CIVIL RIGHTS COMMISSION

STATE OF HAWAII

In the Matter of SHIRLEY MAE SMITH on behalf of herself and JONATHAN BETTS, her minor son Complainants - - - - - - - - - - - - - - - - - - MTL, INC.; OAHU TRANSIT SERVICES, INC.; DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU; HONOLULU PUBLIC TRANSIT AUTHORITY, CITY AND COUNTY OF HONOLULU, Respondents.	Docket No. 92-003-PA-R-S HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

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CIVIL RIGHTS COMMISSION
HONOLULU, HAWAII

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

I. INTRODUCTION

1. Chronology of Case

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

2. Summary of the Parties' Contentions

The Executive Director asserts that Respondents MTL, Inc. (hereinafter, "MTL") and Oahu Transit Services, Inc. (hereinafter, "OTS") violated H.R.S. §§ 489-3 and 489-8 when their bus driver, Jarvis Chong: a) used the racial slurs

"nigger" and "black thing" and the sexist slur, "mama", when speaking to and about Complainant Smith; b) failed to stop at Complainants' signaled bus stop; c) drove the bus in an erratic manner; and d) pushed and threatened Complainants. The Executive Director also alleges that Respondents failed to take immediate and proper remedial action or reasonable steps to prevent further discriminatory acts from occurring.

Respondents MTL/OTS admit Chong used the racial slur "nigger" when radioing MTL Central Control and failed to stop at Complainants' bus stop. However, they contend Complainant Smith provoked Chong into taking these actions. Respondents deny the other adverse incidents occurred. Respondents maintain they took prompt and reasonable action to correct Chong's conduct in light of the collective bargaining agreement and MTL's progressive discipline policy. Respondents also assert that while Chong's one time use of the term "nigger" is a denial of the full and equal enjoyment of its bus services to Complainant Smith, the Executive Director must show a habitual or customary practice of discrimination in order to establish a violation of H.R.S. § 489-3.

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. From 1971 to 1991 the City and County of Honolulu contracted with Respondent MTL to operate its bus system known as "TheBus". MTL, a private corporation, provided all management, supervisory and operational personnel for TheBus. It had the exclusive control over the training, discipline, hiring and firing of all its personnel, including its bus drivers. (Exs. 16; 17)[2]

2. On January 30, 1991 the City and County of Honolulu contracted with Respondent OTS, another private corporation, to operate TheBus. At this time, OTS knew of the complaint filed by Complainant Shirley Mae Smith with the Hawaii Civil Rights Commission on June 21, 1991. OTS replaced MTL on January 1, 1992 and assumed all the functions and responsibilities previously held by MTL. OTS also used the same or substantially the same work force, supervisory personnel, city and county buildings and structures previously used by MTL. (Tr. vol. V at 31; Exs. 17; 27; Q; Prehearing Conference Order filed April 14, 1993 Stipulated Facts Nos. 3, 4, 5, 6)

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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 May 17, 19-21 and 24, 1993; "Ex." followed by a number refers to the Executive Director's exhibits; "Ex." followed by a letter refers to Respondents MTL/OTS's exhibits.

3. Pursuant to the above contracts, all operational costs, including payments of claims filed against these corporations arising out of their operation of TheBus, are subject to reimbursement from the City and County of Honolulu. (Ex. 16 "Special Provisions" at 19; Ex. 17 at 4-5; Ex. Q at 9; Department of Transportation Services/Honolulu Public Transit Authority, City and County of Honolulu Scheduling Conference Statement filed November 13, 1992)

4. Complainant Shirley Mae Smith is a Black African woman. In 1987 she moved to Hawaii from the Washington D.C. area. From fall 1990 to spring 1992 Complainant Smith was a full time student at Chaminade University. (Ex. J at 11-12, 21; Ex. 31)

5. Complainant Jonathan Betts (hereinafter, "Jonathan") is a Black African child and is the minor son of Complainant Smith. On March 7, 1991 Jonathan was four years old and attended L. Robert Allen Montessori Preschool. (Tr. vol. I at 56, 105; Ex. J at 28, 39)

6. In the early afternoon of March 7, 1991 Complainants boarded a city and county bus designated as Route 53 (Ala Moana Shopping Center to Pacific Palisades) from a bus stop located on Beretania and Punchbowl Streets. This bus was driven by Jarvis Chong, who was then an employee of MTL. (Tr. vol. I at 19, vol. IV at 11-12; Ex. 23 vol. 1 at 28; Ex. J at 39-40)

7. Chong had been a bus driver with MTL since July, 1986. Prior to March 7, 1991 Chong would allow entering passengers who could not show a bus pass the opportunity to settle themselves down and show him their passes later. This was because MTL had trained Chong and other bus drivers to give passengers "the benefit of the doubt" by assuming that such passengers would present their bus passes or pay their fares later. (Tr. vol. IV at 65; Ex. 23 vol. I at 51-52)

8. At the time of boarding, Complainant Smith was carrying Jonathan, who was sleeping, her backpack, Jonathan's backpack and lunch box, and an umbrella. Chong observed that Complainants were of Black/African descent. Complainant Smith did not have a free hand to show Chong her bus pass when boarding the bus. Chong did not ask Complainant Smith to show a bus pass or pay a fare as she entered the bus. (Tr. vol. I at 20, vol. IV at 12, 59; Ex. 23 vol. 1 at 44, 84; Ex. J at 40-43)

9. After entering the bus, Complainant Smith sat down on the window seat of the first forward facing bench on the door side of the bus. Jonathan was sitting in her lap sleeping. She began to put down her packages. A passenger behind Complainant Smith then asked her questions about her braided hairstyle. (Tr. vol. I at 21; Ex. J at 40-44)

10. After proceeding Ewa on Beretania Street at or near Bishop Street, Chong turned around and asked Complainant Smith if she had a bus pass. Complainant Smith told Chong that she

would show him her pass as soon as she caught her breath and after she adjusted her packages. Chong believed that Complainant Smith had a bus pass. (Tr. vol I at 21, vol. IV at 12; Exs. 9; 12; 13; 14; Ex. 23 vol. 1 at 51-52; Ex. J at 44-45)

11. Complainant Smith then finished putting the two backpacks on the floor and placed her umbrella behind the priority seating bench in front of her. (Tr. vol. I at 23)

12. At or near River Street, Chong again asked Complainant Smith to show her bus pass. Chong told Complainant Smith that "old mamasans" who ride his bus have their passes ready and that she too should have hers ready before the bus comes. Complainant Smith replied that such elderly people do not carry so many things, and that she would show him her pass when she was "ready". Chong then told Complainant Smith to take her time because he was going to let her off the bus when he was "ready". He also told Complainant Smith not to take his bus again. (Tr. vol. I at 21-23, vol IV at 12-13; Exs. 9; 12; 13; 14; Ex. 23 vol. 1 at 37; Ex. J at 46-49)

13. Somewhere near Aala Park, approximately 3-4 stops after entering the bus, Complainant Smith stated, "Bus driver, here's my pass" and showed Chong her bus pass from her seat. Chong saw Complainant Smith's bus pass. From this point neither Chong nor Complainants said anything to each other until after the bus passed the Waimalu Zippy's bus stop. (Tr. vol. I at 23, vol. IV at 42-43; Exs. 9; 10; 14; Ex. 23 vol. 1 at 59, 63-64;

Ex. J at 49-51)

14. The bus then proceeded on to the H-1 freeway, off at the Red Hill exit, back on to H-1 and then off at the Halawa exit on to Kamehameha Highway in the Aiea/Pearl City area. (Tr. vol. IV at 14)

15. Prior to reaching the bus stop near Waimalu Zippy's, Complainant Smith rang for this stop. She put on her backpack, stood up holding Jonathan and their things in her right arm and walked to the front of the bus. Complainant Smith then stood behind Chong's right side, holding a vertical hand rail located on the partition behind the driver's seat with her left hand. Tr. vol. I at 24-25, 165; Ex. J at 52-53)

16. Chong saw Complainant Smith ring for her stop. He slowed the bus. Complainant Smith walked towards the front exit door. Chong then accelerated and passed Complainant's stop. There were no traffic or safety reasons for Chong to pass this stop. (Tr. vol. I at 24-25, vol. IV at 43, 60-62; Ex. 23 vol. 1 at 64-67; Ex. J at 53)

17. Over the next 2-3 minutes, the following events occurred:

a) Chong's acceleration past Complainants' bus stop caused Complainant Smith to lose her balance and fall backwards. Complainant Smith grabbed the handrail located near the fare box with her left hand; her back and right side fell against Chong's right shoulder and upper arm area. (Tr. vol. I at 25, 166, vol.

IV at 66-67; Ex. 23 vol. 1 at 67; Ex. J at 53-54)

b) Chong then pushed Complainants off of himself and towards the front exit door. Complainant Smith fell forward, hitting her upper right arm against the vertical handrail located between the front exit door and first priority seat. (Tr. vol. I at 25, vol. IV at 66-67; Ex. 14; Ex. J at 54-55)

c) Complainant Smith continued to stand near the front exit door. This was because she saw a woman waiting at the next bus stop and thought Chong would stop to pick up the woman and that she and Jonathan could then exit. Chong slowed down and then accelerated passed this stop. (Tr. vol. I at 25-27, vol. IV at 66-67; Ex. J at 55)

d) Complainant Smith told Chong that if he stopped, she would get off the bus. Chong stated to the other passengers, "You folks see this nigger standing up here? If we get into an accident, it's going to be her fault." Complainant Smith then told the other passengers, "You see this idiot driving the bus? He's trying to kill all of you because of me." Chong then pointed to a sign informing passengers to remain behind the yellow standee line and warned Complainant Smith to sit down or she and her son would be the first to go through the front window. (Tr. vol. I at 26-27, vol. IV at 66-67; Ex. J at 58-60)

e) Complainant Smith then became afraid for her life and her son's life. She tried to sit down but could not regain her balance to get to a seat. (Ex. J at 57-58)

f) Chong then "hit the brakes" and stopped the bus on Kamehameha Highway. He called MTL Central Control on his radio and stated, "I get one nigger here giving me a bad time." Chong then described the location of his bus. The radio dispatcher told him to meet a road supervisor at the Waimano Home Road bus stop near Foodland Supermarket. (Tr. vol. I at 29-30, vol. IV at 15-16, 66-67; Ex. 14; Ex. 23 vol. 1 at 83, 89; Ex. J at 61)

18. Over the next 7-8 minutes the following events occurred:

a) After Chong stopped the bus and radioed MTL Central Control, Complainant Smith sat down in the priority seating area on the door side of the bus. Chong told Complainant Smith that when a bus driver calls central control "it's serious business". Complainant Smith stated that she was glad Chong called central control because if he hadn't, she would have called them herself. (Tr. vol. I at 30-31, vol. IV at 67; Ex. J at 61-62)

b) Chong then offered Complainant Smith a quarter to make the telephone call. Complainant Smith replied she didn't need his quarter and that on his [Chong's] salary he probably needed it more than she did. Chong then said, "Don't talk to me about how much money I make, mama". Complainant Smith said, "Mama?". Chong replied, "Yeah, you Black thing". (Tr. vol. I at 31, vol. IV at 67; Ex. 14; Ex. J at 62)

c) Chong's words and actions shocked Complainant Smith and made her feel angry and hurt. She also felt disgraced by

Chong in front of the other passengers. She began to lecture Chong about the derogatory meaning of the words "mama", "Black thing" and "nigger". Chong shook his head and laughed. (Tr. vol. I at 31-32, vol. II at 133-134, vol. IV at 67; Ex. 5a; Ex. J at 62)

d) Chong then stopped the bus at the Waimalu Foodland stop and opened the front door. Jonathan woke up and asked his mother what happened. Complainant Smith told Jonathan that she and the bus driver were having an argument. (Tr. vol. I at 32, vol. IV at 67)

e) MTL Road Supervisor Michael Hooper met the bus at the Waimalu Foodland stop. As a road supervisor, Hooper was responsible for investigating incidents which occurred on City and County buses and for filing reports about such incidents. Hooper boarded the bus, standing on the first step. Chong said to Hooper, "Take this nigger lady off my bus". Hooper asked Chong to step off the bus and explain the situation to him. Chong got off the bus and told Hooper that Complainant Smith was the "nigger giving [him] a bad time". Hooper took notes of Chong's statements. (Tr. vol. IV at 67; Exs. 12; 14; Ex. 26 at 18-19, 34-35; Ex. 41 at 14; Ex. J at 63)

f) At this time, Chong knew that the term "nigger" was racist and derogatory and that the term "mama" was sexist and derogatory. (Ex. 23 vol. 1 at 87-88)

19. After Chong spoke to Hooper, Hooper told Chong to get back onto the bus and continue with the route. Hooper then boarded the bus and asked Complainants to step off the bus and speak to him. (Tr. vol. IV at 17-18; Ex. 12; Ex. 26 at 21)

20. Despite MTL guidelines and training which require bus operators and road supervisors to take witness names and statements whenever an unusual incident of any kind occurs on a bus, neither Chong nor Hooper took down any witness names or statements. (Tr. vol. V p. 21, 68-69; Ex. 23 vol. 1 at 91-92; Ex. 26 at 36-37; Ex. 41 at 19)

21. After exiting the bus, Complainant Smith said to Hooper, "Did you hear what the operator said? ...I do not condone it." Complainant Smith then told Hooper what happened on the bus and stated that she wanted to file a complaint with MTL. Hooper took notes of her statements. Hooper asked Complainant Smith if she also wanted to file a complaint with the Honolulu Police Department. Complainant Smith stated that she did. (Tr. vol. I at 34-35; Ex. 26 at 21-22, 27-31; Ex. J at 66)

22. Hooper contacted MTL Central Control and instructed them to call the Honolulu Police Department (hereinafter, "HPD"). MTL Central Control called the HPD and then directed Chong to stop at the bus stop across from Waimalu Foodland on his return trip from the Pacific Palisades terminus to meet with an HPD officer. (Tr. vol. IV at 18; Ex. 12)

23. At around 2:25 p.m. HPD Officer Paul Akana arrived at the Waimalu Foodland bus stop. Officer Akana briefly spoke with Hooper about the situation. He then took a statement from Complainant Smith, who was at this time upset, excited and agitated. (Tr. vol. I at 35, vol. III at 123-127; Ex. 9)

24. Officer Akana then crossed the street and took Chong's statement. Chong denied calling Complainant Smith a "nigger" but admitted that he passed Complainants' bus stop. (Tr. vol. III at 127-129, 132-133, 139; Ex. 9)

25. Officer Akana told Chong that he could be charged with kidnapping because he intentionally passed Complainants' stop. Chong was shocked and offered to apologize to Complainant Smith only for passing her stop. (Tr. vol. III at 128-130, 139, vol. IV at 18; Ex. 23 vol. 1 at 102)

26. Officer Akana crossed the street and told Complainant Smith that Chong was willing to "apologize" to her. Complainant Smith refused to accept Chong's apology and stated that Chong could "make his apology in court". (Tr. vol. I at 35, vol. III at 129-130, 139; Ex. J at 67)

27. Officer Akana then told Chong that Complainant Smith would not accept his apology. Chong got back on his bus and continued on his return route back to Ala Moana. (Ex. 26 at 41-42)

28. Officer Akana instructed Hooper to take Complainants home. Hooper told Complainants to board the next bus back to

their stop. Complainants boarded the next route 53 bus back to Waimalu Zippy's. (Tr. vol. I at 36, vol. III at 137; Ex. J at 67-68)

29. After arriving home, Complainant Smith telephoned the MTL Customer and Public Relations division to make a complaint. While she was speaking to MTL, Officer Akana telephoned on her call waiting system. Complainant Smith took Officer Akana's call. When she tried to telephone MTL again, their Customer and Public Relations office was closed. (Tr. vol. I at 38; Ex. J at 68)

30. Complainant Smith then telephoned her best friend, Juana Kerr, and attempted to explain to Kerr what had happened on the bus. Because Complainant Smith became emotional, Kerr told Complainant Smith that she and her two daughters would come over and bring dinner. Shortly afterwards, Kerr and her daughters arrived at the Complainants' home. Kerr fed Jonathan and her children and put them to sleep. Complainant Smith was so upset she was unable to eat. She then told Kerr about the bus incident and started crying. She felt hurt and angry and was scared that Chong would find out where she lived and would come and harm them. (Tr. vol I at 38-42)

31. After Kerr and her daughters left, Complainant Smith kept crying and had a difficult time falling asleep. She kept thinking about what Chong had said and done to her, and other ways she could have responded. (Tr. vol I at 42-44)

32. The next day, March 8, 1991, Complainant Smith telephoned the MTL Customer and Public Relations division and lodged a complaint. After speaking to Complainant Smith, the Customer and Public Relations staff typed up a complaint report. The complaint report alleges, inter alia, that Chong told Complainant Smith "When I get to your stop, I'm not stopping, And, don't you ever catch my bus ever!"; that Chong slowed and accelerated passed Complainant Smith's bus stop and the next stop; that Chong drove erratically by jamming on the gas and brakes; that Chong shoved Complainant Smith; and that Chong called Complainant Smith "nigger" and "mama". (Ex. 14; Ex. J at 68-69)

33. That same day, Complainant Smith's right bicep and shoulder hurt so she went to the emergency clinic at Pali Momi Hospital for treatment. She told Dr. William Baker, the emergency physician on duty, that her arm had been injured the prior day when she was pushed into a pole while riding a bus. Dr. Baker diagnosed Complainant Smith as having a right bicep strain. She was given a prescription for Anaprox and was told to see her regular physician if her condition did not improve. (Tr. vol. I at 44-46; Ex. 8)

34. On March 8, 1991 Chong informed Amos McMillan, Superintendent of MTL's Transportation Department, Halawa division, that he had an incident with Complainants the prior day. As a superintendent, McMillan was responsible for

interviewing bus drivers about complaints made against them and for disciplining drivers who violated company policies and rules. McMillan conducted a preliminary investigation of the incident. He instructed Chong to file an incident report, which Chong did that day. The incident report does not state that Chong used racial or sexist slurs in speaking to or about Complainant Smith. Later that day, McMillan reviewed the incident report with Chong, told Chong that he had not followed proper procedures in waiting for Complainant Smith to show her pass and in passing Complainants' stop. McMillan also informed Chong that he [Chong] could receive disciplinary action for these errors. (Ex. 25 at 50-56; Ex. 13; Ex. A at 89)

35. Complainant Smith saw her regular physician, Dr. Michael Inada, on March 14, 1991. At this time Complainant Smith's bicep was still tender and she experienced pain when flexing her elbow. (Tr. vol. I at 46-47; Exs. 6, 7)

36. Complainant Smith continued to feel very hurt, upset, humiliated and angry about Chong's words and behavior throughout the week following the incident. She thought and cried about the incident at least twice a day. She felt angry and ashamed that she hadn't said or done more at the time of the incident. She had difficulty eating and sleeping at night. She didn't want to ride a city bus again because she didn't want to see Chong and was afraid that Chong or other bus drivers would somehow retaliate against her and Jonathan. (Tr. vol. I at 47-

52, vol. II at 133-134)

37. About a week after the incident, Complainant Smith told another friend, Aurora Johnson, about the incident. Johnson told Complainant Smith that Chong might belong to a "gang" who may come after Complainants and hurt them. Johnson also suggested that she [Johnson] and her boyfriend could find some people to go and hurt Chong first. Upon hearing this, Complainant Smith became more fearful that Chong, his family, "gang" or other bus drivers would somehow retaliate against her and Jonathan. However, she told Johnson that she didn't want Johnson to enlist anyone to hurt Chong. (Tr. vol. I at 155-160; vol. II at 11-12)

38. Both MTL and OTS had General Discipline Codes for their employees containing three classes of offenses. A class III offense is the most serious and requires 10-30 days suspension as a minimum disciplinary action. A class II offense is less serious and requires a written warning as a minimum disciplinary action. In cases where a manager believes the disciplinary action should be waived, the manager must inform the employee that the disciplinary action is not final. Furthermore, the manager must submit the reasons for noncompliance to the department head for review of the merits of the case and to render the final decision. (Tr. vol. V at 63; Ex. 35N)

39. Both MTL and OTS management considered the use of a racist slur by a bus driver, even if provoked, to be prohibited under their General Discipline Code and to constitute a class III offense. (Tr. vol. V at 82-84; Ex. 25 at 67-68)

40. On March 19, 1991 McMillan's office received a copy of Complainant Smith's March 8, 1991 complaint report from the MTL Customer and Public Relations division. (Ex. 27, answer to interrogatory no. 27)

41. On April 18, 1991 Manuel Rallita, an MTL Assistant Superintendent of Transportation who was filling in for McMillan (who was on vacation), interviewed Chong about the March 7, 1991 incident. Rallita reviewed Complainant Smith's March 8, 1991 complaint report with Chong. Chong admitted to Rallita that he had referred to Complainant Smith as a "nigger" and had made certain other remarks. Rallita disciplined Chong by counselling him to check his tone when speaking to passengers and by reminding Chong that MTL does not condone rude and sarcastic behavior. This disciplinary action was approved by Kenneth Hong, MTL Vice President of Transportation. (Ex. 10; Ex. 24 at 20-32)

42. On April 10, 1991 Betty Krauss, Manager of the MTL Customer and Public Relations division, wrote in response to Complainant Smith's complaint report. The letter states that MTL does not condone the actions of the operator as described in the complaint report; that MTL is genuinely concerned when it

hears of operators who express "anything less than the true 'Aloha Spirit' in dealing with the public"; that a thorough investigation was conducted; and that disciplinary action was taken. This letter was written and mailed to Complainant Smith prior to Rallita's investigation of the incident and disciplining of Chong. (Ex. 11)

43. On June 21, 1991 Complainant Smith filed a complaint with the Hawaii Civil Rights Commission. Prior to filing this complaint, Complainant Smith continued to feel hurt, humiliated and upset about the incident. She would also periodically cry over it. After filing the complainant, her fear of Chong subsided and she resumed her life as a full time student. (Tr. vol I at 52-54, vol. II at 12)

44. Sometime in 1992, Complainant Smith was informed that a hearing for this case had been scheduled for April, 1992. Complainant Smith again became fearful that Chong might lose his job and retaliate physically against her and Jonathan. (Tr. vol. II at 12-13)

45. In August, 1992 Complainants moved away from Oahu because Complainant Smith feared retaliation from Chong and because she planned to marry Ernest Bonhomme, a person she met prior to moving to Hawaii. Complainant Smith and Bonhomme were married in August, 1992 in Maryland. In September, Complainants and Bonhomme moved to Coral Springs, Florida, where they presently reside. (Tr. vol. I at 66-67, 128-132)

46. By letter dated December 9, 1992 Karl K. Sakamoto, Enforcement Attorney for the Hawaii Civil Rights Commission, requested Dr. Jack N. Singer conduct a psychological evaluation of Complainant Smith and diagnose any mental or emotional distress she experienced as a result of the March 7, 1991 incident. Dr. Singer is a licensed psychologist who practices in Coral Springs, Florida. (Tr. vol. II at 24, 48; Exs. 5e, I-1)

47. Complainant Smith was examined by Dr. Singer on December 29, 1992 and January 19, 1993. During these two examinations, Dr. Singer interviewed Complainant Smith about her personal history and the March 7, 1991 bus incident. He also administered the Burns Anxiety Inventory, Burns Depression Check List and Beck Examination For Depression. Dr. Singer also conducted several follow up interviews with Complainant Smith up through May 18, 1993 (the day before he testified at this hearing) and reviewed several depositions and prehearing pleadings. (Tr. vol. II at 48-50, 87-88, 99-100)

48. Based on information obtained from the above interviews, test results and prehearing documents, Dr. Singer diagnosed Complainant Smith as having post traumatic stress disorder mild in intensity. The diagnostic criteria for post traumatic stress disorder used by Dr. Singer is contained in the Diagnostic and Statistical Manual of Mental Disorders, Third Edition - Revised (DSM-III-R) published in 1987 by the American

Psychiatric Association. Page 247 of the DSM-III-R states that the essential feature of post traumatic stress disorder (PTSD) is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience. Thus, a person must experience an event that would be markedly distressing to almost anyone (criteria A) and experience the following types of symptoms: persistent reexperiencing of the traumatic event (criteria B), persistent avoidance of stimuli associated with the event or a numbing of general responsiveness (criteria C), persistent increased arousal (criteria D), and duration of such symptoms for at least one month (criteria E). (Tr. vol. II at 82, 101- 133; Exs. 5f; 5g)

49. Dr. Singer's diagnosis of Complainant Smith, however, is based on the occurrence of two events and the resulting symptoms caused by one or both of these two events: 1) the March 7, 1991 incidents on the bus with Chong; and 2) the fear that Chong would retaliate against her and Jonathan caused by statements made by Aurora Johnson as well as cultural stereotypes about people in Hawaii that Complainant Smith held. (Tr. vol. II at 84, 101-110, 128-133)

50. Dr. Singer recommends that if Complainant Smith plans to move back to Hawaii, her distress from the incident and her fears about retaliation should be treated through a series of desensitization sessions. These sessions should include

meetings with Chong in which he admits to what occurred, agrees to attend a sensitization program, agrees not to repeat the adverse behavior and assures Complainant Smith that he does not harbor any ill feelings towards her. (Tr. vol. II at 136-138; Ex. 5b)

III. CONCLUSIONS OF LAW[3]

A. Jurisdiction

Respondents MTL/OTS admit that they are places of public accommodation as defined in H.R.S. § 489-2. See, Prehearing Conference Order filed April 14, 1993 Stipulated Fact Nos. 7, 8; Respondents' Proposed Findings Of Fact #1 filed June 8, 1993. Respondents MTL/OTS are therefore subject to the provisions of H.R.S. Chapter 489.

B. Discrimination in Public Accommodations

H.R.S. § 489-3 prohibits "[u]nfair discriminatory practices which deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, and accommodations of a place of public accommodation on the basis of race, sex, color, religion, ancestry or disability..."

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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.

Respondents argue that even if the alleged events of March 7, 1991 occurred, there is no violation of § 489-3 because such events were an isolated instance of discrimination. They contend that the words "unfair discriminatory practices" as found in § 489-3 prohibit only recurring, habitual or customary discriminatory acts by a place of public accommodation. Respondents MTL and OTS' Post Hearing Brief at 10-15.

I disagree.

The fundamental starting point for interpreting a statute 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 intent and to implement that intent to the fullest degree. Briones, supra, State v. Tupuola, 68 Haw. 276 (1985). In addition, statutory provisions must be construed in a manner consistent with the purposes of the statute and not in a manner which produces an absurd result. State v. Burgo, 71 Haw. 198, 202 (1990).

Based on the language and legislative history of H.R.S. Chapter 489, I conclude that § 489-3 prohibits single isolated instances of discriminatory conduct by a public accommodation. H.R.S. § 489-1 states:

> a) The purpose of this chapter is protect the interests, rights, and privileges of all persons within the State with regard to

access **and use** of public accommodations by prohibiting **unfair discrimination.**

b) This chapter shall be liberally construed to further the purposes stated in subsection (a).

(Emphasis added.) The conference committee report on the passage of this chapter also states in relevant part:

> Hawaii is well known for its cultural diversity and the uniqueness of its people. In keeping with the Aloha Spirit, this bill clearly proclaims the State's policy of prohibiting **all unfair discrimination** in public accommodations.

Conf. Com. Rep. 50-86, 1986 Senate Journal at 746-747 (emphasis added). Thus, the purpose of Chapter 489 is to prohibit <u>all instances of unfair discrimination</u> by public accommodations on the basis of race, sex, color, religion, ancestry or disability, and not only recurring practices of discrimination. Furthermore, Chapter 489 was enacted to provide the same protections found in Title II of the federal Civil Rights Act of 1964, allowing people in Hawaii to seek redress within the state, rather than though the Office of Civil Rights in Washington D.C. SCRep. 233-86, 1986 House Journal at 1087. Title II[4] prohibits single isolated incidents of discrimination

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[4] 42 U.S.C. § 2000a states in relevant part:

> (a) Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.

by public accommodations. Finally, § 489-8 requires the assessment of fines for each violation of the chapter and states that each day of violation shall be considered a separate violation. Such penalties could not be assessed if only recurring acts of discrimination violate the statute.

The above interpretation of § 489-3 also recognizes the fundamental difference in the singular nature of contact between a business and its customer, and the on-going relationship between employer and its employee. Thus, while a single isolated incident of racial harassment may amount to a violation of Chapter 489, a similarly isolated incident may be insufficient to establish employment discrimination under Chapter 378. See, King v. Greyhound Lines, Inc., 656 P.2d 349, 351 at n. 6 (Or. App. 1982).

Per Se Violation of H.R.S. § 489-3

A per se violation of H.R.S. § 489-3 is established if the Executive Director shows, by a preponderance of the evidence, that an owner or employee of a public accommodation made a racial or sexist insult to a customer or about a customer in the course of serving that customer. Any customer who must suffer racial or sexist slurs in the course of being served is clearly being denied the full and equal enjoyment of that public accommodation's goods, services, facilities, privileges,

advantages and accommodations on the basis of race.[5] King, supra, at 351 (racial insults, including the use of the terms "boy" and "nigger" by bus company's ticket agent to Black customer when giving him a refund was a distinction, discrimination or restriction on account of race).

In the present case, the Executive Director has shown by a preponderance of the evidence that Chong used the racial slurs "nigger" and "Black thing" and the sexist slur "mama" when speaking to or about Complainant Smith. Chong's use of such terms denied Complainant Smith the full and equal enjoyment of the City and County's bus services on the basis of her race and sex and constitutes a per se violation of H.R.S. § 489-3.

Respondents admit that Chong used the term "nigger" once when he radioed MTL Central Control but contend that Chong did not say the other slurs. They argue that Complainant Smith's testimony is not credible because it became exaggerated and embellished over time.

I find Complainant Smith's testimony credible because portions of it were corroborated by other witnesses and because it is consistent with reports she made immediately after the incident. Road supervisor Hooper stated that upon entering the bus, Chong said to him, "Take this nigger lady off my bus".

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[5] Respondents MTL and OTS admit that even when provoked, the use of racial slurs by an owner or employee of a public accommodation is a denial of the full and equal enjoyment of that public accommodation's services. Respondents MTL and OTS' Post Hearing Brief at 14.

Hooper also stated that after stepping off the bus, Chong identified Complainant Smith as the "nigger giving [him] a bad time". (Ex. 26 at 18-19, 34-35) Hooper's report, made a few minutes after the incident, also notes that Complainant Smith alleged that Chong called her a "nigger" in speaking to other passengers. (Ex. 12) Officer Akana's report contains similar allegations. (Ex. 9) The complaint report taken by MTL Customer and Public Relations division on March 8, 1991 states that Complainant Smith alleged that Chong called her "mama" after pushing her. (Ex. 14)

In contrast, I find Chong's testimony denying the use of these terms not credible. This is because Chong's account of what occurred conflicts with the testimony of others and has been inconsistent. In his deposition and at the hearing, Chong admitted that he referred to Complainant Smith once as a "nigger" when he radioed Central Control. (Tr. vol. IV at 16, 49; Ex. 23 vol. 1 at 83) However, when speaking to Officer Akana on the day of the incident, Chong denied ever saying the word "nigger". (Tr. vol. III at 127-129, 132-133, Ex. 9) He continued to conceal his use of the term when he failed to mention it in the incident report filed March 8, 1991 with Superintendent McMillan. (Ex. 13) In his deposition and at the hearing, Chong denied using the term "nigger" when speaking to Hooper. (Tr. vol. IV at 49; Ex. 23 vol. 1 at 95) However, Hooper remembered and noted Chong's use of the term in referring

to Complainant Smith at least twice. (Ex. 12, 26 at 18-19, 34-35)

Direct Evidence Of Other Discriminatory Acts

Discrimination under Chapter 489 may also be established by direct evidence of discriminatory motive. Racial or sexist insults made by an owner or employee of a place of public accommodation at or near the time such owner or employee takes an adverse action against a customer can constitute direct evidence of intent to discriminate. See, Jones v. City of Boston, 738 F.Supp 604, 605-606 (D. Mass. 1990) (bartender's use of the word "nigger" in referring to a customer just prior to ejecting that customer from the premises shows an intent to discriminate on the basis of race); see also, Miles v. M.N.C. Corp., 750 F.2d 867, 36 EPD 34,953 at 36,267-36,270 (11th Cir. 1985) (racial slur made by plant superintendent who refused to rehire Black plaintiff was direct evidence of discrimination); 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

his failure to promote Black plaintiff); Senello v. Reserve Life Insurance Co., 872 F.2d 393, 50 EPD 38,977 at 57,228 (11th Cir. 1989) (negative statements about women in management and that plaintiff woman manager hired too many women constituted direct evidence of discriminatory motive for terminating plaintiff).

Once the Executive Director presents direct evidence of discriminatory intent, the burden of proof shifts to the respondent to either: 1) rebut such evidence by proving that it is not true; 2) establish an affirmative defense; or 3) 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, Vaughn v. Edel, 918 F.2d 517, 55 EPD 40,455 at 65,237 (5th Cir. 1990); EEOC v. Alton Packaging Corp., supra; 42 U.S.C. §2000e(g)(2)(B) (Civil Rights Act of 1991 § 107(b).

The Executive Director has established, through direct evidence of discriminatory intent, that Chong committed other discriminatory acts against Complainants in violation of § 489-3. Chong's adverse actions in passing Complainants' stop, referring to Complainant Smith as "nigger" when speaking on the radio and to other passengers, driving in an erratic manner, pushing her, calling her "mama" and "Black thing" and referring to her as a "nigger" two more times to Hooper all occurred within a span of about 10 minutes. The racial slurs on their

face demonstrate Chong's racial bias against Complainants. The sexist slur demonstrates Chong's sex bias against Complainant Smith. The fact that these slurs were made intermittently and within minutes of the adverse actions taken by Chong links such actions to Chong's bias and constitutes direct evidence of Chong's intent to discriminate against Complainants because of their race and because of Complainant Smith's sex. See, Jones v. City of Boston, supra; Miles v. M.N.C., supra; EEOC v. Alton Packaging Corp., supra; Senello, supra.

Respondents argue that aside from passing Complainants' stop, the other adverse actions did not occur. However, the weight of the evidence supports Complainant Smith's testimony, which was again consistent with reports she made immediately after the incident. In her statement to Hooper, Complainant Smith stated that Chong deliberately rocked the bus by accelerating and stopping hard. (Ex. 12; Ex. 26 at 31, 35-36) In her statement to Officer Akana, Complainant stated that Chong slowed and then accelerated past her stop, and was "jerking" the bus. (Ex. 9) In the complaint report made to MTL customer service, Complainant Smith similarly stated that Chong slowed and then accelerated past her stop and the next stop, continued jamming on the gas and brakes, and shoved her. (Ex. 14) When seeking medical attention later that day, Complainant Smith told Dr. Baker that she was pushed into a pole while riding the bus. (Ex. 8)

In contrast, Chong's version of what occurred has been inconsistent and implausible. Immediately after the incident, Chong told Hooper that Complainant Smith showed him her bus pass when the bus was on the freeway before Red Hill. (Ex. 12) In his file report to McMillan, Chong states that Complainant showed him her bus pass when the bus entered the freeway after passing Palama Settlement. (Ex. 13) Chong later told Assistant Superintendent Rallita that Complainant Smith showed him her bus pass after three stops, which corroborates Complainant Smith's testimony. (Ex. 10) In his deposition taken on March 3, 1993 Chong admits he saw Complainant Smith's bus pass. (Ex. 23 vol. 1 at 59) Later at the hearing Chong denied ever seeing it. (Tr. vol. IV at 14, 60) In terms of passing Complainants' bus stop, Chong first asserted to Rallita that he passed the stop because Complainant Smith wanted to speak to a supervisor. (Ex. 10) Later at the hearing Chong claimed that he passed Complainants' stop because he was angry with Complainant Smith for showing her bus pass so late. (Tr. vol. IV at 43-44, 58) In his incident report to McMillan, Chong states that Complainant Smith began to lean on him after he called MTL Central Control. (Ex. 13) Later, in his deposition and at the hearing, Chong claimed that Complainant Smith stood up and started to lean on him after he passed the Waimalu Zippy's bus stop but before he called Central Control. (Tr. vol. IV at 15, 63-64; Ex. 23 vol. 1 at 37-38, 67) In addition, Chong admitted

that Complainant Smith said nothing when she started to lean on him, that he didn't know how or why she leaned on him and didn't know if she lost her balance and fell. (Tr. vol. IV at 54; Ex. 23 vol. 1 at 80) Finally, in the incident report Chong states that Complainant Smith sat down after he pointed to a sign requiring passengers to remain behind the yellow standee line (Ex. 13); in his deposition and testimony at the hearing Chong stated that Complainant Smith didn't sit down until after he stopped the bus and radioed Central Control. (Tr. vol. IV at 64; Ex. 23 vol. 1 at 89-90)

The testimony of Susanna Sabala, a passenger on the bus, is also not credible evidence that the conduct did not occur. Sabala observed very little during the bus ride and what she could recall was inconsistent with both Complainant Smith's and Chong's versions of the events. Sabala testified that when the bus reached Palama Settlement, Complainant Smith turned around and said words to the effect that the bus driver was harassing her. (Tr. vol. III at 146) Neither Chong nor Complainant Smith testified that such statement was ever made. In addition, Sabala stated that she was sitting in the last forward facing bench seat across from the back door of the bus and could not hear any words spoken by Chong or Complainant Smith. (Tr. vol. III at 146, 161-162) Sabala testified that during the bus ride she closed her eyes, looked out the window and did not see Complainant Smith ring for her stop, stand up at the front of

the bus, or lean on Chong. (Tr. vol. III at 162-164, 169) She also didn't see Chong radio Central Control. (Tr. vol. III at 165) The only other time Sabala observed Complainants was when they were getting off the bus at the Foodland stop. (Tr. vol. III at 164)

Respondents argue that Complainant Smith provoked Chong in to passing Complainants' stop when she failed to show her bus pass on time and provoked Chong into calling her "nigger" when she leaned against him. Such assertions do not establish that Chong would have acted as he did without regard to Complainants' race or Complainant Smith's sex. Chong testified that prior to the incident, he always allowed passengers who could not show their passes upon boarding the opportunity to show their passes later. (Tr. vol. IV at 65; Ex. 23 vol. 1 at 51-52) Chong had a record of being a quiet, safe bus driver with good public relations. (Ex. 25 at 51) Furthermore, MTL trained its bus drivers to give late paying passengers a reasonable time to pay their fares or show their passes, and to treat such passengers like any other passenger. (Ex. 23 vol. 1 at 51-52, 57-58; Ex. 27, answer to interrogatory no. 38; Ex. 25 at 53) Finally, MTL/OTS management testified that even if provoked, bus drivers were prohibited from using racist slurs in speaking to or about passengers. (Tr. vol. V at 77, 82-84; Ex. 25 at 67-68)

Circumstantial Evidence Of Discriminatory Acts

Finally, discrimination under Chapter 489 may be established by circumstantial evidence. The burden shifting formula enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973) has been used by other courts to analyze cases under Title II and other state public accommodation statutes. See, K-Mart Corp. v. Human Rights Comm., 383 S.E.2d 277, 280-281 (W.Vir. 1989); Lewis v. Doll, 765 P.2d 1341, 1344 (Wash.App. 1989); Potter v. LaSalle Sports & Health Club, 368 N.W.2d 413, 416-417 (Minn.App. 1985) affirmed, 384 N.W.2d 873 (1986). I conclude that such formula is applicable to such cases under Chapter 489.

Accordingly, the Executive Director has the initial burden of establishing a prima facie case of discrimination by proving by the preponderance of the evidence that:

(1) complainant belongs to a protected group;

(2) complainant attempted to avail himself or herself of the goods, services, facilities, privileges, advantages or accommodations of a public accommodation;

(3) respondent denied, or attempted to deny, complainant the full and equal enjoyment of its goods, services, facilities, privileges, advantages or accommodations.

K-Mart Corp. v. Human Rights Comm., supra.

The establishment of the above prima facie case raises a presumption of discrimination because such actions, if otherwise unexplained, are more likely than not based on unlawful discrimination. Texas Dept. Of Community Affairs v. Burdine,

450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207, 216 (1981).

The burden then shifts to the respondent to rebut this presumption by producing evidence that the complainant was denied its services, goods, facilities, privileges, advantages or accommodations for a legitimate, nondiscriminatory reason. If respondent carries this burden of production, the presumption raised by the prima facie case is rebutted. K-Mart Corp. v. Human Rights Comm., supra; Texas Dept. Of Community Affairs v. Burdine, 67 L.Ed.2d 207, 216-217.

The Executive Director must then prove that respondent's proffered reason was not the true reason for its actions either by showing that: 1) the action was more likely motivated by a discriminatory reason; or 2) the respondent's explanation was untrue. K-Mart Corp. v. Human Rights Comm., supra; Texas Dept. Of Community Affairs v. Burdine, supra.

In the present case, if the Commission concludes that there is no per se violation of H.R.S. § 489-3 and/or that there is no direct evidence of discriminatory intent, I alternatively conclude that the Executive Director has established, through circumstantial evidence, that Chong committed discriminatory acts against Complainants. The Executive Director met its initial burden of establishing a prima facie case of discrimination when it proved that: 1) Complainants belong to a protected group (they are Black African; additionally, Complainant Smith is a woman); 2) Complainants attempted to use

the services of TheBus, a public accommodation; and 3) TheBus denied Complainants the full and equal enjoyment of its services when its bus driver failed to stop at their signaled bus stop, referred to Complainant Smith as a "nigger", "Black thing" and "mama", drove the bus in an erratic manner and pushed Complainants.

Respondents attempted to rebut this prima facie case by arguing that Complainant Smith provoked Chong into passing Complainants' stop when she failed to show her bus pass on time, and provoked Chong into calling her "nigger" when she leaned against him.[6] However, these arguments are not legitimate, non discriminatory reasons for denying Complainants equal enjoyment of Respondents' bus services. MTL management testified that even if Complainant Smith did not immediately show her bus pass, Chong was trained to allow her a reasonable time to show her pass and to treat her like any other passenger. (Ex. 17, answer to interrogatory no. 38; Ex. 25 at 53). Complainant Smith did show her bus pass within 3-4 stops after entering the bus, and after showing her pass, there was no reason not to stop at Complainants' signaled bus stop. MTL management also testified that even if provoked, Chong was prohibited from using racist

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[6] Respondents also argue that aside from passing Complainants' stop and referring to Complainant Smith once as a "nigger" the other adverse actions did not occur. As discussed in the above two sections, I find that Chong used the slur "nigger" more than once, as well as the terms "Black thing" and "mama", drove the bus in an erratic manner and pushed Complainants.

slurs in speaking to or about Complainant Smith. (Tr. vol. V at 77, 82-84; Ex. 25 at 67-68) Respondents have failed to carry their burden of producing evidence of legitimate, nondiscriminatory reasons for Chong's adverse actions towards Complainants. They therefore failed to rebut the presumption of discrimination raised by the Executive Director's prima facie case.

C. LIABILITY

1. Respondent MTL, Inc.

Given Chapter 489's broad prohibition against all unfair discrimination in public accommodations, I conclude that the doctrine of respondeat superior is applicable to cases involving discriminatory acts committed by employees of a public accommodation against their customers. People of State of N.Y. v. Ocean Club, 602 F. Supp. 489, 492-494 (E.D.N.Y. 1984) (club liable under Title II for discriminatory acts of its manager against members and their Jewish guests); Black v. Bonds, 308 F.Supp 774, 776 (S.D. Ala. 1969) (cafe owner liable for discriminatory acts of waitress under Title II even though waitress acted in defiance of owner's instructions); see also, King, supra, at 352. Respondent MTL, Inc. is therefore liable for the discriminatory acts of its bus drivers regardless of whether the acts were authorized or even forbidden, and

regardless of whether it knew or should have known of their occurrence. Because Chong was an employee of MTL when he committed the above violations, MTL is liable for his conduct.

2. Respondent OTS, Inc.

Respondent OTS, Inc. is the successor operator of TheBus.

Under Title VII, a successor employer may be liable for the discriminatory acts of its predecessor if there is a substantial continuity of identity in the business enterprise. EEOC v. MacMillan Bloedel Containers, Inc. 503 F.2d 1086, 8 EPD 9727 at 6038-6039 (6th Cir. 1974); Slack v. Havens 522 F.2d 1091, 10 EPD 10343 at 5046 (9th Cir. 1975). I conclude that a successor owner and/or operator of a public accommodation may be similarly liable for the discriminatory acts committed by its predecessor if there is a substantial continuity of identity in the entity. This is because the analysis used to justify the successor doctrine in employment discrimination cases is applicable to public accommodation discrimination cases. The analysis involves balancing of the purpose of Title VII with the legitimate and often conflicting interests of the successor and victim. See, MacMillan Bloedel, 8 EPD 9727 at 6038-6039.[7]

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[7] In MacMillan Bloedel, the Sixth Circuit stated that the purpose of Title VII was to eliminate employment discrimination and to make victims whole by eradicating present and future effects of past discrimination. It also found that the failure to hold a successor employer liable for the discriminatory acts of its predecessor could leave a victim without a remedy (such as no monetary relief) or with an incomplete remedy (inability to be

In the present case, the purposes of Chapter 489 are to protect the public's interest in being free of unfair discrimination by public accommodations and to give victims complete relief. H.R.S. §§ 489-1, 368-17; Conf. Com. Rep. 50-86, 1986 House Journal at 936; SCRep. 372, 1989 House Journal at 984. Complainants have an interest in obtaining restitution for their injuries and in securing assurances that future discriminatory acts will not occur. Respondent OTS is in the best position to effectively remedy this violation and prevent future violations. Furthermore, Respondent OTS can and did protect itself from financial liability by securing an indemnity clause in its contract with the City and County of Honolulu.

The factors used to determine successor liability under Title VII[8] are also relevant in determining successor liability under Chapter 489. Thus, Respondent OTS, as the successor contractor with the City and County of Honolulu to operate TheBus, is also liable for Chong's conduct because: 1) it had notice of Complainant Smith's complaint with the Hawaii Civil Rights Commission; 2) MTL had the ability to provide relief;

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[8] This involves a case by case consideration of whether: 1) the successor had notice of the charge; 2) the predecessor had the ability to provide relief; 3) there has been a substantial continuity of business operations; 4) the new employer used the same plant; 5) the same work force is being used; 6) the same supervisory personnel are being used; 7) the same jobs exist under substantially the same working conditions; 8) the same machinery, equipment and methods of production are being used; 9) the same product is being produced. EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 8 EPD 9727 at 6042 (6th Cir. 1974); Slack v. Havens, 522 F.2d 1091, 10 EPD 10343 at 5406 (9th Cir. 1975).

3) there is a substantial continuity of business operations; 4) it uses the same buildings and structures as MTL; 5) it uses the same or substantially the same work force as MTL; 6) it uses the same or substantially the same supervisory personnel; 7) the same jobs exist under substantially the same working conditions; 8) it uses the same machinery and equipment as MTL; and 9) it offers the same services as MTL.

I therefore conclude that both Respondents MTL, Inc. and OTS, Inc. are liable for violating H.R.S. § 489-3.

D. REMEDIES

1. Compensatory Damages

The Executive Director requests that Respondents be ordered to pay Complainant Smith compensatory damages of $35,000 for the physical injury and emotional distress she suffered. It also seeks Complainant Smith's costs for future psychological treatment.

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 Complainants suffered as a result of Chong's actions. 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.

a) Emotional Injuries

The evidence shows that Complainant Smith suffered considerable emotional distress during the incident which continued at least until she filed a complaint with this Commission on June 21, 1991. While on the bus with Chong, Complainant Smith was shocked, angry and hurt by Chong's words and actions. She also felt disgraced by Chong in front of the other passengers. When Chong began to drive in an erratic and jerking manner, Complainant Smith thought she and Jonathan would be seriously injured or killed. After the incident, Complainant Smith continued to feel angry and upset about Chong's conduct. She constantly cried, thought about the incident and felt humiliated and ashamed that she did not respond to Chong's actions in a more effective way.

The Executive Director, however, has not shown by a preponderance of the evidence that Complainant Smith suffered post traumatic stress disorder as a result of Chong's conduct. Dr. Singer testified that Complainant Smith's symptoms were caused both by Chong's conduct and the fears she had that Chong, his "gang" or other bus drivers might retaliate. These fears stemmed not from Chong's conduct, but from stereotypes about local people Complainant Smith held, as well as from Aurora Johnson's statements about Chong possibly belonging to a "gang". When discussing Complainant Smith's symptoms such as: fear of riding a bus in Hawaii (criteria B), not engaging in social

activities (criteria C), cutting short her education because she felt she couldn't stay in Hawaii (criteria C), continuing difficulties falling asleep and difficulties concentrating on her school work (criteria D), Dr. Singer did not specify whether these symptoms were caused by Chong's actions, Complainant Smith's fears, or both. Therefore, although Complainant Smith may be suffering from post traumatic stress disorder, the Executive Director has not established that such condition was caused by Chong's conduct. (Tr. vol. II at 101-110, 128-136)

Considering these circumstances, I determine that $20,000 is appropriate compensation for Complainant Smith's physical and emotional injuries.

b) Future Medial Costs

The Executive Director also seeks Complainant Smith's costs for future psychological treatment. Dr. Singer, based on his diagnosis that Complainant Smith suffered distress from Chong's conduct and has mild post traumatic stress disorder, recommended at least five desensitization sessions, including meetings with Chong and his family, to treat her condition. (Tr. vol. II at 136-139) However, because Complainant Smith's post traumatic stress disorder stems from both Chong's conduct and her fears of Chong caused by her own stereotypes and Johnson's statements, I determine that Respondents should pay the costs for three desensitization sessions. These sessions are to be held if and when Complainant Smith moves back to Hawaii and should include

meetings with Chong and his family, as recommended by Dr. Singer.

2. Threefold Damages

The Executive Director seeks $1,000 or threefold damages, pursuant to H.R.S. § 489-7.5.

H.R.S. § 489-7.5(a) provides that any person who is injured by an unlawful discriminatory practice may sue for damages sustained and if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater. (Emphasis added)

The present case is not a suit brought by a person injured by an unlawful discriminatory practice. The provisions of § 489-7.5 therefore do not apply and I decline to award treble damages.

3. Nominal Damages to Complainant Betts

The Executive Director requests nominal damages of $1 to Complainant Jonathan Betts.

When compensatory damages are not computable, nominal damages of $1 may be awarded for injuries arising from a violation of some legal right. Ferreira v. Hon. Star-Bulletin, 44 Haw. 567, 577-579 (1960); Minatoya v. Mousel, 2 Haw. App. 1, 6 (1981).

In the present case, although Complainant Betts was sleeping when the adverse incidents of March 7, 1991 occurred

and the Executive Director did not present any evidence of emotional or physical injuries suffered by him, nevertheless his rights under chapter 489 were violated when Chong passed his bus stop and pushed him and his mother towards the front door of the bus because of their race. I therefore award Complainant Betts nominal damages of $1.

4. Civil Penalties

Pursuant to H.R.S. § 489-8, the Executive Director asks the Commission assess the maximum civil penalty of $10,000 for one violation of H.R.S. § 489-3.[9] H.R.S. § 489-8 provides that any person, firm, company, association, or corporation who violates Chapter 489 shall be fined a sum of not less than $500 nor more than $10,000 for each violation.

The record shows that Respondent MTL did not take reasonable actions to investigate the incident and discipline Chong. Neither Chong nor Hooper took names of witnesses to the incident despite MTL regulations which require bus drivers and road supervisors to do so. MTL customer relations sent a letter to Complainant Smith stating that it had fully investigated the incident and disciplined Chong before Assistant Superintendent Rallita did these things. The discipline given to Chong was inadequate. MTL management considered a bus driver's use of racial slurs, even if provoked, to be a class III offense, with

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[9] Given that Chong committed a series of adverse actions against Complainants, I do not necessarily agree that only one violation of H.R.S. § 489-3 occurred in this case.

a minimum disciplinary action of 10-30 days suspension. However, Rallita merely counselled Chong to check his tone in speaking to passengers. Such disciplinary action was approved by MTL Vice President of Transportation Kenneth Hong even though Rallita never provided any reasons for non-compliance with the MTL disciplinary code.

The evidence also shows that although Respondent OTS subsequently took serious and commendable steps to: terminate a bus driver who allegedly made racial slurs to a passenger; issue a non discrimination policy; post notices of its policy on its buses and develop training materials on such policy for its bus drivers[10], these actions did not occur until after a second

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[10] On February 13, 1992 Mark Ibanez, a bus driver for OTS, Inc. was suspended pending dismissal for saying "I don't like people like you" and using an "Amos and Andy" accent to mock Jacqueline Langley, a Black passenger on his bus. On February 19, 1992 Ibanez was terminated. OTS management believed that Ibanez also called Langley a "nigger". (Exs. 33b; A-109-2)

Pursuant to a collective bargaining agreement between OTS and the Hawaii Teamsters and Allied Workers Union Local 996, Ibanez filed a grievance. The arbitrator concluded that if Ibanez had made overt racial slurs to a bus passenger, such conduct would constitute a class III offense. However, because OTS did not prove that Ibanez had used racial slurs or an "Amos and Andy" accent towards Langley, the arbitrator set aside the termination, ordered OTS to give Ibanez a refresher course on public relations, and ordered Ibanez reinstated, without back pay or benefits on six months probationary status. (Ex. 33b)

After the Ibanez-Langley incident, OTS management began drafting a specific policy prohibiting discrimination in the provision of transit services. On March 20, 1993 a draft non discrimination policy was sent to the Executive Director of the Hawaii Civil Rights Commission with a request that she comment on its adequacy. The Executive Director did not provide OTS with comments. OTS issued the policy to its employees on April 6, 1992

together with a letter from James E. Cowan, OTS General Manager, entitled "Let's Keep The Aloha In Our Spirit". The policy states in relevant part:

1. No person on the grounds of race, color, sex, religion, ancestry, national origin, or handicap status shall be excluded from participation or denied the benefits of our transit service.

2. Harassment of the public or fellow employees on the grounds of race, color, sex, religion, ancestry, national origin, or handicap status is prohibited. Employees found to be engaging in such harassment are subject to severe discipline up to and including termination. Employees must guard against uttering racial, ethnic, or sex-based comments as these constitute a form of harassment.

3. Under state and federal law, employees and the public have the right to file complaints alleging discrimination on the basis of race, color, sex, religion, ancestry, national origin, or handicap status.

(Tr. vol. V at 38-40; Ex. A at 1-3; Ex. A-109-2)

Prior to April 6, 1992 MTL and OTS did not have a specific personnel policy prohibiting discrimination in the provision of transit services. Both MTL and OTS had agreed to abide by a Title VI Guideline issued by the Federal Transit Administration which prohibits discrimination in the provision of services based on race, but this guideline was not disseminated to MTL or OTS bus drivers. However, prior to April 6, 1992 MTL and OTS bus drivers were generally trained to be courteous to passengers, to provide friendly service and to treat passengers as the driver would want to be treated. (Tr. vol V. at 17, 27-28, 31, 51-58; Ex. 25 at 66; Ex. A at 11, 13, 14,, 16, 18, 20, 22, 32, 35, 38, 39, 43, 44, 54, 77)

Sometime after April 6, 1992 OTS developed training materials for new bus drivers as well as remedial training materials for "problem" bus drivers which explain the non discrimination policy. OTS is currently developing refresher training materials for all bus drivers which explain the non discrimination policy. (Tr. vol. V at 80-81; Exs. P-1, P-2) At the time of the hearing in this case, Chong had received a copy of the non discrimination policy issued on April 6, 1992 with one of his paychecks. However, he has not received any training as to what this policy means or how it is to be implemented. (Ex. 23 vol. 2 at 13-17)

incident occurred. In addition, non-entry and non-"problem" bus drivers, such as Chong, have still not received training on such policy even though it was promulgated over one year ago. (Tr. vol. V at 38-40, 80-81; Ex. 23 vol. 2 at 13-17; Ex. A at 1-3; Exs. P-1, P-2)

Considering the above, together with Chong's use of several racial slurs and the severity of his adverse conduct towards Complainants, I determine that the maximum penalty of $10,000 is appropriate.

5. Deposition Costs

The Executive Director also seeks its deposition costs.

H.R.S. § 368-17(a)(9) allows payment to the complainant of all or a portion of the costs of maintaining the action before the Commission. The deposition costs in the present case were borne by the Executive Director, not the Complainants. I therefore decline to award the Executive Director its deposition costs.

Sometime in 1992, OTS began placing posters entitled, "Non Discrimination Policy for Public Transit" on all of its buses. The posters state:

> TheBus is a place of public accommodation where courtesy counts. Harassment of passengers or employees is against the Law. If you have any complaints, please call:
>
> Oahu Transit Services, Customer Services 848-4500
> Honolulu Public Transit Authority 527-6891
> Hawaii Civil Rights Commission 586-8636

(Tr. vol. IV at 92-94; Ex. K)

6. Other Equitable Relief

Finally, the Executive Director asks that the Commission order Respondents to:

a) 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;

b) adopt a comprehensive policy prohibiting unlawful discrimination;

c) formally train their employees and officers about such policies; and

d) post notices provided by the Commission setting forth compliance with civil rights laws in conspicuous places, including the buses.

Respondent OTS has already developed a non discrimination policy, a poster for its buses and is in the process of developing training materials on non discrimination for its bus drivers. It has stated that it has been and remains willing to work with the Executive Director to further develop its policy, training program and bus notices. (Tr. vol. V at 46-47, 187-188; Ex. A-109-1)

I therefore recommend that the Commission direct the Executive Director to submit its comments on Respondent OTS's policy, bus poster and training materials within 60 days of the effective date of the Commission's final decision in this matter. I also recommend that the Commission direct Respondent OTS to adopt in substance the Executive Director's comments and accordingly modify its policy, bus posters and training materials within 90 days of the receipt of the Executive

Director's comments. I further recommend that the Commission direct Respondent OTS to conduct formal training on the revised non discrimination policy for all its employees and officers within 180 days of modifying its policy and training materials. Respondent OTS is to schedule Jarvis Chong to participate in the first refresher training program on such non discrimination policy.

Finally, I believe that the best way to publicize this decision and OTS's non discrimination policy to the public is to require Respondents MTL and OTS to publish the attached Notice (Attachment 1) in a newspaper published in the state of Hawaii having a general circulation in the City and County of Honolulu.

RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondents MTL, Inc. and OTS, Inc. violated H.R.S. § 489-3 when their bus driver: used racial and sexist slurs in speaking to and about Complainant Smith, passed Complainants' bus stop, drove the bus in an erratic manner and pushed Complainants.

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

1. Respondents MTL, Inc. and OTS, Inc. to jointly and severally pay Complainant Smith $20,000.00 as damages in compensation for her physical and emotional injuries.

2. Respondents MTL, Inc. and OTS, Inc. to jointly and severally pay Complainant Smith, should she return to live in Hawaii, the costs for three desensitization sessions which are to include meetings with Chong and his family as recommended by Dr. Singer.

3. Respondents MTL, Inc. and OTS, Inc. to jointly and severally pay Complainant Betts nominal damages of $1.00.

4. Respondents MTL, Inc. and OTS, Inc. to jointly and severally pay $10,000.00 in civil penalties to the State of Hawaii General Fund.

5. Respondents MTL, Inc. and OTS, Inc. to jointly publish the attached Notice (Attachment 1) in a newspaper published in the state of Hawaii having a general circulation in the City and County of Honolulu within 10 days of the Commission's final decision in this matter.

6. The Executive Director to submit its comments on OTS's non discrimination policy, non discrimination training materials and the non discrimination bus poster within 60 days of the effective date of the Commission's final decision in this matter.

7. Respondent OTS, Inc. to modify its non discrimination policy, training materials and bus poster to adopt, in

substance, the Executive Director's comments within 90 days after receiving such comments.

8. Respondent OTS, Inc. to conduct training of all its employees, including bus drivers, supervisory personnel and officers on the modified non discrimination policy within 180 days of modifying its policy. In addition, Respondent OTS, Inc. is to schedule Jarvis Chong to participate in the first refresher training program on such policy.

Dated: Honolulu, Hawaii, July 23, 1993.

HAWAII CIVIL RIGHTS COMMISSION

LIVIA WANG
Hearings Examiner

ATTACHMENT 1

NOTICE TO ALL USERS OF THEBUS

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 the operators of TheBus (MTL, Inc. and Oahu Transit Services, Inc.) violated Hawaii Revised Statutes Chapter 489, Discrimination In Public Accommodations, on March 7, 1991 when one of their bus drivers discriminated against a passenger and her child on the basis of race and sex by:

a) using racial and sexist slurs in speaking to and about that passenger;
b) intentionally passing that passenger and her child's bus stop;
c) driving the bus in an erratic manner which made that passenger fall; and
d) pushing that passenger and her child.

(In Re Smith and MTL, Inc. et. al. Docket No. 92-003-PA-R-S, [date of final decision] 1993).

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

1) Pay that passenger a monetary award to compensate her for the physical and emotional injuries she suffered and pay her child a nominal award to compensate him for violation of his rights under Chapter 489.

2) Pay a civil penalty to the State of Hawaii general fund.

3) Allow the Executive Director of the Hawaii Civil Rights Commission to comment on the non discrimination policy, training materials and bus poster developed by Oahu Transit Services, Inc.

4) Require Oahu Transit Services Inc. to modify its non discrimination policy, training materials and bus poster pursuant to the Executive Director's comments and to conduct training sessions for its bus drivers, supervisors and officers to educate them about their treatment of passengers under the modified policy.

DATED: _____

BY: _____
Authorized Agent for MTL, Inc.

BY: _____
Authorized Agent for Oahu Transit Services, Inc.

APPENDIX A

On October 7, 1992 the Executive Director sent Respondents MTL, Inc., Oahu Transportation Services, Inc. (hereinafter "OTS"), Department of Transportation Services, City and County of Honolulu and Honolulu Public Transit Authority, City and County of Honolulu (hereinafter, "City Respondents") a final conciliation demand letter pursuant to Hawaii Administrative Rule (H.A.R.) 12-46-17.

On October 23, 1992 the complaint was docketed for administrative hearing and a Notice Of Docketing Of Complaint was issued. On November 4, 1992 an Amended Notice Of Docketing Of Complaint was issued to include Honolulu Transit Authority, City and County of Honolulu as a respondent.

On November 11, 1992 the Executive Director filed its Scheduling Conference Statement. OTS filed its Scheduling Conference Statement on November 12, 1992. On November 13, 1992, City Respondents and MTL, Inc. filed their Scheduling Conference Statements. A Scheduling Conference was held on November 20, 1992 and the Scheduling Conference Order was issued that same day.

On March 31, 1993 notices of hearing and prehearing Conference were issued. The Executive Director filed its Prehearing Conference Statement and Amended Prehearing Conference Statement on April 5, 1993 and April 12, 1993, respectively. Respondents MTL/OTS filed their Prehearing Conference Statement and Amended Prehearing Conference Statement on March 30, 1993 and April 12,

1993, respectively. City Respondents notified the Hearings Examiner that the parties were in the process of dismissing City Respondents from this action and that City Respondents would not file a prehearing conference statement nor attend the prehearing conference. On April 12, 1993 a prehearing conference was held and the Prehearing Conference Order was issued on April 14, 1993.

On April 8, 1993 the parties stipulated to extend the hearing date from April 19, 1993 to May 17, 1993 to accommodate the Complainant Smith's work schedule. On April 14, 1993 the Commission approved the Stipulation To Extend Hearing Date. On April 14, 1993 an Amended Notice Of Hearing and the Prehearing Conference Order were issued.

On April 14, 1993 Respondents MTL and OTS filed a Motion To Further Discovery in order to take the deposition of Dr. Jack Singer, the Executive Director's expert witness. On April 22 and 23, 1993 the Executive Director filed its memorandum in opposition to this motion and a supplemental affidavit, respectively. On April 24, 1993 the Hearings Examiner issued an Order Granting Respondents MTL and OTS's Motion To Further Discovery.

On April 28, 1993 the Executive Director filed a Motion For Summary Judgment Or Partial Summary Judgment. On May 6, 1993 Respondents MTL and OTS filed their Memorandum In Response To Executive Director's Motion For Summary Judgment. On May 7, 1993 a hearing was held on this motion and on May 10, 1993 Respondents MTL and OTS filed their Supplemental Memorandum In Response To The

Executive Director's Motion For Summary Judgment Or Partial Summary Judgement. On May 11, 1993 the Hearings Examiner issued an order denying the Executive Director's Motion For Summary Judgment Or Partial Summary Judgment.

On April 29, 1993 the parties filed a Stipulation For Partial Dismissal With Prejudice Of Respondents Department Of Transportation Services, City And County Of Honolulu And Honolulu Public Transit Authority, City And County Of Honolulu.

On April 29, 1993 the Executive Director filed a Motion To Limit Respondents' Expert Witnesses And Related Orders. On May 6, 1993 Respondents OTS and MTL filed an Amended Identification Of Expert Witnesses. On May 7, 1993 the Hearings Examiner issued an order granting in part and denying in part the Executive Director's Motion To Limit Respondents' Expert Witnesses And Related Orders.

On May 11, 1993 Respondents MTL and OTS filed a Motion To Amend Witness List. That same day, the Executive Director filed a Motion To Prevent Respondents From Naming Another Witness, Or In The Alternative, Motion For Further Discovery And Related Orders. On May 13, 1993 the Hearings Examiner issued an Order Granting Respondents MTL and OTS' Motion To Amend Witness List and issued an order granting in part and denying in part the Executive Director's Motion To Prevent Respondents From Naming Another Witness Or In The Alternative, Motion For Further Discovery And Related Orders.

On May 12, 1993 the Executive Director filed its Identification of Witnesses, List Of Exhibits and exhibits.

Respondents MTL and OTS also filed their List Of Exhibits and exhibits.

On May 13, 1993 the parties stipulated to have a court reporter record the contested case hearing in this matter with costs to be borne by the Executive Director.

The contested case hearing on this matter was held on May 17, 19, 20, 21 and 24 1993 at the Hawaii Civil Rights Commission conference room, 888 Mililani Street, 2nd floor, Honolulu, Hawaii pursuant to H.R.S. Chapters 91 and 368. The Executive Director was represented by Enforcement Attorneys Karl K. Sakamoto and Calleen J. Ching. Complainant Smith was present during portions of the hearing. Respondents MTL and OTS were present through their representative, Amos McMillan and were represented by their attorneys Jared H. Jossem and Kitty K. Kamaka.

On May 18, 1993 Respondents MTL and OTS filed a Memorandum of Authorities regarding invoking an adverse inference from the Executive Director's failure to call its listed witnesses. The Executive Director also filed a Memorandum In Opposition To Respondents' Claim For An Adverse Inference on May 18, 1993.

The parties were granted leave to file proposed findings of fact and conclusions of law and/or hearing briefs. On June 7 and 8, 1993 the Executive Director filed its Post Hearing Memorandum and Supplemental Post Hearing Memorandum, respectively. On June 8, 1993 Respondents MTL and OTS filed their Proposed Findings Of Fact And Conclusions Of Law and Post Hearing Brief.

On June 15, 1993 pursuant to a request by the Hearings Examiner, the parties stipulated to admit the document entitled "City and County of Honolulu Public Transit Authority Management and Operations Agreement" dated December 30, 1991 into the record of the contested case hearing in this matter as Exhibit Q.