aloha Islandair's minimum pilot qualification requirements." (Ex. 45) In its draft, unsigned response to Complainant's First Request for Answers to Interrogatories also dated December 9, 1998, IslandAir states in response to interrogatory #3

> Prior to 1989, Aloha Islandair determined that pilots need to have 20/20 corrected vision in both eyes. To the best of IslandAir's knowledge, the policy was established by its first President James I. Williamson who is deceased.

IslandAir's draft answer to interrogatory #10 states that Complainant Pied was not hired, in whole or in part, because he did not have 20/20 corrected vision in both eyes, and its draft answer to interrogatory #17 states that IslandAir does not believe that the essential job functions of a pilot can be performed by someone who does not have 20/20 corrected vision in both eyes. (Ex. 46)

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[28] Pursuant to the Executive Director's allegations, Complainant's applications were made prior to July 25, 1991. Cabrinha did not become President until September 1, 1991. Therefore the order acknowledges the existence of the policy prior to Cabrinha's administration.

[29] Again, this is prior to Cabrinha's administration.

After December 1998 IslandAir claimed that its policy was not established until the end of September 1991 and did not exist prior to that date. (Tr. at 464-466) On January 27, 1999 it amended its answers to interrogatories to reflect this change and to allege that Complainant was not hired in 1990 because he had not timely applied. (Tr. at 496-497; Ex. 48) Wing, the IslandAir director of administration, testified that he prepared the draft answers (Ex. 46) based on information provided by Patricia Pedro, IslandAir's manager of human resources. (Tr. at 488-490) Pedro at first denied that she aided Wing in preparing the draft responses to interrogatory numbers 3, 10 and 17. (Tr. at 802-807, 809-810) She later admitted that she assisted Wing with these interrogatories by "finding information". Specifically, Pedro testified that she spoke to Ernst about interrogatory #3 and that Ernst provided the information in the draft response. (Tr. at 808, 812-813) Pedro then contradicted herself and testified that Ernst did not provide this information and that she and Wing somehow put the answer together. (Tr. at 813-815) Wing testified that he changed the draft answers solely based on discussions with IslandAir's counsel, who became aware of new facts. The changes were not based on any records or further discussions with Pedro or any other IslandAir employees. (Tr. at 490-491, 494-495, 502-503, 507-509)

Other IslandAir managers were also not forthright. During his deposition, Ernst confirmed that Complainant timely applied for the November 1990 ground school class but could not give a reason why

Complainant wasn't considered. (Tr. at 686-687; Ex. 80 p. 47-48). Later at the contested case hearing Ernst testified that Complainant probably wasn't considered because he interviewed poorly with Dickey. (Tr. at 656-658) Cabrinha, who as president of IslandAir conducted an internal investigation of Complainant's discrimination charge, incredibly testified that he never determined why Complainant was not hired. (Tr. at 461-463)

Given the above, I conclude that Respondent IslandAir deliberately attempted to cover up and conceal its discriminatory conduct. Complainant should therefore be awarded punitive damages, the amount to be determined after the Commission's final decision in this case.

6. Attorneys' Fees and Costs

Pursuant to H.R.S. § 368-17(a)(9) the Commission may order payment to the Complainant of all or a portion of the costs of maintaining an action, including reasonable attorneys' fees and expert witness fees. However, attorneys' fees cannot be awarded in addition to punitive damages; rather they must constitute the whole of the punitive damage award or be accounted for as a portion of the total punitive damage award. Lee v. Aiu, 85 Haw. 19, 35, 936 P.2d 655 (1997); Romero v. Hariri, 80 Haw. 450, 459-460, 911 P.2d 85 (1996). I therefore recommend that Complainant should be awarded his reasonable costs, the amount to be submitted and determined after the Commission's final decision in this case. Complainant should also be awarded his reasonable attorneys' fees, the amount to be submitted and determined after the Commission's

final decision in this case, if such fees exceed the amount of punitive damages awarded.

7. Other Equitable Relief

Finally, the Executive Director asks that the Commission order Respondent IslandAir to:

a) cease and desist from its policy and practice of refusing to consider and/or hire monocular pilot who have first class medical certificates and waivers for their vision;

b) adopt a written non-discrimination policy based on disability;

c) post such policy and procedures at all job sites;

d) formally train all management personnel about such policy; and

e) publish the results of this contested case hearing in a press statement provided by the Commission in at least one newspaper published in the State and having general circulation in Honolulu, Hawaii.

At the contested case hearing, Wing testified that IslandAir maintains a policy of not considering and/or hiring monocular pilots who have vision waivers to their first class medical certificates. (Tr. at 495) In Aloha IslandAir Inc. v. Tseu, the Ninth Circuit stated that because Complainant Pied had received full FAA medical approval to fly, his monocular vision does not hinder his ability to safely pilot planes. 128 F.3d 1301, 1303 (9th Cir. 1997) I therefore recommend that the Commission order Respondent to cease and desist from implementing and maintaining this policy. I also recommend that the Commission direct Respondent IslandAir to adopt an non-discrimination policy based on disability within 90 days after the final decision in this case. I

also recommend that the Commission direct Respondent to conduct formal training for all management personnel within 90 days of adopting such policy.

The Commission should also direct Respondent to post such policy on employee bulletin boards throughout its work sites within 90 days of its adoption.

I believe that the best way to publicize this decision and IslandAir's non-discrimination policy to the public is to require it to publish the attached Public Notice (Attachment 1) in a newspaper published in the State of Hawaii having a general circulation in the City and County of Honolulu.

IV. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondent Aloha IslandAir Inc. violated H.R.S. § 378-2 when it failed to hire Complainant Bruce Pied as a pilot on the basis of his disability.

For the violation found above, I recommend that pursuant to H.R.S. § 368-17, the Commission should order:

1. Respondent IslandAir to immediately employ Complainant Pied as a first officer in the next ground school class.
2. Respondent to pay Complainant back pay in the amount he would have earned as a first officer with IslandAir from August 31, 1990 - August 31, 1995, a captain with

IslandAir from August 31, 1995 - August 31, 1998 and as a first officer with a national airline from August 1998 to his placement in an IslandAir ground school class. This amount should include benefits he would have received and should be offset by any amounts Complainant earned and the value of any benefits he received from August 31, 1990 to the date of his placement. The amount should be adjusted to account for income taxes and should include prejudgment interest at the rate of 10% per annum until the date of the Commission's final decision.

3. Respondent to pay Complainant the difference between his salary as a first officer with IslandAir and what he would earn as a first officer with a national airline until Complainant obtains a first officer position with a national airline or until he reaches age 60.

4. Respondent to pay Complainant $150,000 as damages in compensation for injury to his feelings, emotions and mental well-being.

5. Respondent to pay Complainant punitive damages, the amount to be submitted and determined at a later hearing.

6. Respondent to pay Complainant his reasonable costs, to be submitted and determined at a later hearing, and his reasonable attorney's fees and costs, to be submitted and determined at a later hearing if such fees exceed the amount of punitive damages awarded.

APPENDIX A

On August 22, 1991 Complainant Bruce Pied filed a complaint against Aloha IslandAir, Inc. (hereinafter "IslandAir") alleging disability discrimination. On October 12, 1994 Complainant filed a second complaint against IslandAir alleging disability discrimination and retaliation.

On December 13, 1994 IslandAir filed an action in the U.S. District Court for the District of Hawaii seeking declaratory and injunctive relief that the Airline Deregulation Act preempted the disability discrimination provisions of H.R.S. Chapter 378. On July 13, 1995 the District Court granted IslandAir's motion for summary judgment, concluding that the Airline Deregulation Act preempts the application of the disability discrimination provisions of H.R.S. Chapter 378 to IslandAir's pilot applicants, and permanently enjoined Executive Director from applying the disability provisions of H.R.S. Chapter 378 to IslandAir's pilot applicants. On October 14, 1997 the Ninth Circuit Court of Appeals vacated the District Court's order, holding that the disability provisions of H.R.S. Chapter 378 are not preempted by the Airline Deregulation Act because Complainant's disability discrimination claim does not raise significant safety concerns.

On November 19, 1997 the Executive Director issued a notice of finding of reasonable cause to believe that unlaw discriminatory practices have been committed. On August 6, 1998 the Executive Director sent Respondent Aloha IslandAir, Inc. a final

conciliation demand letter pursuant to Hawaii Administrative Rule (H.A.R.) 12-46-17 in FEP Nos. WH-5137 and 6827.

On August 24, 1998 both complaints were docketed for administrative hearing and notices of docketing of complaint were issued. On August 25, 1998 the Executive Director filed a motion to consolidate the two cases. This motion was granted on August 26, 1998.

On August 25, 1998 the Executive Director also filed an ex parte motion to postpone the scheduling conference until after the disposition of Complainant's Petition for Declaratory Relief, which sought a ruling from this Commission as to his right to participate in the contested case hearing. On August 26, 1998 the Hearings Examiner issued a Notice of Scheduling Conference, setting the scheduling conference beyond thirty days after the docketing of the complaints. On September 2, 1998 Respondent IslandAir moved to strike the motion to postpone scheduling conference and to rescind order granting such motion. On September 18, 1998 the Hearings Examiner issued an order reconsidering in part and amending the Notice of Scheduling Conference and Order.

On September 18, 1998, the Commission issued an order summarily granting Complainant's Petition for Declaratory Relief. On September 21, 1998 Complainant filed a motion for intervention as a party. On September 24, 1998 the Executive Director filed a statement of support of Complainant's motion. On September 25,

1998 Respondent filed a memorandum in opposition to the motion. A hearing on the motion was held on September 19, 199998 at the Department of Labor and Industrial Relations Director's conference room, 830 Punchbowl St., room 320, Honolulu, Hawaii. Participating were: David F. Simons, Esq. on behalf of Complainant, Enforcement Attorney Cheryl Tipton, and Richard M. Rand, Esq. on behalf of Respondent. On September 30, 1998 the Hearings Examiner granted Complainant's Motion for Intervention as a party.

On September 24, 1998 the Executive Director filed its scheduling conference statement. On September 30, 1998 Complainant filed his scheduling conference statement. IslandAir filed its scheduling conference statement on October 2, 1998. A scheduling conference was held on October 5, 1998 and the parties agreed that Complainant's retaliation claim would not be litigated in the contested case proceeding. A Scheduling Conference Order was issued on October 8, 1998. An Amended Scheduling Conference Order was issued on January 22, 1999.

On January 25, 1999 notices of hearing and pre-hearing conference were issued. On January 29, 1999 the parties filed a Stipulation for Protected Order Regarding Complainant's Tax Records.

On February 5, 1999 Complainant filed a motion for summary judgment and Respondent filed three motions for summary judgment. A notice of hearing on all four motions was issued that day. On February 9, 1999 the parties filed memoranda in opposition to the

motions. The Executive Director also filed a memorandum in support of Complainant's motion for summary judgment. On February 10, 1999 Respondent filed reply memoranda in support of two of its motions. A hearing on the four motions for summary judgment was held on February 11, 1999 at the Hawaii Civil Rights Commission conference room, 830 Punchbowl St. room 411 before this Hearings Examiner. Participating were: David F. Simons, Esq. and Matthew J. Viola, Esq. on behalf of Complainant, Enforcement Attorney Cheryl Tipton, on behalf of the Executive Director, and Richard M. Rand, Esq. and Tamara M. Gerrard, Esq. on behalf of Respondent. At the conclusion of the hearing, the Hearings Examiner orally denied summary judgment on all four motions.

The parties filed their pre-hearing conference statements on February 9, 1999. On February 11, 1999 a pre-hearing conference was held. On February 12, 1999 the parties filed a Stipulation as to Respondent's Averments.

On February 12, 1999 Respondent filed three motions in limine and Complainant filed two motions in limine. On February 16, 1999 Complainant and Respondent filed memoranda in opposition to each other's motions in limine. A hearing on all five motions was held on February 16, 1999. Participating were: David F. Simons, Esq. on behalf of Complainant, Enforcement Attorney Cheryl Tipton on behalf of the Executive Director, and Richard M. Rand, Esq. and Tamara M. Gerrard, Esq. on behalf of Respondent. At the conclusion of the hearing, the Hearings Examiner orally denied all five

motions in limine.

The contested case hearing on this matter was held on February 16, 17, 18, 19, 22, 23, 26 and March 2, 1999 at the Hawaii Civil Rights Commission conference room, 830 Punchbowl Street, room 411, Honolulu, Hawaii pursuant to H.R.S. Chapters 91 and 368. Complainant was represented by David F. Simons, Esq. and Complainant Pied was present during portions of the hearing. The Executive Director was represented by Enforcement Attorney Cheryl Tipton. Respondent IslandAir was represented by Richard M. Rand, Esq. and Tamara M. Gerrard, Esq.

On February 18, 1999 the parties filed a Stipulation Regarding Executive Director's Position on Complainant's Disability. On February 23, 1999 Complainant orally moved to amend his first complaint to allege a failure to hire from the period August 1990 through August 1994. On February 24, 1999 the Executive Director filed a joinder in the motion and Respondent filed a memorandum in opposition to the motion. A hearing on the motion was held on February 26, 1999 and at the conclusion of the hearing, the Hearings Examiner orally granted the motion.

The parties were granted leave to file post-hearing briefs. On March 23, 1999 the parties filed post-hearing briefs.

On March 29, 1999 Respondent IslandAir filed a motion to reopen the record to receive the testimony of Tony Rogers. By letter dated April 16, 1999 this Hearings Examiner notified the parties that she planned to reopen the hearing to take the

testimony of Patricia Pedro. On April 21, 1999 Complainant and the Executive Director filed memoranda in opposition to the motion. A hearing on the motion was held on April 23, 1999. In attendance were: Richard M. Rand, Esq. and Tamara M. Gerrard, Esq. on behalf of Respondent IslandAir, Enforcement Attorney Cheryl Tipton on behalf of the Executive Director, and David F. Simons, Esq. for Complainant. At the conclusion of the hearing, the Hearings Examiner orally granted the motion and issued an order reopening the hearing to receive the testimony of Tony Rogers and Patricia Pedro that day.

The contested case hearing was continued on May 10, 1999 at the Hawaii Civil Rights Commission conference room, 830 Punchbowl Street, room 411, Honolulu, Hawaii pursuant to H.R.S. Chapters 91 and 368. Complainant was represented by David F. Simons, Esq. The Executive Director was represented by Enforcement Attorney Cheryl Tipton. Respondent IslandAir was represented by Richard M. Rand, Esq. On May 17, 1999 the parties filed supplemental post-hearing briefs.

ATTACHMENT 1

PUBLIC NOTICE

published by Order of the
HAWAII CIVIL RIGHTS COMMISSION
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
STATE OF HAWAII

After a full hearing, the Hawaii Civil Rights Commission has found that Aloha IslandAir, Inc. violated Hawaii Revised Statutes Chapter 378, Employment Discrimination, when it failed to hire an applicant for a pilot position because of his disability (monocular vision). (William D. Hoshijo, Executive Director, on behalf of the complaint filed by Bruce A. Pied and Bruce A. Pied vs. Aloha IslandAir, Inc., Docket Nos. 98-007-E-D and 98-008-E-D-RET, [date of final decision] 1999).

The Commission has ordered us to publish this Notice and to:

1) Immediately hire that applicant as a first officer in the next ground school class

2) Pay that applicant back pay in the amount he would have earned (including benefits) if he had been hired in August 1990

3) Pay that applicant front pay (the difference in the amount he earns as a first officer with Aloha IslandAir, Inc. and in the amount he would earn as a first officer with a national airline)

4) Pay that applicant a monetary award to compensate him for emotional injuries he suffered

5) Pay that applicant punitive damages

6) Pay that applicant his reasonable costs and attorneys' fees, if such fees exceed the amount of punitive damages awarded

7) Cease and desist from implementing and maintaining a policy of refusing to consider and/or hire monocular applicants who have FAA first class medical certificates with vision waivers

8) Develop a written non discrimination policy based on disability, conduct training on such policy and post such policy on employee bulletin boards.

DATED: _____ By _____
Authorized Agent for Aloha IslandAir, Inc.