'92 NOV -4 A8:55

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

In the Matter of	Docket No. 92-001 E-SH
DOLORES SANTOS, Complainant	HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER; APPENDIX A
HAWAIIAN FLOWER EXPORTS, INC. and MASAMI "SPARKY" NIIMI, Respondents.	

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

I. INTRODUCTION

1. Chronology of Case

Because the procedural history of this case is rather long and complex, it is set forth in the attached Appendix A.

2. Summary of the Parties' Contentions

The Executive Director asserts that Respondents Hawaiian Flowers Exports, Inc. (hereinafter "HFE") and Masami Sparky Niimi (hereinafter "Sparky") violated H.R.S. § 378-2 and H.A.R. §§ 12-46-101 and 109 by subjecting Complainant Dolores Santos to unwelcome sexual conduct which unreasonably interfered with her job performance and/or created an intimidating, hostile or offensive work environment. Sparky denies that the alleged sexual conduct occurred and contends that Complainant voluntarily quit her job in anticipation of being fired for

excessive absences. In addition, he asserts that he is not an agent of HFE and is not an employer individually liable under H.R.S. Chapter 378. HFE decided not to contest the Executive Director's allegations or claims.

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. In November 1972 HFE was incorporated to do business in the State of Hawaii. The officers of the corporation at that time were: Masami Sparky Niimi, president; his son Robert Niimi, vice president/assistant manager; and Susan Ijima, secretary. Sparky held 75% of the corporate shares and Robert Niimi held 25% of the corporate shares. (Tr. 640-641; Ex. 31b at 33-38)[2]

2. Prior to HFE's incorporation, the business was owned and operated as Pearl's Anthuriums and later as Hawaiian Flowers Exports by Sparky and his first wife, Tsuyako Niimi. (Tr. 639-

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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 September 8-11, 1992; "Ex." followed by a number refers to the Executive Director's exhibits; "Ex." followed by a letter refers to Respondent Sparky Niimi's exhibits.

640; Ex. 31b at 22, 32-33)

3. Some time around 1975 Susan Ijima left the corporation and Sparky's other son, Richard Niimi, became a vice president and shareholder. (Ex. 31b at 38)

4. In 1981 when Sparky became 65 years old, he retired as an officer of HFE. (Tr. 641; Ex. 31b at 39) Robert Niimi then became president, Richard Niimi became vice president, Caroline Niimi (Richard Niimi's wife) became treasurer and Cynthia Niimi (Robert Niimi's wife) became the secretary. (Ex. 22) Sparky was thereafter a director of HFE at least throughout the years 1988, 1989 and 1990 and did not receive a salary from HFE during those years. (Ex. 23)

5. On November 16, 1988 Sparky transferred all of his shares in the corporation to Robert, Cynthia, Richard and Caroline Niimi. This was because Sparky had remarried and did not want any conflicts between his second wife and his sons to arise over the management of HFE should something happen to him. (Tr. 641-644; Ex. A and B attached to Ex. 31b; Ex. 31b at 48) On that same date, the directors of HFE voted to pay Sparky a pension of $1,000 per month for the rest of his life. HFE paid Sparky this amount at least throughout the years 1989 - 1990. (Tr. 686-687; Ex. 31b at 49-50, Ex. 33a)

6. HFE is located in Mountain View, Hawaii. (Ex. 31b at 21) During Complainant's employment at HFE, the business was primarily engaged in the following activities: a) growing

anthurium flowers; b) buying anthurium flowers grown by others for resale to customers; and c) grading and packing anthurium flowers for marketing to customers. Accordingly, HFE employees were made up of field workers who worked in the anthurium fields; packing plant employees who graded and packed the flowers; and office workers. (Tr. 649-650)

7. Robert Niimi was in charge of the overall operations of HFE. He spent about 20% of his time in the anthurium fields directing and reviewing the work of the field workers. (Tr. 659-660) Richard Niimi was in charge of the office work, bookkeeping and payroll matters at HFE. He occasionally helped out with other aspects of the business. Richard Niimi spent most of his time in the HFE office and packing plant, which are located in the same building. He was seldom out in the anthurium fields. (Tr. 592; Ex. 31a at 15)

8. On December 22, 1988 Robert Niimi interviewed Complainant Dolores Santos for a job as a field worker with HFE. Sparky and Richard Niimi were also present at the interview. On that date, Robert Niimi hired Complainant and she was given a tour of the HFE grounds by Robert, Richard and Sparky Niimi. (Tr. 31-32, 36-37, 593, 659; Ex. 31b at 58)

9. Complainant was employed by HFE from December 23, 1988 to November 12, 1990. (Tr. 37; Complaint dated 11-13-90)

10. During Complainant's employment at HFE, the corporation had one or more employees. (Ex. 32 at 7)

11. During Complainant's employment at HFE, the corporation did not have an expressed policy against sexual harassment. It also did not conduct any training among its management or employees about sexual harassment. (Ex. 31a at 15-17; Ex. 32 at 16, 18) The corporation had an informal grievance procedure by which employees could talk to either Robert or Richard Niimi if they had any problems. (Ex. 32 at 18-19)

12. At the beginning of her employment, Complainant was a general nursery worker. At first, her job duties were weeding the fields and transplanting anthurium plants. Robert Niimi considered Complainant a good worker. Later Complainant's job duties also included cutting flowers, fertilizing the plants, spraying herbicides and insecticides, putting in cinders, repairing the saran covering over the fields and preparing the greenhouses. (Tr. 38, 690-691; Ex. 31b at 65-66)

13. After about six months of employment at HFE, Complainant was promoted to flower cutting supervisor. After one year of employment with HFE, Complainant was promoted to forelady and given additional duties such as driving employees to the fields, fixing the sprinkler system and transporting flowers to the packing plant. Towards the end of her employment, Complainant also graded and packed flowers in the packing plant. She was given vacation benefits and an increase in pay to $5.50 an hour. (Tr. 39-41, 667-668, 691-692; Ex. 31b

at 66-67; Ex. 32 at 8-9)

14. During Complainant's employment at HFE, Sparky was active in HFE's business affairs. He came in to the office and packing area from 1-3 times a week to pick up and deliver flowers to customers in the Hilo area and to the airport for shipping to customers on the outer islands and in Japan. (Tr. 87, 123-124, 591-592, 608-609, 644-645; Ex. 31b at 91-92; Ex. 32 at 21) Sparky also worked with and supervised Complainant and the other field workers approximately 2-3 times per week for up to half day periods. When Robert Niimi was not out in the fields, Sparky directed Complainant and others where to weed and spray, how to mix pesticides, how to clip the flowers, how to repair the saran and how to use and take care of the masks and other equipment used by the workers. (Tr. 42-47, 61, 381, 386, 467-469, 489-490, 660-661, 671-675; Ex. 31b at 90-91; Ex. 32 at 21) On transplanting days, Sparky cut up to 1,000 anthurium plants for Complainant and other field workers to transplant. This involved cutting each plant's root at the correct length; otherwise the plant would die. In the packing plant, Sparky showed Complainant how to grade and pack the flowers. (Tr. 45)

15. Sparky had no set working hours at HFE. He came on to the premises and worked and/or supervised the employees whenever he wanted to. (Tr. 591-592, 608, 645-646)

16. Robert and Richard Niimi approved of Sparky's work and supervision of HFE employees. (Tr. 591-592, 660-661, 671-675)

When Sparky's directions to HFE field workers conflicted with earlier directions given by Robert Niimi, Robert Niimi would instruct Complainant and others to follow Sparky's directions. (Tr. 44-45, 469, 489) With HFE management's approval, Sparky exercised supervisory authority over Complainant and had significant control over her conditions of employment.

17. Throughout Complainant's employment with HFE, Sparky continuously subjected Complainant to offensive and unwelcome sexual conduct. Such conduct included the following incidents:

a) Shortly after her employment, Sparky asked Complainant personal questions, such as if she was single and if she had boyfriends. He also asked her if he could take her to her home after work and if he could be her boyfriend. Complainant refused Sparky's requests to take her home and be her boyfriend. She felt that the questions had sexual overtones. (Tr. 64-66; Ex. G at 49)

b) Sparky also made comments about other female HFE employees to Complainant. Once he told Complainant that Roxanne Taylor, the other female field worker, wore her pants tight and that he thought she was a nymphomaniac. (Tr. 189) Sparky also told Complainant that Toby Mahu, Complainant's roommate who worked in the HFE office for a short time, looked nice because she wore a bra. (Tr. 253)

c) Sparky's verbal comments became more offensive. Several times when they were weeding, Sparky would ask

Complainant to wait until he got closer before she bent down. (Tr. 247) He also compared Complainant's breasts and buttocks to his wife's, stating that Complainant's "ass" was like his wife's, but that he liked Complainant's "tits" better. (Tr. 224) Once when Complainant was working in the field near Sparky's house, he told her he wanted to "suck" her "pussy". (Tr. 242-243) Sparky also told Complainant that she should wear a bra to work so that she would look better, and also asked Complainant to wear short skirts to work so he could see underneath her skirts. (Tr. 243-244) When Complainant was in the presence of Ivan Farinas and another male field worker, Sparky asked which one of them was going to go home with her that day. (Tr. 229-230, 383) While Complainant was in the presence of Alfredo Cabaccang, another male field worker, Sparky told Mr. Cabaccang to "eat" Complainant's "pussy" because it would taste good. (Ex. G at 64) Once after Complainant parked the company van, Sparky walked up, pulled his zipper down, grabbed his crotch and told Complainant she would feel good if she grabbed his "head". (Tr. 244-245) These comments embarrassed Complainant and made her feel ashamed and cheap. (Tr. 225, 230)

d) On many occasions, Sparky would put his hand on Complainant's shoulder or put his arms around her shoulders and pull her towards him when he was talking to her.

Complainant would usually step away from Sparky, push him away or shake his hand or arm off her shoulder when he did this because she didn't want him to touch her. (Tr. 90-91, 185, 382, 440-444; Ex. G at 64)

e) Sparky's physical conduct also became more offensive. He attempted to kiss Complainant several times while she was working in the fields. (Tr. 186-187, 445-448, 496-497) He also attempted to kiss Complainant when she was opening the corporation's van doors to put flowers inside. (Tr. 176, 184-185, 445-446; Ex. G at 58-62) During these incidents, Complainant would push Sparky away and tell him to leave her alone. (Tr. 184-187, 445, 447; Ex. G at 60, 62) Sparky also grabbed and squeezed Complainant's buttocks while she was bending down to check pesticides in the pesticide shed. The grabbing of her buttocks caused Complainant physical pain. (Tr. 73-74) Sparky also grabbed Complainant's breasts. Once he stood behind Complainant, reached his arms around her and grabbed her breasts when she was packing flowers. (Tr. 70-72; Ex. G at 70-71) On two occasions when Complainant was near the company van, Sparky walked in front of her and grabbed her breasts. She told Alfredo Cabaccang about one incident, while Richard Carlson, another field worker, witnessed the other. (Tr. 172-175, 183-184, 472-477; Ex. G at 51-58) On these occasions, Complainant would push or slap Sparky away

and tell him not to do it or to leave her alone. (Tr. 74, 175, 472-473; Ex. G at 56, 71) Sparky would respond by laughing or smirking and then walk away. (Tr. 175, 186; Ex. G at 56) In the presence of Ivan Farinas, Sparky attempted to grab Complainant's crotch area. Complainant backed off and put her arms down to block Sparky's hand from touching her. (Tr. 229, 381-383, 395-397, 405-406; Ex. G at 68) Sparky also attempted to grab Complainant's crotch area when she was in the packing plant after she had torn a hole in her plastic clothes covering. (Tr. 230-231; Ex. G at 68)

18. These incidents made Complainant feel very ashamed, degraded, cheap and dirty. (Tr. 225, 229, 263-264; Ex. G at 71) Complainant no longer enjoyed her job and started to dread going to work. (Tr. 229, 234) After some of these incidents Complainant became so upset she would not go to work the next day or next few days just to avoid Sparky. (Tr. 262; Ex. G at 90-91)

19. Complainant also observed or heard about Sparky's offensive and unwelcome conduct towards other female employees of HFE. Such conduct included the following:

a) On several occasions Complainant saw Sparky look over the bodies of female HFE employees from head to toe. (Tr. 248-249)

b) Shortly after Complainant began employment with HFE, Kalei Peterson, one of the HFE secretaries, told

Complainant that Sparky once tried to kiss her and that she felt uncomfortable when he was around. (Tr. 93-95, 250) Complainant also noticed that Ms. Peterson would move away from Sparky when he came near her. (Tr. 251-252)

c) Complainant saw Sparky pull the women employees towards him and try to kiss them on the mouth when giving them gifts on birthdays, Valentine's and Mother's Day. These employees would turn their heads so that he would only kiss their cheeks. (Tr. 258; Ex. G at 77-78)

d) Jennie Mar (Sparky's sister) and Vivian Tamashiro, two female HFE employees who worked in the packing plant, also warned Complainant to watch out for Sparky, and that they tried to avoid him. (Tr. 257-258)

e) On one occasion, Complainant saw Sparky walk toward Teresita Domingo, a female packer, and try to grab Ms. Domingo's waist area. Complainant saw Ms. Domingo step off her stool and jump back from Sparky. (Tr. 254-255; Ex. G at 79)

f) Complainant also saw Sparky try to grab at the waist area of another woman employee known as "Nana". Nana told Complainant she felt uncomfortable when Sparky was around. (Tr. 255-256)

20. The final incident occurred on November 12, 1990. Complainant had caught a small lizard near the packing area. She went to the secretaries' office to get a container to put it in.

Sparky was in the packing area picking up flowers for delivery. He went to the secretaries' office, approached Complainant from behind and asked if he could see the lizard too. Complainant thought that the person behind her was Robert Niimi. She turned around, holding the lizard in one hand and a cup in the other hand. Sparky then grabbed and squeezed Complainant's crotch area. Complainant slapped Sparky's arm away with one of her hands and said something like "Don't touch me". Complainant then left the secretaries' office and went back to the packing area. (Tr. 103-105, 273-277, 421-433; Ex. G at 81-88) Sparky showed Ms. Peterson a bruise on his arm which he said Complainant had inflicted and then walked out. (Tr. 103) At the packing table, Complainant decided that she could not take Sparky's conduct any longer. A short time later, she went outside to the window near Ms. Peterson's desk and told Ms. Peterson that Sparky had touched her private parts. Complainant asked Ms. Peterson to call Toby Mahu to take her home. Throughout this discussion, Complainant was sobbing. She was sobbing so hard she could not even state Toby's telephone number. She then walked home. (Tr. 104, 277-279, 281) Soon afterwards, Ms. Peterson reported this incident to Robert Niimi. (Tr. 104, 664-665; Ex. 32 at 22)

21. Complainant thereafter did not return to work at HFE. Sparky's offensive conduct towards Complainant forced her to quit. (Tr. 285)

22. Aside from the grabbing incident near the van and the "lizard" incident, Complainant did not talk to any other HFE employees about Sparky's offensive conduct and tried not show how upset she was after each incident. This was Complainant's way of trying to keep up her self esteem at work and her way of maintaining her ability to work. (Tr. 266; Ex. G at 71)

23. Complainant attempted to indirectly discuss Sparky's conduct with Robert and Richard Niimi by asking them on separate occasions why Sparky touched the ladies the way he did. However, she did not tell Robert or Richard Niimi about any incidents of Sparky's offensive conduct towards her. Complainant liked Robert and Richard Niimi because they were always respectful towards her and treated her well, and she felt uncomfortable informing them of their father's conduct. She also did not report Sparky's conduct to them because she felt ashamed about the incidents. (Tr. 266-270, 597-598; Ex. G at 73-78, 101)

24. Both Robert and Richard Niimi saw Sparky put his hand or arm around the shoulders of other female employees, saw him kiss female employees when he gave them gifts, and knew that Sparky told jokes involving sex to both male and female HFE employees during work hours. (Tr. 618-622, 635, 694-698; Ex. 31a at 23-29; Ex. 31b at 75-76) However, except for the "lizard" incident, both Robert and Richard Niimi did not know about Sparky's other offensive conduct towards Complainant.

(Tr. 596-597, 661-663; Ex. 32 at 20)

25. After hearing about the "lizard" incident, Robert Niimi spoke to Sparky about the incident. He also made some kind of effort to contact Complainant to have her come into his office and discuss what happened. At that time, Complainant did not have a phone in her home, which is located only 1-1/2 miles away from HFE by car, and Robert Niimi did not attempt to go to her home to talk with her or leave her a message. (Tr. 435, 699-700; Ex. 31b at 88-89; Ex. 32 at 26, 47)

26. By November 1990, the HFE flower fields became infected with anthurium blight. At one time HFE grew about 18 acres worth of anthurium flowers. Because of the blight, by November 1990 HFE grew only about three acres worth of anthuriums. (Tr. 649, 654)

27. Sometime during 1990, Robert and Richard Niimi began laying off some of the HFE field worker employees because of the decreased acreage in production. Their decision to lay off certain workers was generally based on: a) the dependability of the worker; b) whether the worker had alternate employment opportunities and c) the financial situation of the corporation at the time. (Tr. 654, 665-667, 701-703)

28. After Complainant's first 1-1/2 years of work at HFE, Robert Niimi noticed that she was absent from work approximately 1-2 times per week. When she was present at work, however, Robert Niimi considered Complainant's work performance satisfactory. A few weeks before the "lizard" incident, Robert

Niimi verbally informed Complainant that if her attendance didn't improve, he would have to let her go. (Tr. 648, 654-655; Ex. 31b at 63-64, 68; Ex. 32 at 12)

29. Prior to being subjected to Sparky's sexual conduct, Complainant had no pre-existing emotional difficulties. She had been a sociable person who enjoyed going to the beach, the library and shopping with her friends. (Tr. 264-265, 311; Ex. G at 93-94)

30. Sparky's conduct caused Complainant to feel dirty, degraded and ashamed. She felt she didn't belong in a crowd of people and became withdrawn. She had no social life. She became edgy, couldn't concentrate and had difficulty sleeping at night. Right after the "lizard" incident, Complainant felt suicidal. She didn't want to be around anyone. She stayed in her room by herself for a few days. Then she packed some food and water and went to a secluded beach in Keaukaha where she lived alone out of her jeep for two months. (Tr. 263-266, 282, 285-290, 292-299; Ex. G at 92)

31. On July 1, 1991 Complainant filed a claim for workers' compensation benefits for emotional injuries resulting from sexual harassment at HFE. In a decision issued on February 19, 1992, the Director of the Disability Compensation Division, Department of Labor and Industrial Relations, State of Hawaii, found Complainant to be temporarily and totally disabled due to emotional injury caused by sexual harassment which occurred on

November 12, 1990. The Director ordered HFE to pay for Complainant's medical care, services and supplies, as well as weekly compensation of $153.34 for temporary total disability beginning July 4, 1991. (Ex. 18 attached to Complainant's [sic] Amended Pre-Hearing Conference Statement dated 8-25-92)

32. Complainant first sought medical help also on July 1, 1991. (Exs. 15, 16) In October 1991, Dr. Sally Hildebrand, Complainant's treating psychologist, conducted a mental status evaluation and a Minnesota Multiphasic Personality Inventory test on Complainant. (Ex. 15) Based on these, Dr. Hildebrand diagnosed Complainant as having major depression, post-traumatic stress disorder, anxiety disorder, a tremendous loss of self esteem, loss of self confidence, inability to cope, suicidal thoughts, and concentration and memory impairment. In November 1991, Dr. Robert Bloomgarden, a psychiatrist, conducted a mental status and medical evaluation of Complainant. (Ex. 17) Dr. Bloomgarden observed her as being "almost frozen in place" and diagnosed her as having extraordinarily severe major depression and post-traumatic stress disorder, as well as very low self esteem, low self confidence, feeling unable and afraid to work and being at a high risk for suicidal behavior.
Dr. Bloomgarden also found that Complainant had been through a tremendous amount of pain and was extremely withdrawn, fatigued and exhausted. Dr. Ernest Bade, Complainant's medical doctor, found that Complainant had the following symptoms: insomnia,

tearfulness, feelings of depression and worthlessness, motor retardation and inability to concentrate and make decisions. (Ex. 16)

33. Based on their evaluations of Complainant, Doctors Hildebrand, Bloomgarden and Bade concluded and I find that Complainant's condition dates back to and was caused by Sparky's offensive conduct toward her.

34. From November 4, 1991 to May 3, 1992, Complainant was treated by Dr. Hildebrand with weekly psychotherapy sessions. From May to August 1992, Complainant was in session with Dr. Hildebrand on an every other week or once a month basis. From August 1992 until the hearing on this case held during September 8-11, 1992, Complainant had sessions with Dr. Hildebrand on an emergency as-needed basis. (Tr. 301-303; Ex. 15) From October 25, 1991 Complainant has also been taking medication (Trazadone and Xanax) to treat her depression and insomnia, as prescribed by Doctors Bloomgarden and Bade. (Tr. 303-304; Exs. 16, 17)

35. Recently on August 29, 1992, Dr. Hildebrand diagnosed Complainant as still having major depression, post-traumatic stress disorder and anxiety disorder. Complainant's prognosis is guarded. Dr. Hildebrand estimates that Complainant will need to continue her treatment every other week for six to twelve more months. (Ex. 15) Dr. Bade estimates that Complainant will also need to continue taking medication for another six to

twelve months. (Ex. 16)

36. On or about the end of September 1991 the last two field workers at HFE were laid off. On or about October 1991 HFE began leasing its fields to other growers. (Tr. 654, 701, 703)

37. HFE stopped operations on March 23, 1992 and filed Chapter 7 bankruptcy on July 23, 1992. (Tr. 655-656)

38. Due to her total disability from emotional injuries caused by Sparky's sexual conduct, Complainant was unemployed from November 13, 1990 through December 1991. Since around January 1992, Complainant has worked a few yard jobs, earning approximately $100 total. (Tr. 293-294)

III. CONCLUSIONS OF LAW[3]

H.R.S. § 378-2(1)(A) makes it an unlawful discriminatory practice for any employer to discriminate against an individual in the terms, conditions or privileges of employment because of sex. Hostile work environment sexual harassment is a violation of the above statute. H.A.R. 12-46-109; see also Meritor Savings Bank, FSB v. Vinson, 477 US 57, 91 L.Ed.2d 49, 106 S.Ct 2399, 40 EPD 36,159 at 42,577 (1986).

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

A. JURISDICTION

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.

The statute in turn defines "person" to mean one or more individuals and includes, but is not limited to, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, or the State or any of its political subdivisions.

1. Respondent HFE

During Complainant's employment at HFE, Respondent HFE was a corporation with one or more employees. I therefore conclude that HFE is an employer under H.R.S. § 378-1 and is subject to the provisions of H.R.S. Chapter 378.

2. Respondent Masami Sparky Niimi

Sparky argues that he was not an agent of HFE during Complainant's employment at HFE and is personally not subject to Chapter 378 because : 1) the definition of "employer" in H.R.S. §378-1 requires an agent to also employ one or more persons; or alternatively, 2) he did not exercise authorized, significant control over Complainant. See, Respondent Niimi's Hearing Brief at 8-11.

Sparky's first argument is without merit. A plain reading of the definition of "employer" as found in § 378-1 and its legislative history show that an agent is not required to employ

one or more persons.

The fundamental starting point for interpreting a statue is the language of the statute itself. State v. Briones, 71 Haw. 86, 92 (1989); State v. Eline, 70 Haw. 597 (1989). However, a court or agency's primary duty in interpreting a statute is to ascertain and give effect to the legislature's intention and to implement that intention to the fullest degree. Briones, supra, State v. Tupuola, 68 Haw. 276 (1985). Such intention is primarily obtained from the language of the statute itself, although legislative history may be considered. Briones, supra, Eline, supra.

The phrase "including the State or any of its political subdivisions and any agent of such person" is parenthetic and modifies the preceding phrase "any person". See, 2A Sutherland Stat. Const. § 47.15 (5th Ed. 1992); Strunk and White, The Elements of Style, 3rd Ed. 1979 at 2. Therefore the phrase "having one or more employees" only modifies the first phrase "any person" and does not also modify the words "any agent of such person". Sutherland, supra, at § 47.33.

The legislative history of this definition confirms this reading. H.R.S. Chapter 378 was originally enacted in 1963 as Act 180. Act 180 did not contain a definition of the term "employer". In 1964 the statute was amended, in part to add definitions for various key terms such as "employer" in order to avoid administrative and legal difficulties. See, Act 44, L.

1964; House SCRep. 455, 1964 House Journal at 381; Senate SCRep. 442, 1964 Senate Journal at 504. Act 44 L. 1964 defined "employer" to mean

> . . . any person having one or more persons in his employment, and includes any person acting as an agent of an employer, directly or indirectly.

This definition clearly did not require an agent to also have one or more employees. The statute was again amended in 1981 to its present wording as stated above. See, Act 94, L. 1981. However, the purpose of this amendment was merely to extend coverage of Chapter 378 to state and county government employees; it was not amended to additionally require agents to have one or more employees. House SCRep. 549, 1981 House Journal at 1166; Senate SCRep. 653, 1981 Senate Journal at 1195; Senate SCRep. 1109, 1981 Senate Journal at 1363. While grammatically not as clean as its pre-1981 wording or the federal definition of "employer" found in 42 U.S.C. § 2000e(b)[4], § 378-1 does not require an agent to have one or more employees.

Sparky's second argument also fails because the facts show that Sparky was an agent of HFE during Complainant's employment. H.R.S. Chapter 378 and the Administrative Rules do not define the term "agent". Hawaii appellate courts have also not defined

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[4] 42 U.S.C. § 2000e(b) states in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year and any agent of such person, but such term does not include. . .

the term. However, H.A.R. 12-46-109(c) states that the Commission

> . . . will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acted in either a supervisory or agency capacity.

Hawaii caselaw similarly holds that an agency relationship may be implied from the actions of the parties or surrounding circumstances. Wong Wong v. Skating Rink, 24 Haw. 181, 192 (1918); Ottensmeyer v. Baskin, 2 Haw.App. 86, 89 (1981) (despite express language in franchise agreement disclaiming agency, actual relationship with alleged agent must be considered); Kapu v. McInerny, 6 Haw. 263, 266 (1880) (whether a person pays a salary to another has no effect on the question of agency).

Because H.A.R. 12-46-109(c) is nearly identical to the EEOC Regulations on Sex Discrimination[5], federal caselaw on this issue is also instructive. The federal courts have looked to common law agency principles in applying these guidelines. Meritor Savings Bank, FSB v. Vinson, 40 EPD 36, 159 at 42, 581; Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 44 EPD

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[5] 29 CFR § 1604.11(c) (1980) states in relevant part:

> . . . The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

Title VII does not define the term "agent" as found in 42 U.S.C. § 2000e(b).

37,493 at 49,459 (11th Cir. 1987). They have also construed the term "agent" liberally to effectuate the purposes of Title VII. Hamilton v. Rodgers, 791 F.2d 439, 442, 40 EPD 36,115 (5th Cir. 1986); Mason v. Twenty-Sixth Judicial Dist. of Kansas, 670 F.Supp. 1528, 1532 (D.Kan. 1987). Accordingly, the courts have held that an individual who serves in a supervisory position and exercises significant control over a plaintiff's hiring, firing or conditions of employment qualifies as an agent. Kauffman v. Allied Signal, Inc., 61 U.S.L.W. 2129, 59 EPD 41,642, 1992 WL 167531 at 7 (6th Cir. 1992); Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), vacated on other grounds, 900 F.2d 27, 53 EPD 39,833 (4th Cir. 1990). A person may exercise such supervisory authority even though the company has formally designated another as the plaintiff's supervisor so long as company management approves or acquiesces in that person's supervisory control. Paroline, supra. Therefore, a company director or officer who participates in discriminatory conduct can qualify as an "agent" and "employer" under Title VII. Hendrix v. Fleming Companies, 650 F.Supp. 301, 302-303 (D. Minn. 1986); see also, Thompson v. Intern. Ass'n of Machinists, 580 F.Supp. 662, 668-669 (D.C. 1984); Watson v. Sears, Roebuck Co., 742 F.Supp. 353, 357 (M.D.La. 1990).

Pursuant to the above, courts have found individuals in the following situations were or could be considered "agents". In Thompson, four individual officers of the International

Association of Machinists who recommended an assistant director's discharge or made the final discharge decision were found to be employers. Thompson, supra. In Hamilton, the court found defendants to be agents of the Houston fire department because they had control over the plaintiff's car and shift assignments, and had filed critical reports in his personnel file. 791 F.2d 439, 442-443. Similarly, in Maturo v. National Graphics, the court found a supervisor who assigned tasks and instructed plaintiff in the operation of folding machines an agent of his employers. 52 EPD 39,675 at 61,289 (D. Conn. 1989). In Mason, the court found that supervisors who rated a court services officer's work performance and controlled her work could be agents. Mason, supra. A supervising physician who established plaintiff's medical assistant job responsibilities and influenced her working conditions can be deemed an employer. Howard v. Temple Urgent Care Center, 53 BNA 1416, 1417 (D.Conn. 1990). In Tafoya v. Adams, the court found a parks department supervisor who had control over plaintiff's work conditions and had recommended plaintiff's termination an agent of the city of Denver. 612 F.Supp 1097, 38 BNA 630, 636 (D. Colo. 1985).

The evidence in the present case shows that Sparky likewise served in a supervisory position over Complainant and exercised significant control over her work conditions at HFE. Robert Niimi, Complainant, and Ivan Farinas testified that with HFE

management's approval: a) Sparky was out in the HFE fields approximately 2-3 times per week; b) he would tell Complainant where to weed and spray, how to clip flowers, mix pesticides, repair the sarans, and use and repair the masks; and c) Complainant would follow his directions. (Tr. 42-47, 61, 381, 671-672) In the packing plant, Sparky taught Complainant how to grade and pack flowers. (Tr. 45)

Sparky argues that he was not necessarily acting as an agent of HFE every time he appeared on the premises and at the time of each alleged harassing act. He claims that many times he was merely paying social visits to certain HFE employees. However, the evidence shows that HFE gave Sparky the authority to supervise Complainant and other employees <u>whenever he came on to the premises</u>. Robert and Richard Niimi testified that they needed and approved of Sparky's help; they also instructed the employees to follow Sparky's directions even if his directions conflicted with their own. (Tr. 44-45, 469, 489, 591-592, 671-675) Furthermore, the evidence shows that Sparky was working with and/or supervising Complainant at least during the times when he: asked her to wait before bending down, put his hands or arms on her shoulders, tried to kiss her, gestured towards her crotch area, and during the "lizard" incident. (Tr. 90-91, 186, 247, 381-383, 386, 739-741)

Based on the foregoing, I conclude that Sparky was an agent of Respondent HFE during Complainant's employment and at the

time the harassing acts occurred. He is therefore an employer under H.R.S. § 378-1.

B. Hostile Work Environment Sexual Harassment

H.A.R. 12-46-109 defines hostile work environment sexual harassment as

> . . . unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or visual forms of harassment of a sexual nature. . . when. . . that conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Because H.R.S. § 378-2 and H.A.R. 12-46-109(a) are very similar to Title VII provisions[6] and EEOC regulations[7] pertaining to hostile environment sexual harassment, federal caselaw from this circuit is instructive in formulating the elements of such a claim.[8] Thus, the Executive Director must

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6 42 U.S.C. § 2000e-2(a)(1) (1982) states that it is "an unlawful employment practice for an employer. . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

7 29 CFR §1604.11(a)(3) defines hostile work environment sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature" where "such conduct has the purpose or effect of unreasonable interfering with an individuals work performance or creating an intimidating, hostile, or offensive working environment".

8 Unfortunately, there is no Hawaii Appellate caselaw which defines such elements pursuant to H.R.S. §378-3.

prove by the preponderance of the evidence that:

(1) The complainant was subjected to sexual advances, requests for sexual favors or other visual, verbal or physical conduct of a sexual nature. Ellison v. Brady, 924 F.2d 872, 55 EPD 40,520 at 65,624 (9th Cir. 1991); Jordon v. Clark, 847 F.2d 1368, 46 EPD 38,009 at 52,245 (9th Cir. 1988).

(2) The conduct was unwelcome. Ellison, supra ; Jordan, supra. The conduct must be unwelcome in the sense that the complainant did not solicit or incite it, and in the sense that the complainant regarded the conduct as undesirable or offensive. Henson v. City of Dundee, 682 F.2d 897, 29 EPD 32,993 at 26,707 (11th Cir. 1982).

(3) The conduct was sufficiently severe or pervasive to alter the conditions of employment, such as having the purpose or effect of unreasonably interfering with an individual's work performance or by creating an intimidating, hostile or offensive working environment. H.A.R. 12-46-109(a)(3); Ellison, supra; Jordan, supra; Meritor Savings Bank, supra, at 42,579; Henson, supra.

The required showing of severity or seriousness of the conduct varies inversely with the pervasiveness or frequency of the conduct. Ellison, supra, at 878. Therefore, a single act can be sufficiently severe under some circumstances to constitute unreasonable interference

with an individual's work performance, or to create an intimidating, hostile, or offensive work environment. Id.; see also, EEOC Policy Guidance No. N-915.050 (March 19, 1990) ("a single unwelcome physical advance can seriously poison the victim's work environment.") Repeated incidents, however, create a stronger claim of hostile work environment, with the strength of the claim depending on the number of incidents and the intensity of each incident. Id.

In addition, the perspective to be used in evaluating the severity or pervasiveness of the harassment is that of the victim. Ellison, supra, at 878-879; Austen v. State of Hawaii, 759 F.Supp 612, 56 EPD 40,760 at 67,041 (D. Haw. 1991). Because the complainant in the present case is a woman, this element is met if a reasonable woman would consider such conduct sufficiently severe or pervasive to unreasonably interfere with work performance or create an intimidating, hostile or offensive environment.

The establishment of the above prima facie case of hostile work environment sexual harassment constitutes direct evidence of intent to discriminate. Katz v. Dole, 709 F.2d 251, 255, 31 BNA 1521, 1523-1524 (4th Cir. 1983). The burden shifting formula enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), which is used to determine discriminatory intent in Title VII disparate treatment

cases, is therefore inapplicable to this case.[9] Id. See also, Price Waterhouse v. Hopkins, O'Conner concurring opinion, 490 U.S. 228, 109 S. Ct. 1775, 1801-1802, 104 L.Ed.2d 268, 49 EPD 38,936 (1989); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523, 35 EPD 34,851 at 35,688 (1985).

Thus, once a complainant makes out the above prima facie case of hostile environment sexual harassment, the burden of proof shifts to the employer to rebut such showing by: 1) proving that such conduct did not take place; 2) showing that the conduct was not unwelcome; or 3) showing that such conduct was trivial or isolated. Katz v. Dole, 31 BNA 1521, 1524.

1. Whether the Sexual Conduct Occurred

In the present case, the Executive Director has shown by a preponderance of the evidence that Sparky subjected Complainant to verbal, visual and physical sexual conduct. The evidence establishes that Sparky made numerous sexual comments to Complainant about her body, what he wanted her to wear and about other female employees. More seriously, on several occasions Sparky put his arms around Complainant's shoulders, kissed and attempted to kiss her, and grabbed and attempted to grab her

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[9] I therefore do not determine whether the McDonnell Douglas formula applies to other disparate treatment cases under H.R.S. Chapter 378 where there is no direct evidence of discriminatory intent.

breast and crotch areas. Complainant also observed or heard about Sparky's sexual conduct towards other female employees.

Sparky denies that he engaged in such conduct and argues that Complainant's testimony is not credible because many of the documents used by Complainant to recall the dates of certain incidents appear to be fabricated. Specifically, Sparky argues that Complainant did not make the calendar entries on Exhibits 8, 9, 12 and 13 on or near these dates, but made them some time after January 23, 1992 when the Enforcement Attorney informed her that these were the dates of absences alleged by HFE. See, Respondent Niimi's Hearing Brief at 1-5.

The evidence is compelling that the entries were not made at or about the time the events occurred. Complainant testified that these were the only calendar entries she made pertaining to harassing incidents and ensuing absences; coincidentally they are the same exact dates of absences alleged by HFE. (Tr. 323-324; Ex. 28) In addition, although the incidents occurred over a three month period, they appear to be written in the same black ball point ink. This is unlikely, given Complainant's testimony that a pen was not attached to the calendar book and that she routinely used all different kinds of pens. (Tr. 340-341, 356-357) Complainant could also not explain why she scratched out the printed dates for September 30, November 22, and November 23, and replaced them with the dates and entries of September 19, November 6 and November 7, respectively. (Tr.

332-334, 336-338; back of Ex. 9, Ex. 13) Finally, in her cover letter sent with these exhibits to the Enforcement Attorney, Complainant states "[t]o the best of my knowledge these things that happen on this dates are true. . ." and that she was "trying to get it all together" but it was hard for her to "pinpoint anything, or any dates". (Ex. H) Significantly, she does not state that the exhibits were entries that she actually made on or near those calendar dates.

Exhibits 4, 5, 6, 10 and 36 are also questionable. Exhibits 6 and 10 are each written with two different pens. Complainant's explanation for this was contradictory and confused. (Tr. 356-358) In terms of Exhibit 4, on direct examination Complainant verified that it was written on about April 17, 1990. (Tr. 205-210) However, on cross examination, Complainant was certain that Exhibit 4 was not made in April 1990 but she could not explain why the dates "4-17 though 4-19, 1990" were written in the same color ink right above the entry. (Tr. 363-366) Complainant testified that the two long entries on Exhibit 5 were written on the back side of the filler paper while the paper was clipped front side up on her clip board. (Tr. 353-355) This is unlikely since it would be physically difficult to do. On Exhibit 36, Complainant testified that she wrote the words "Sparky, & Richard" "Hired" and circled the date December 22, 1988 at the same time with the same pen after she was hired at HFE. However, a close examination of Exhibit 36

shows that the word "Hired" appears to be written in black felt pen ink, while the words "Sparky, & Richard" and the circle are made in black ball point ink. (Tr. 374-378; Ex. 36)

While I find Exhibits 4, 5, 6, 8, 9, 10, 12, 13 and 36 not reliable evidence of the dates of those events, I do not find them to be complete fabrications of what occurred. Instead, I find these exhibits to be reconstructions of what Complainant recalled happening on those dates. This is because I find Complainant's testimony about the actual occurrence of these and other incidents of Sparky's sexual conduct credible and persuasive. Independent of these exhibits, Complainant described clearly and with some detail the location and circumstances of each incident. Furthermore, her testimony as to each of the incidents was consistent throughout the hearing and was for the most part consistent with the testimony given at her deposition. Although Complainant could not remember the exact sequence and dates of the incidents, this is plausible given the number of repeated incidents which occurred over an approximately two year period and her current memory impairment.

I find Complainant's testimony credible also because portions of it were corroborated by other witnesses. Kalei Peterson testified that Sparky did pull female HFE employees towards him and tried to kiss them and put his tongue in their mouths when he gave them birthday, Valentine's and Mother's Day gifts, that she did warn other female employees during lunch and break times about Sparky's kissing, and that Complainant might

have been present during those discussions. (Tr. 92-96, 139) Ms. Peterson also witnessed Sparky putting his hand or arm around Complainant's shoulders and that at times Complainant didn't like it. (Tr. 90-91; Ex. C) Ms. Peterson also heard Teresita Domingo talking about being embarrassed about an incident involving Sparky. (Tr. 101, 114-115)

Ivan Farinas, a former HFE field worker, witnessed Sparky put one hand on Complainant's shoulder and gesture towards Complainant's crotch area with his other hand. Mr. Farinas also heard Sparky ask Complainant which of the male field workers was going home with her that day. (Tr. 381-384) Despite being a long time family friend, I find Mr. Farinas a credible witness, because in relating these events he candidly disclosed that Sparky appeared to be playing and joking around.

Richard Carlson, another former field worker, witnessed Sparky putting his hand on Complainant's breast when Sparky attempted to embrace her while she near the van. He also saw Sparky attempt to kiss Complainant in the fields. (Tr. 472-477, 496-497) While Mr. Carlson appeared tentative when describing Sparky's sexual conduct towards Complainant, I find that this was because he was embarrassed about the incidents. I also find Mr. Carlson to be a credible witness because although his other testimony regarding the taking of unusable flowers and his termination from HFE was also made in a hesitant and defensive manner, it was later confirmed by the testimony of Richard

Niimi. (Tr. 470-472, 484-487, 612-615)

Other witnesses also corroborated Complainant's version of the "lizard" incident. Kalei Peterson and Roxann Kagawa heard Sparky ask if he could see the lizard. (Tr. 103; Ex. C; Ex. D) Ms. Peterson saw Complainant turn around, push Sparky's arm away and tell him not to touch her. Ms. Peterson also testified that Sparky showed her a bruise on his arm that he claimed Complainant had inflicted. She also witnessed Complainant sobbing outside the office window and stating that Sparky had touched her private parts. (Tr. 103-105, 124-126; Ex. C)

In contrast, I find Sparky's testimony denying these events not credible. Sparky testified that he could not have engaged in such conduct with Complainant because he was ill and hardly ever in the HFE fields or packing plant. (Tr. 720-721, 725-726, 755; Ex. 31c at 38-39) This conflicts with the testimonies of Robert Niimi, Richard Niimi, Kalei Peterson, Ivan Farinas and Richard Carlson, who all confirmed that Sparky was present in the HFE fields and packing plant on the average of 2-3 times per week, and that they had seen him talking to Complainant on several occasions. (Tr. 87-88, 123-124, 382, 386, 473, 489-490, 615, 671-675) Sparky himself testified that he often talked to the field workers working in the anthurium field adjacent to his house, and that he often walked from his house to his orchid greenhouse. (Tr. 721, 748, 755, 782-783) This is the field and walking route where many of the incidents occurred and shows

that he was in the vicinity of Complainant. Sparky also denied ever putting his hand or arm around Complainant's or any other female employees' shoulders aside from patting Teresita Domingo to thank her for giving him papayas. (Tr. 728-732; Ex. 31c at 39-40) Yet Richard Niimi, Jennie Mar, Kalei Peterson, and Ivan Farinas all stated that they saw Sparky put his hand or arm around Complainant's and/or other female employees' shoulders. (Tr. 90-91, 382; Ex. 31b at 75-76, Ex. 31d at 14, 26-28; Ex. C) Sparky also testified that he never kissed any female employees when giving them gifts and stated that it was certain female employees who hugged him when it was his birthday. (Tr. 729, 732-733) However, Richard Niimi, Kalei Peterson and Complainant saw Sparky kiss female employees when giving them birthday, Valentine's and Mothers' Day presents. (Tr. 92-96, 139, 258, 618-620; Ex. 31a at 23-25) Finally, in recalling the "lizard" incident, Sparky testified that neither he nor Complaint exchanged any words, that Complainant, without provocation, suddenly turned around, grabbed his wrists with both of her hands and started to twist his arms and swing him from side to side. Sparky testified that he got scared, broke free from Complainant and ran out of the office. (Tr. 739-742, 765-771) Sparky's account of the "lizard" incident completely conflicts with the testimonies of Ms. Peterson, Ms. Kagawa and Complainant. It is also implausible in light of his testimony that Complainant had never grabbed him before and had no reason

to suddenly turn and grab him that day. (Tr. 789-791)

The affidavits submitted by Sparky are also not credible evidence that the acts did not occur. The affidavit of Alfredo Cabaccang states that he did not see Sparky touch, grab or kiss Complainant, or attempt to do these things. (Ex. A) However, Mr. Cabaccang's affidavit does not state that Complainant never talked to him about the breast grabbing incident, or that Sparky never told him to "eat" Complainant's "pussy". In terms of the "lizard" incident, while both Ms. Peterson and Ms. Kagawa state in their affidavits that they did not see Sparky grab Complainant's crotch area (Ex. C and D), later testimonies of Ms. Peterson, Robert Niimi and Complainant show that this was because Complainant's back was to them. (Tr. 103, 429, 665; Ex. G at 87) Similarly, while Jennie Mar states in her affidavit that Complainant did not appear to be upset or crying after returning to the packing area (Ex. E), Ms. Mar later clarifies in her deposition that she had only glanced up at Complainant upon her return, and that Complainant thereupon went back to work in an area not visible to Ms. Mar. (Ex. 31d at 57-58)

2. Whether The Sexual Conduct Was Unwelcome

The Executive Director has also shown by a preponderance of the evidence that the conduct was unwelcome. Complainant testified that after each incident she would push Sparky away and tell him to leave her alone or not to touch her. Sparky

would respond by laughing or smirking and then walking away. During one incident in which Sparky tried to grab Complainant's crotch area, Ivan Farina's observed that although Sparky appeared to be "playing", Complainant was serious, had blocked Sparky's attempt to grab her crotch area and was upset after the incident. (Tr. 382-383, 386-387, 396-397) Richard Carlson testified that Complainant would be upset or in a bad mood after Sparky touched her. (Tr. 472-474) Kalei Peterson testified that during the "lizard" incident, Complainant had pushed Sparky's arm away and told him not to touch her. (Tr. 103; Ex. C) Complainant was clearly offended by Sparky's conduct and no evidence was presented to show that Complainant solicited, incited or welcomed such conduct.

3. Whether The Conduct Created An Intimidating, Hostile Or Offensive Work Environment

The record is replete with evidence of Sparky's repeated, continuous and unwelcome verbal, visual and physical sexual conduct towards Complainant and other HFE female employees. This conduct affected Complainant's emotional well-being and her ability to work. She became depressed, lost sleep, dreaded going to work and called in sick to avoid being near Sparky. I conclude that a reasonable woman would consider Sparky's conduct sufficiently severe and pervasive to create a hostile, intimidating and offensive work environment.

C. CONSTRUCTIVE DISCHARGE

Federal caselaw from this circuit is also instructive in formulating the elements of a constructive discharge claim.[10] Constructive discharge occurs when, looking at the totality of the circumstances, a reasonable person in the employee's position would have felt that she was forced to quit because of intolerable and discriminatory working conditions. Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987); Howard v. Daiichiya-Love's Bakery, Inc., 714 F. Supp. 1108, 1112 (D. Haw. 1989). This test is an objective one and does not involve showing employer intent to force the complainant to resign. Watson, supra.

In general, a single isolated instance of employment discrimination is not sufficient to support a finding of constructive discharge. Watson, supra. A complainant must instead show some aggravating factors, such as a continuous pattern of discriminatory treatment. Id.

The Executive Director has shown by a preponderance of the evidence that Complainant was forced to quit her job because of Sparky's sexual conduct. After almost every incident, Complainant pushed or shoved Sparky away and told him to leave her alone or to stop touching her. However, Sparky continued to harass Complainant and other female HFE employees throughout the

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[10] Again, there appears to be no Hawaii Appellate cases which set out such elements.

nearly two year period that she was employed at HFE. Respondent HFE did nothing to prohibit or remedy the sexual conduct of Sparky that it was aware of. It did not investigate or determine whether Sparky's jokes about sex to HFE female employees or his habit of putting his hand or arms around their shoulders or kissing them when giving gifts were offensive to them. Even after it learned about the "lizard" incident, HFE failed to contact Complainant to investigate or remedy the situation. Given these circumstances, I conclude that a reasonable person in Complainant's position would have felt that she was forced to quit because of intolerable and discriminatory working conditions and that Respondents HFE and Masami Sparky Niimi constructively discharged Complainant.

D. LIABILITY

1. Respondent HFE

An employer is responsible for its acts and those of its agents and supervisory employees regardless of whether the acts were authorized or even forbidden, and regardless of whether the employer knew or should have known of their occurrence. H.A.R. 12-46-109(c). Because Sparky was an agent of HFE during Complainant's employment, Respondent HFE is liable for Sparky's conduct towards Complainant.

2. Respondent Masami Sparky Niimi

Sparky, as an agent of HFE, is an employer under H.R.S. § 378-1. Therefore, pursuant to H.A.R. 12-46-109(c), he is

personally liable for sexually harassing Complainant.

I therefore determine that Respondents HFE and Masami Sparky Niimi are liable for sexually harassing and constructively discharging Complainant.

E. REMEDIES

The Executive Director requests that Respondents be ordered to pay Complainant back pay and compensatory and punitive damages. The Executive Director must demonstrate the extent and nature of the resultant loss or injury, and Respondents must demonstrate any bar or mitigation to any of these remedies. The Executive Director also seeks to have Respondents publish the results of the Commission's investigation in a press statement provided by the Commission in at least one newspaper published in the state and having general circulation in Hilo, Hawaii, and to have Respondents post notices in a conspicuous place. The Executive Director also seeks its costs for transcribing and/or copying of depositions.

1. Back Pay

Back pay encompasses the amount Complainant could have earned if she continued to work for Respondent HFE but for the constructive discharge. Respondents have the burden to prove any offsets to Complainant's expected earnings.

The evidence shows that Respondent HFE stopped payment of Complainant's wages on November 12, 1990, the date Complainant quit her job. Complainant was paid $5.50 per hour and worked 40 hours per week. (Tr. 692; Ex. 31b at 67) However, Complainant was also paid $11 per hour approximately 12 hours per month for spraying. (Tr. 637-638) Therefore, Complainant's average weekly wages were $230.00. <u>See also</u>, DLIR Disability Compensation Decision dated 2-19-92 attached as Ex. 18 to Complainant's [sic] Amended Pre-hearing Conference Statement dated 8-25-92).

Sparky argues that Complainant's hours should be offset by her absenteeism of 1-2 days per week. However, the evidence shows that her absenteeism was due to Sparky's harassing conduct, and that when Complainant was present at work, her work performance was satisfactory. Sparky also argues that the outside limit for an award should be September, 1991 when the last two field workers were laid off. Robert Niimi testified that the last two field workers were laid off around the end of September, 1991. Given the factors used by Robert Niimi to decide which workers to lay off, I determine that HFE would have employed Complainant until the end of September 1991. The record also shows that Complainant did file for and did receive weekly workers' compensation disability payments. Disability payments are made by an employer's insurance carrier as a percentage of an employee's wages, and may be offset against

back pay awards. Austen v. State of Hawaii, 56 EPD 40,760 at 67,042.

I therefore determine that Respondent HFE should be ordered to pay Complainant back pay in the amount of $230 per week for the period beginning November 13, 1990 and ending September 30, 1991, a total of 46 weeks. This computes to a total amount of $10,580.00 in back pay. This amount should be offset by any amounts Complainant received in weekly workers' compensation disability payments for the period between July 4, 1991 and September 30, 1991.

2. Compensatory Damages

Pursuant to H.R.S. §368-17, the Commission has the authority to award compensatory damages for any pain, suffering, embarrassment, humiliation or emotional distress[11] Complainant suffered as a result of Respondent Masami Sparky Niimi's harassment.

The evidence shows that Complainant suffered considerable embarrassment, humiliation and emotional distress from Sparky's sexual harassment. Prior to the harassment, Complainant was a friendly, sociable person who was always going out with her

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[11] This statutory remedy is not to be confused with the common law tort of negligent infliction of emotional distress in which a plaintiff is required to show that a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances. Rodrigues v. State, 52 Haw. 156, 173-174 (1970).

friends and was a competent worker who took pride in doing her job well. For nearly two years, Sparky's conduct towards Complainant made her feel dirty, cheap, ashamed and not fit to be around other people. She became extremely withdrawn, had low self-esteem, self-confidence and had difficulty sleeping and eating. She became suicidal after the "lizard" incident and felt so badly about herself that she moved out of her house and went to live alone on an isolated beach. After leaving HFE, Complainant suffered and still suffers from anxiety disorder, severe depression, and post-traumatic stress disorder. She has been unable to function and work for the last two years. She will continue to be totally disabled from her emotional injuries for another six to twelve months. (Tr. 263-266, 285-299; Exs. 15, 16, 17)

Complainant's injuries were also observed in part by other witnesses. Ivan Farinas testified that Complainant became so upset after Sparky put his hand on her shoulder and gestured towards her crotch area that he offered to talk to Sparky to put a stop to it. (Tr. 384) Richard Carlson observed that Complainant became upset and was in a bad mood when Sparky touched her. (Tr. 472-474) Toby Mahu testified that towards the end of her employment, Complainant became depressed and would often lock herself in her room and cry. Ms. Mahu also confirmed that after the "lizard" incident, Complainant left their house and lived down at the beach. (Tr. 510-512)

The evidence also shows that Respondents did almost nothing to rectify the harassing conduct. When Complainant shoved Sparky away or told him to leave her alone or not to touch her, he only laughed or smirked and then walked away. Although Complainant made it clear that she did not welcome his conduct, Sparky made no effort to curb his offensive behavior towards her. Both Richard and Robert Niimi made no attempt to investigate or remedy the sexual conduct of Sparky that they knew of, such as his touching of other female employees' shoulders, kissing female employees on the mouth when giving gifts or telling jokes about sex. Robert Niimi did not make an adequate attempt to investigate the "lizard" incident. Considering these circumstances, I determine that $100,000 is appropriate compensation for Complainant's injuries.[12]

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[12] This amount is also comparable to damages for emotional distress awarded in hostile environment sexual harassment cases under other state civil rights acts. See, Delahunty v. Cahoon, 832 P.2d 1378 (Wash.App. 1992) (female waitresses who were physically harassed by supervisor for 10 days awarded $7,500 compensatory damages); Howard v. Canteen Corp., 481 N.W.2d 718 (Mich.App. 1991) (employee awarded $200,000 for emotional distress caused by 2 years of verbal sexual harassment and retaliation); Department of Civil Rights ex rel. Johnson v. Silver Dollar Cafe, 469 N.W.2d 42, 59 EPD 41,580 (Mich.App. 1991) (waitress who was harassed by cafe owner who made sexual comments and gestures for almost 1 year awarded $30,000 for emotional distress); Melisha v. Wickes Companies, Inc., 459 N.W.2d 707 (Minn.App. 1990) (employee awarded $50,000 for past emotional distress and $20,000 for future emotional distress resulting from verbal sexual harassment which occurred over a 3 year period); SUNY College of Environ. Science and Forestry v. State Div. of Human Rights, 534 N.Y.S.2d 270 (N.Y.A.D. 1988) (sexually harassed employee awarded $100,000 for emotional distress).

3. Punitive Damages

H.R.S. § 368-17 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, Masaki v. General Motors Corp., 71 Haw. 1, 6 (1989).

The practice of awarding punitive damages is centuries old, surviving because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and of deterring such conduct. Id. at 7-8. Since its purposes are punishment and deterrence, punitive damages are awarded only when a respondent's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime. Id. Accordingly, the inquiry focuses primarily on the respondent's mental state and to a lesser degree on the nature of his or her conduct. Id. at 7.

The penal character of punitive damages requires a standard of proof more stringent than the preponderance of the evidence standard generally employed in administrative hearings and civil trials. Id. at 16. Therefore, the Hawaii Supreme Court has, and I will utilize, the clear and convincing standard of proof for punitive damages claims. Id. at 16.

In the present case, the Executive Director is therefore required to show, by clear and convincing evidence, that

Respondents acted wantonly, oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful misconduct or entire want or care which would raise the presumption of a conscious indifference to consequences. Id. at 15-17.

Given the above, I conclude that the Executive Director has failed to show, by clear and convincing evidence, that Respondent HFE acted wantonly, maliciously or with a conscious disregard for Complainant's rights. Complainant confirmed that she did not inform either Robert or Richard Niimi about Sparky's offensive conduct towards her. Both Robert and Richard Niimi testified that they did not know of Sparky's sexual conduct towards Complainant except for the final "lizard" incident. Furthermore, while Robert Niimi's investigation of the "lizard" incident was inadequate, he did question some employees and Sparky about the incident and did make some attempt to contact Complainant. (Ex. 31b at 88-89; Ex. 32 at 26, 47)

In contrast, I conclude that the Executive Director has shown by clear and convincing evidence that Sparky acted wantonly, wilfully and with a conscious disregard for Complainant's right to work in an environment free of sexual harassment. Besides making unwelcome verbal comments and gestures, Sparky physically assaulted Complainant on numerous occasions, grabbing her buttocks and breasts, kissing her on the cheek or mouth, and grabbing her crotch area. His conduct

continued unabated for almost two years, despite Complainant's clear distress and demands to leave her alone.

In determining the amount of punitive damages, I have considered the following factors: 1) the degree of malice and reprehensibility of Sparky's conduct; 2) Sparky's financial situation; and 3) the amount of punitive damages which will have a deterrent effect on Sparky in light of his financial situation. See, Beerman v. Toro Mfg. Co., 1 Haw.App. 111, 119 (1980); Kang v. Harrington, 59 Haw. 652, 663-664 (1978). The record shows that Sparky and his wife own a one acre parcel with a home on it located in Mountain View, Hawaii. The home and lot have no mortgage, and are valued at $89,500.00. (Ex. 31c at 50-51; Ex. 35) Sparky also receives $900 per month in social security and has approximately $2,000 in a checking account and $4,000 in an IRA. (Ex. 31c at 43, 55-56) Sparky and his wife also own 1984 and 1980 Toyota cars in full, but no evidence was presented to show the present value of these cars. (Ex. 31c at 60) Sparky no longer receives a pension from HFE, and has no other assets. (Ex. 31c at 50-65)

Given these factors, I determine that an award of $10,000 in punitive damages is appropriate.

4. Other Relief

I decline to award the remaining relief requested by the Executive Director. Because Respondent HFE has ceased

operations and is currently in Chapter 7 bankruptcy proceedings, it would serve no purpose to require HFE to post notices of the Commission's decision on the premises and the corporation is not likely to have funds to publish such notices in a newspaper of general circulation. The Executive Director, however, is free to issue press statements regarding the results of the Commission's investigation or regarding compliance with the state's sexual harassment laws on its own. In terms of the deposition costs sought, H.R.S. § 368-17(a)(9) allows "[p]ayment to the complainant of all or a portion of the costs of maintaining the action before the commission". (Emphasis added.) The deposition costs in the present case were borne by the Executive Director, not the Complainant.

V. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondents HFE and Masami Sparky Niimi violated the provisions of H.R.S. § 378-2 and H.A.R. 12-46-101 and 109 by subjecting Complainant Dolores Santos to unwelcome sexual conduct which created an intimidating, hostile and offensive work environment and by constructively discharging her.

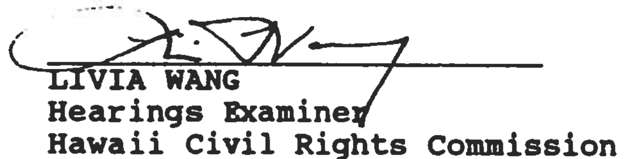
For the violations found above, I recommend that pursuant to H.R.S. § 368-17, the Commission should order:

1. Respondent HFE to pay Complainant back pay in the amount of $10,580.00. This amount should be offset by any amounts Complainant received as workers' compensation disability payments.

2. Respondents HFE and Masami Sparky Niimi jointly and severally to pay Complainant $100,000.00 as damages in compensation for her emotional injuries.

3. Respondent Masami Sparky Niimi to pay Complainant $10,000.00 as punitive damages.

DATED: Honolulu, Hawaii November 4, 1992.



LIVIA WANG
Hearings Examiner
Hawaii Civil Rights Commission

APPENDIX A

On February 14, 1992 the Executive Director sent Respondents Hawaiian Flowers Exports, Inc. (hereinafter "HFE") and Masami Sparky Niimi (hereinafter "Niimi") a final conciliation demand letter pursuant to Hawaii Administrative Rule (H.A.R.) 12-46-17.

On March 2, 1992 the complaint was docketed for administrative hearing and a Notice Of Docketing Of Complaint was issued. On March 3, 1992, Respondents, by and through their attorney Glenn S. Hara, orally objected to the docketing of the complaint on the grounds that they had not received the final conciliation demand letter until February 18, 1992. By telephone conference with the parties on March 4, 1992, the Hearings Examiner orally rescinded the Notice Of Docketing Of Complaint sua sponte.

On March 4, 1992 Respondents requested a continuance of conciliation efforts. The Executive Director orally granted a continuance up to noon, March 10, 1992. This continuance was confirmed by letter dated March 5, 1992. On March 5, 1992 the Hearing Examiner issued an Order Rescinding The Docketing Of Complaint.

A conciliation agreement was not reached by the parties by noon, March 10, 1992. By letter dated March 10, 1992 the Executive Director rejected Respondents' counter offer and found

that conciliation would not resolve the complaint. On that date at approximately 2:36 p.m. the complaint was docketed a second time and a Notice Of Second Docketing Of Complaint was issued.

On March 16, 1992 the Executive Director filed a Motion For Order Vacating Hearing Examiner's Order Rescinding Docketing Of Complaint. The Executive Director also filed a Motion for Order Granting Declaratory Relief with the Commission.

On March 17, 1992 the Executive Director filed its Scheduling Conference Statement.

On March 18, 1992 Respondents filed a Motion To Set Aside Notice Of Second Docketing of Complaint.

On March 20, 1992 the Commission issued its order denying the Executive Director's Motion For Order Granting Declaratory Relief. The Executive Director subsequently withdrew its Motion For Order Vacating Hearing Examiner's Order Rescinding Docketing of Complaint.

On March 25 a hearing by telephone conference was held on Respondents' Motion To Set Aside Notice Of Second Docketing Of Complaint before the undersigned Hearings Examiner. After considering the pleadings and arguments presented, the Hearings Examiner verbally denied Respondents' motion. The Hearing Examiner's Order Denying Motion To Set Aside Notice Of Second Docketing Of Complaint was issued on March 30, 1992.

On March 27, 1992 Respondents filed their Scheduling Conference Statement. On April 3, 1992 a Scheduling Conference

was held. The Scheduling Conference Order was issued on April 6, 1992.

On April 8, 1992 Respondents filed a Motion For Order Granting Declaratory Relief, Or In The Alternative, Reconsideration Of Hearing Examiner's Order [denying motion to set aside notice of second docketing of complaint] with the Commission. Respondents filed an amendment to this motion on April 8, 1992. On April 28, 1992 the Commission issued an order denying Respondents' amended motion.

On July 22, 1992 Respondent Niimi filed a Motion to Strike Notice Of Second Docketing Of Complaint and a Motion To Dismiss Complaint As To Masami Sparky Niimi Due To Lack Of Jurisdiction.

On July 23, 1992 Respondent HFE filed a voluntary petition for bankruptcy with the U.S. Bankruptcy Court of the district of Hawaii. On July 24, 1992 the Executive Director filed a Motion To Stay Proceedings, Discovery and Deadlines based on its belief that all persons were enjoined and stayed from commencing or continuing any proceedings against Respondent HFE pursuant to 11 U.S.C. § 362. On July 27, 1992 the Hearing Examiner issued an order denying the Executive Director's motion to stay proceedings on the grounds that pursuant to 11 U.S.C. § 362(b)(4) the proceedings were exempt from the automatic stay provisions. On July 28, 1992 the Hearings Examiner issued an amended order denying the Executive Director's motion to stay proceedings. On July 29, 1992 the Executive Director filed a

Motion For Reconsideration And For Immediate Stay Of Proceedings, Discovery, Deadlines And Continuance Of Hearing with the Commission. On July 29, 1992 Respondent Niimi filed a statement of no objection to the Executive Director's motion. On August 6, 1992 the Commission issued an Order Denying Motion For Immediate Stay of Proceedings. However, the Commission also extended all deadlines established in the Scheduling Conference Order by 14 days.

On August 3, 1992 Glenn S. Hara filed a Notice of Withdrawal As Counsel for Respondent HFE on the grounds that Respondent HFE had discharged him.

On August 6, 1992 the Hearings Examiner issued an Amended Scheduling Conference Order, Amended Notice of Prehearing Conference and Order, and an Amended Notice of Hearing.

On August 17, 1992 the Executive Director filed a Memorandum In Opposition To Respondent's Motion To Dismiss Complaint As To Masami Sparky Niimi Due To Lack Of Jurisdiction, and a Memorandum In Opposition To Respondent's Motion To Strike Notice Of Second Docketing Of Complaint.

On August 18, 1992 the Executive Director filed a motion to compel Respondent HFE to answer its first amended request for answers to interrogatories. On that date it also filed a motion to compel Respondent Niimi to respond to certain questions contained in its first request for answers to interrogatories. On August 19, 1992 the Hearings Examiner issued an order

granting the Executive Director's motion to compel as to Respondent HFE and issued an order granting in part and denying in part the Executive Director's motion to compel as to Respondent Niimi.

By letter dated August 20, 1992 Respondent Niimi objected to the Hearing Examiner's August 19, 1992 order granting in part and denying in part the motion to compel as to him. On August 20, 1992 the Hearings Examiner rescinded the order granting in part and denying in part the Executive Director's motion to compel as to Respondent Niimi. On August 25, 1992 Respondent Niimi filed a memorandum in response to the Executive Director's motion to compel. On that same date, the Executive Director filed a withdrawal of its motion to compel as to Respondent Niimi.

On August 19, 1992 the Executive Director and Respondent Niimi filed their prehearing conference statements.

On August 20, 1992 a hearing was held on Respondent Niimi's Motion To Dismiss Complaint As To Masami Sparky Niimi Due To Lack Of Jurisdiction and Motion To Strike Notice Of Second Docketing Of Complaint. On August 20, 1992 the Hearings Examiner issued an Order Denying Motion To Dismiss Complaint As To Masami Sparky Niimi Due To Lack Of Jurisdiction. On August 24, 1992 the Hearings Examiner issued an Order Denying Motion To Strike Notice Of Second Docketing Of Complaint.

On August 25, 1992 the Executive Director filed an Amended Prehearing Conference Statement. On August 28, 1992 a Prehearing Conference was held, and the Prehearing Conference Order was issued on September 1, 1992.

On September 2, 1992 Respondent Niimi filed a Motion For Reconsideration Of Hearings Examiner's Order Denying Motion To Strike Second Docketing Of Complaint with the Commission. On September 4, 1992 the Commission issued an order denying Respondent Niimi's motion for reconsideration.

On September 1, 1992 Respondent Niimi filed a Motion In Limine To Require The Presence Of Kalei Peterson At Hearing. On September 4, 1992 the Executive Director filed its memorandum in opposition to the motion in limine. A hearing on this motion was held on September 8, 1992, at which the Hearings Examiner orally denied the motion.

On September 8, 9, 10 and 11 the contested case hearing on this matter was held by the Hearings Examiner pursuant to H.R.S. Chapters 91 and 368 and the Amended Notice Of Hearing. The Executive Director was represented by Enforcement Attorneys Karl K. Sakamoto and Anne Randolph. Complainant was present during portions of the hearing and knowingly waived her right to be present during the portions of the hearing in which she was absent. Respondent Niimi was present and was represented by his attorney, Glenn S. Hara. Robert Niimi and Richard Niimi appeared on behalf of Respondent HFE and were present during

portions of the hearing. They knowingly declined to contest the allegations and claims contained in the Executive Director's Scheduling Conference Statement and declined to present a case on behalf of HFE. They also waived HFE's right to be present during the portions of the hearing in which they were absent.

The parties were granted leave to file proposed findings of fact and conclusions of law and/or hearing briefs. On September 25, 1992, the Executive Director filed its Post Hearing Memorandum. On September 25, 1992 Respondent Niimi filed his Hearing Brief.