CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO, Executive Director, on behalf of the complaint filed by ERIC WHITE, v. STATE OF HAWAII, UNIVERSITY OF HAWAII; and ROB WALLACE, Respondents.	)	Docket No. 97-001-PA-R HEARINGS EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER; APPENDIX A; APPENDIX B; ATTACHMENT 1.

HEARINGS 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: a) Respondent Rob Wallace, a student manager for the University of Hawaii men's basketball team, was an employee or alternatively, an agent of Respondent State of Hawaii, University of Hawaii (hereinafter "UH"); b) Respondent Wallace violated H.R.S. § 489-3 when he used a racial slur towards Complainant Eric White during a basketball game held on February 18, 1995 at the Special Events Arena; c) Respondent Wallace is liable for damages to Complainant for his discriminatory act and is subject to penalties under H.R.S. § 489-8; d) Respondent UH is liable for damages to Complainant for the

discriminatory acts of its employee or agent and is subject to penalties under H.R.S. § 489-8; and e) even if Respondent Wallace is not an employee or agent of Respondent UH, Respondent UH violated H.R.S. § 489-3 when it failed to take immediate and appropriate corrective action, is liable for damages to Complainant for its discriminatory acts and is subject to penalties under H.R.S. § 489-8.

Respondents admit that Respondent Wallace used a racial slur towards Complainant at least once during the February 18, 1995 basketball game. Respondents contend that: a) Respondent Wallace was not an employee or an agent of Respondent UH; b) Respondent Wallace did not violate H.R.S. § 489-3 and neither Respondents are liable for damages to Complainant or subject to penalties under H.R.S. § 489-8; c) Respondent Wallace's use of a racial slur did not create a severe or pervasive discriminatory environment; and d) after the incident, Respondent UH took immediate and appropriate corrective action.

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

II. FINDINGS OF FACT[1]

1. Complainant Eric White is a 45 year old African American male who was born and raised in New York City. In 1978 Complainant began working for United Air Lines in New York. In 1985 Complainant transferred to Honolulu and is presently employed with United as a ramp service person. (Tr. at 112-114; Ex. 39 at 4-9, 12)[2]

2. Complainant loves basketball and is knowledgeable about the game. Complainant played basketball for the Andrew Jackson High School varsity team, for Queensborough Junior College and in various New York summer leagues. He was also a volunteer coach and referee for several New York high school, junior high school, and church league basketball teams. (Tr. at 379; Ex. 39 at 13-16, 69, 104)

3. Respondent UH is a public corporation established as a state university pursuant to H.R.S. § 304-2. Respondent UH is comprised of several colleges and departments, one of which is Department of Intercollegiate Athletics at the Manoa campus

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[1] As a preliminary matter, this Hearings Examiner has considered the proposed findings of fact filed by the Executive Director. To the extent that the Executive Director's proposed findings of fact are in accord with the findings of fact stated herein, they are accepted, and to the extent that they are inconsistent, they are rejected. In addition, some of the proposed findings are omitted because they are irrelevant or not necessary to determine the material issues in this case.

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 22-23 and December 2, 1997; "Ex." followed by a number refers to the exhibits jointly submitted by the Executive Director and Respondents.

(hereinafter "Department"). The Department's main goal is to provide a comprehensive and competitive program of intercollegiate athletics for students and the community at large. Since 1993, Hugh Yoshida has been the Director of the Department. (Ex. 17 at 6-7; Ex. 18 at 17; Ex. 27 at vi)

4. The Department underwrites a men's basketball team. The purposes of the men's basketball team are to: a) provide student athletes an opportunity to compete at the Division I-A level; b) provide entertainment to the community; c) raise funds for the Department; and d) meet Western Athletic Conference membership requirements. From 1978-1984 and 1987 to the present, Riley Wallace has been the head coach of the men's basketball team. (Ex. 14 at 5-7; Ex. 17 at 7-9; Ex. 23)

5. The men's basketball team has two student managers. Like players, student managers are members of the basketball team and are selected by Riley Wallace. They are supervised by the team's coaches. Respondent UH considers student managers to be student athletes and requires them to: a) be full time students; b) carry at least 12 credits; and c) maintain a grade point average of at least 2.0. The Department grants student managers financial aid in the form of full athletic scholarships, which include tuition waivers, book loans and money for housing and meals. The monies for these scholarships are held in Respondent UH's general scholarship account and are administered by the Department's business office. Unlike Department employees, student-athlete scholarship recipients are not given employee

identification numbers, are not on Respondent UH's payroll and are not given benefits such as annual leave, workers' compensation or health insurance. Respondent UH also does not withhold taxes for student-athlete scholarship recipients. (Tr. at 270-273, 276, 426-427, 431, 433-434; Ex. 12 at 36-40; Ex. 14 at 11; Ex. 17 at 18; Ex. 20 at 11, 13-16, 48; Exs. 32, 32-A, 32-B)

6. Student managers are responsible for team logistics. During the pre-season, student managers issue equipment, prepare the gym for practices and assist the coaches and players during and after practices. During the regular season, student managers additionally set up water and equipment in the arena, maintain equipment and the locker rooms, wipe the floor during games, pack the players' travel bags and take turns traveling with the team. During the post-season, student managers gather equipment from players and attend post-season workouts. Student managers are also required to participate in fund-raising events, such as golf tournaments and dinner auctions which raise money for the basketball program. At these fund-raisers, the Department requires student managers to mingle and socialize with members of the public who attend. The Department also allows student managers to speak to spectators who attend practices and games. (Tr. at 22-46; Ex. 12 at 18-36; Ex. 14 at 10-13; Ex. 28)

7. Student managers are subject to regulations contained in the UH Student-Athlete Handbook (hereinafter "Handbook"). The introduction to Part 1 of the Handbook states:

> As an athlete there are special responsibilities and requirements that accompany the privilege of being a student-

> athlete and representing this University. Other students need not worry about athletic eligibility requirements, media relations, team travel rules, complimentary admissions, drug testing, etc. Thus as an athlete, you have special interests and responsibilities that do not apply to other students.
> . . .
> When you participate in intercollegiate athletics competition, you are representing the University of Hawaii and all the people of Hawaii. As an intercollegiate sports participant, you will be in the "public eye" and your personal conduct should reflect favorably upon yourself, your team and the University.

In the subsection entitled "Good Sportsmanship" the Handbook states, in relevant part:

> The Department of Athletics expects sportsmanlike conduct of its student-athletes and will not tolerate any of the following behaviors:
> . . .
> * Using obscene or inappropriate language or gestures to officials, opponents, team members or spectators . . .

In the subsection entitled "Code of Conduct" the Handbook states in relevant part:

> Always present a positive image in competition as well as in your daily life. Remember that as a UHM student-athlete your actions and conduct in everything you do reflect upon the University and the Athletic Program. In other words, don't do anything which would embarrass yourself, the team, your family or the university.
> . . .
> Because our athletic program is the only NCAA Division I program in the state, we receive more than our share of public and media attention. This interest is obviously of tremendous benefit to the University, the Department and to you. However, it also places upon all persons connected with the program a continuing responsibility to conduct themselves in an appropriate manner.
>
> The Department of Intercollegiate Athletics requires coaches, trainers, and staff to conduct themselves in a way which creates a positive image of the people, values and traditions associated with the University, the WAC and the NCAA. As a student-athlete, you are expected to uphold the same standards of conduct that have been adopted by the Department and the University.

> By joining the UHM's intercollegiate athletic program, you have become a representative not only of your team but of your University. . . You are expected to behave both on and off campus in a manner which brings credit to the University and your team. Be aware of the image you are creating.
> . . .
> As long as you are a student-athlete, you are representing the University and must abide by this Code of Conduct. Therefore, this Code of Conduct applies during the academic year as well as during break time and summer vacation periods, and to conduct on or off campus.

At the beginning of each school year, every student athlete receives a copy of the Handbook and is instructed to read it. Yoshida also reviews the above regulations with all student athletes during orientation meetings. (Tr. at 56-57, 436-438; Ex. 8; Ex. 18 at 31, 33-36; Ex. 20 at 49-50; Ex. 27 at 1, 3-5, 7-8)

8. Respondent Rob Wallace is a 24 year old Caucasian male. He was born in Louisiana and was raised in Honolulu. He is the son of Riley Wallace. In 1992, Riley Wallace asked Respondent Wallace to be a student manager for the UH men's basketball team. Respondent Wallace agreed and served in that capacity during the 1992-93 and 1993-94 school years and for most of the 1994-95 school year. He received full athletic scholarships during these school years. (Tr. at 17, 49-56; Exs. 7, 9, 13, 30-32B; Ex. 12 at 7-9, 14-17, 36-40)

9. Upon moving to Hawaii in 1985, Complainant became an avid supporter of the UH men's basketball team. He attended team practices and gave players advice about their playing skills. He also invited players to his home to eat meals, helped players with their home work, and some times loaned players money. At the airport, Complainant loaded the team's luggage when the team

traveled. (Tr. at 116-117, 131-132, 160-163; Ex. 39 at 14-15, 17-18, 79-80)

10. Complainant was also acquainted with Bob Nash, an assistant coach of the basketball team. Some time around 1986 Nash asked Riley Wallace if he could give Complainant complimentary tickets to the UH men's basketball games. At that time, home games were played in Blaisdell Arena and Riley Wallace held tickets for two rows of seats behind the team bench. Riley Wallace agreed to give Complainant these tickets and thereafter gave Complainant tickets whenever he called and asked for them. Complainant and his wife usually attended 5-6 games a year. Complainant enjoyed sitting in the row behind the team bench because he was able to hear what was said on the bench and was able to directly cheer and encourage the players. (Tr. at 118; Ex. 14 at 21-22; Ex. 15 at 14; Ex. 16; Ex. 39 at 15-19, 44).

11. Complainant saw Respondent Wallace at team practices and at games during the 1993 and 1994 seasons. Although Complainant knew that Respondent Wallace was some kind of team assistant, he did not know Respondent Wallace's name or that he was Riley Wallace's son. Respondent Wallace also saw Complainant at some of the team practices. (Tr. at 62-63, 128-130; Ex. 12 at 43-44; Ex. 39 at 80, 82)

12. In 1994 the basketball team began to play home games at the Special Events Arena. The Special Events Arena is owned by Respondent UH and managed by the Department. It is a place of public accommodation as defined in H.R.S. § 489-2. (Tr. at 116)

13. At the Special Events Arena (hereinafter "arena"), Riley Wallace held tickets to only one row of seats behind the team bench. Prior to the 1994-95 season, Riley Wallace approached Complainant and encouraged him to join the team's booster club so that Complainant could purchase priority season tickets. Complainant decided to join the booster club to support the team. He made a sizeable contribution to the booster club and bought season tickets. He was assigned two seats in the AA section of the arena, which were up and across from the team bench. (Exs. 16, 26; Ex. 39 at 16-17, 21-25, 36, 39-40)

14. Complainant became an enthusiastic member of the booster club. He attended booster club fund-raisers and events. At home games, Complainant and his family usually arrived early and went to the booster hospitality room, which was located on the floor level of the arena. After leaving the hospitality room, Complainant and his family would go on to the floor and chat with players before the games. Complainant would also look for empty seats near the team bench because he couldn't see well from his assigned seats and because he wanted to sit close to the players. (Tr. at 120-121, 191; Ex. 39 at 26-38, 42-48, 53-55)

15. At some point early in the 1994-95 season, Complainant noticed that a seat within the first two rows of the DD section was usually vacant. This section was near the end of the UH team bench and the tunnel through which the team entered and exited the arena. Complainant began to regularly sit in this area, while his wife and daughter sat in other seats. Complainant became friendly with the

season ticket holders in the first two rows of the DD section. One of them, Rodney Okai, let Complainant's wife use one of his tickets so that Complainant and his family could sit together. Thereafter, Complainant, his wife and daughter usually sat somewhere in the first two rows of the DD section whenever they attended games. (Tr. at 284, 313-314, 323-324, 350-351; Exs. 5, 26; Ex. 39 at 38-41, 46-47, 64-66)

16. Complainant was very vocal during basketball games. He yelled supportive comments about the team such as "Good play!" or "Play strong!". Complainant also yelled critical comments about the referees such as, "You blew this call!", "Ref, catch the next one!" and "You're really doing a stinking job!". Complainant, however, did not curse, swear or use profanity because it was against his religion and because he was with his family. Complainant constantly yelled out these comments to get his opinions "off [his] chest" during the game. He considered such comments to be "just saying basketball talk" and did not expect anyone to hear or listen to them. Other spectators in section DD and throughout the arena also engaged in similar "basketball talk". Complainant was never asked by arena personnel or other spectators to quiet down or to refrain from making such comments. (Tr. at 122-128, 156, 255, 294-300, 302-304, 307, 351-354, 365; Ex. 15 at 18-19, 24-25; Ex 17 at 32-33; Ex. 39 at 68-71, 74-79)

17. On Saturday, February 18, 1995 Complainant and his family attended the basketball game against Utah. They sat in the front row of section DD. Respondent Wallace was present at the game as

a student manager. He sat or stood at the end of the team bench and was approximately 8 feet away from Complainant. (Tr. at 65-67, 120-121, 242; Exs. 7, 9, 26, 33; Ex. 12 at 42; Ex. 39 at 38-39)

18. The game was very close and exciting. During the first half of the game, Complainant yelled comments about the referees and opposing players. During the second half of the game, UH was trailing and Complainant felt that certain seniors should be put into the game. He felt that the UH coaches failed to "play the bench" the entire season, and that UH would lose this game because of the same mistake. Complainant became unusually frustrated and began to yell comments about the coaching staff such as, "You're a dinosaur coach!" "You're blowing it!" "You don't know what you're doing!" "Stupid move!" "Play your bench!" "Put Woody [Woodrow Moore] in!" "You gotta use Woody, Woody can do it!" "You can't coach talented players!" "Play your best players!" (Tr. at 75-76, 125, 285, 303-304, 307-308, 344-346, 362-363; Ex. 11; Ex. 12 at 45-49; Ex. 21 at 10-13; Ex. 39 at 71-78)

19. Respondent Wallace became very irritated by Complainant's comments about the coaching staff. The team was having a losing season and there had been several recent newspaper articles critical of Riley Wallace. The entire Wallace family was under stress. Respondent Wallace felt that Complainant's comments were additional attacks on his father. At one point, Respondent Wallace expressed his irritation to Rich Sheriff, the arena manager and a personal friend. Sheriff agreed that Complainant's remarks were

irritating, but felt they were not offensive and did not ask Complainant to quiet down. (Tr. at 70, 75-76, 81. 98; Ex. 12 at 45-49, 52, 60-61, 72-73; Ex. 21 at 11-13)

20. Some time during the final two minutes of the game, Complainant yelled something like, "You should pack your bags and go already!" Upon hearing this, Respondent Wallace exploded. He felt Complainant's comment was very hurtful to him and his family. Without thinking, Respondent Wallace turned towards Complainant and shouted, "Shut up you fucking nigger! I'm tired of hearing your shit! Shut your mouth or I'll kick your ass!". (Tr. at 70-72, 75-76, 84, 97, 132-133, 222-224, 309-310, 347-348, 367-371; Ex. 12 at 52-54, 60-62; Ex. 25; Ex. 39 at 82-85; Ex. 41 at 15-16)

21. Respondent Wallace knew that the word "nigger" was a racist and derogatory term for Black people. Respondent Wallace was taught to respect people of all races and did not believe that African Americans were "niggers" or inferior. He also believed that insulting a person's race was a very ugly and terrible thing to do. Respondent Wallace used the term "nigger" towards Complainant because it was the ugliest thing he could say to hurt Complainant at the time. He would not have used the term if Complainant had not been African American. Respondent Wallace also expected Complainant to be angered by his use of the word "nigger". (Tr. at 72-74, 76, 100, 106-107; Ex. 12 at 49, 62-64, 70-71)

22. Complainant was angry. He was also shocked, hurt and embarrassed. During his childhood, Complainant was taught that the

word "nigger" was the most hateful, derogatory, horrible thing that could be said to an African American. Complainant turned to Respondent Wallace and said, "Oh yeah, punk, come over and try it [kick my ass]! You see me all the time, what's the problem?" (Tr. at 133-134, 208-209, 368-371, 377; Ex. 39 at 82-86, 108)

23. Respondent Wallace moved within a few feet of Complainant and shouted, "Just shut up, nigger or I'll kick your ass!". Complainant responded, "Oh yeah, you and who else?" Adam Primas, the assistant arena manager, intervened. Primas put his hand on Respondent Wallace's arm and said, "Rob, cool it! It's not worth it!" and began to nudge Respondent Wallace into the tunnel. Respondent Wallace burst into tears and ran through the tunnel to the locker room. Primas followed. (Tr. at 74-75, 80, 84-85, 222, 306, 309-310, 347-348; Ex. 12 at 56-58, 73; Ex. 25; Ex. 39 at 82-86)

24. Arguing with spectators, threatening spectators or using the words "nigger" or "fucking nigger", even if provoked by a spectator, are prohibited behaviors and constitute minor violations of the UH Student-Athlete Code of Conduct. A head coach may take disciplinary action, such as temporary suspension from the team, for such violations. Criminal activity, physically violent behavior, drug distribution or drug possession are considered to be major violations of the code. A head coach must immediately suspend a student-athlete for such behavior and refer the matter to the Department Director for further disciplinary action. An athletic scholarship may be revoked only for academic

ineligibility, quitting a team or major misconduct. (Tr. at 280-282; 339-340; Ex. 17 at 48; Ex. 27 at 11-13)

25. After Respondent Wallace exited the floor, Complainant turned to the boosters and security personnel around him and shouted, "Did you hear what he called me? Did you hear that?" Complainant did not understand why someone he barely knew would lash out at him in that manner. He was upset, dazed and embarrassed. (Tr. at 160, 347, 372-373; Ex. 39 at 86, 88)

26. Riley Wallace did not hear Complainant's comments or the exchange with Respondent Wallace. About 30 seconds later, a coaching assistant informed him that Complainant and his son were arguing. Riley Wallace walked down the floor to Complainant, stood with his back towards Complainant and discreetly said, "Eric, could you please take it easy on my son?" Complainant then realized that Respondent Wallace was Riley Wallace's son. He replied, "Coach, when your son uses the "N" word, he's no longer your son. I'm going to break his punk ass." Riley Wallace then walked back to the team bench. (Tr. at 129; 135-136, 224, 289-290, 348, 376; Ex. 14 at 26-27; Ex. 39 at 86)

27. About a minute later, the game was over. Someone notified Sheriff of the incident. Sheriff went to Complainant and demanded, "What the hell were you doing?" Complainant informed Sheriff and a security guard that Respondent Wallace called him "nigger" and that he wanted to make a complaint. Sheriff stated that he couldn't do anything about the matter. The security guard denied hearing the word "nigger". Complainant became more upset

and stated, "What do you mean you didn't hear it?" Riley Wallace then approached the tunnel entrance. Complainant called out something like, "Hey coach!" Riley Wallace, turned, looked at Complainant and then proceeded into the tunnel. Complainant continued to argue with Sheriff about whether Respondent Wallace used the word "nigger", and whether Sheriff would accept his complaint. Sheriff instructed Complainant to file a complaint with the Honolulu Police Department (HPD). At this point, Okai and his wife observed that Sheriff and Complainant were losing their tempers and feared that Sheriff might have Complainant arrested. The Okai's told Sheriff and the security guard to leave and let them handle the situation. The Okai's then calmed Complainant down. (Tr. at 135-136, 158-160, 238, 243-244, 290-291, 320-323; Ex. 36; Ex. 39 at 86-89)

28. Sheriff left the floor and informed Yoshida of the incident. Sheriff and Yoshida then spoke to John Reznick, a spectator who was sitting near Complainant during the incident. Reznick denied hearing Respondent Wallace use the word "nigger". (Tr. at 244-245, 372; Ex. 17 at 34-35; Ex. 21 at 30-31; Ex. 22)

29. Yoshida went into the locker room and asked Respondent Wallace if he had called Complainant a "nigger". Respondent Wallace admitted that he had. Riley Wallace went into the locker room and asked Respondent Wallace what happened. Respondent Wallace informed him of the incident and apologized for his actions. (Tr. at 85-86, 338; Ex. 12 at 75-76)

30. Complainant and his family left the arena and went into the parking lot. Complainant called the HPD on his cellular phone. A few minutes later, a police officer arrived. Complainant sent his wife and daughter home by taxi. He then reported the incident to the officer. (Tr. at 135-137; Ex. 39 at 89-90)

31. Artie Wilson, an African American broadcaster was informed of the incident and heard that Complainant was filing a complaint with the police. Wilson was not an employee or agent of Respondent UH. Wilson went to the parking lot and told Complainant that he would try to arrange a meeting to "patch things up". Wilson then returned to the arena and asked Yoshida and Riley Wallace to meet with Complainant. (Tr. at 137-139, 438; Ex. 14 at 28; Ex. 17 at 35-37; Ex. 39 at 90-91)

32. A few minutes later, Yoshida went to the parking lot to discuss the incident with Complainant. Yoshida stated that he felt Respondent Wallace's use of the word "nigger" was a "reaction . . . . in terms of a father-son relationship". Riley Wallace then went to the parking lot and told Complainant that he wanted to "settle this thing" and "talk it over as men". Complainant followed Riley Wallace and Yoshida to Sheriff's office in the arena. Respondent Wallace and his mother were already in the office. Riley Wallace waived off Yoshida and shut the door. (Tr. at 138; Ex. 12 at 74; Ex. 14 at 28-29; Ex. 17 at 36-39; Ex. 39 at 91-92)

33. Complainant sat with Riley Wallace, Mrs. Wallace and Respondent Wallace, who was bent over with his head buried in his

hands. Complainant asked Respondent Wallace, "Why did you say that? That was a very, very bad thing to do." Respondent Wallace was crying and shook his head. Riley Wallace said something like, "Rob was wrong. We're not going to rehash this, he did it because he loves his father. We're going to let this go, okay?" Riley Wallace then said, "You have a child, if someone starts screaming and yelling at you, what if your daughter was upset with that and she fought back on your behalf? That's what Rob did, he obviously loves me and he was defending me even though he did wrong". Respondent Wallace then softly explained to Complainant that he "lost it" after hearing Complainant's comments and said he was sorry. Complainant felt uncomfortable and intimidated being alone with the Wallaces. Complainant stated that he understood what happened, that he had "kind of lost it too" when he yelled comments about the coaches, but that he didn't like the word "nigger" and didn't want to hear it again. Complainant shook hands with Respondent Wallace, hugged him, then shook hands with Riley and Mrs. Wallace and left. (Tr. at 87-88, 138-139, 141, 164-167, 204; Ex. 12 at 74-76; Ex. 14 at 29-30; Ex. 39 at 88-89, 91-93)

34. Yoshida and his wife then drove Complainant home. Complainant informed the Yoshidas that Respondent Wallace had apologized, that he [Complainant] understood what had happened and was partly at fault. Yoshida thought the matter had been resolved and decided not to investigate further or impose any discipline on Respondent Wallace. At home, Complainant was still shocked and dazed by the incident. He stayed up late thinking about what

occurred and had a difficult time sleeping that night. (Tr. at 140-142, 227, 326-327; Ex. 17 at 39-43)

35. Later that evening, an HPD officer informed Primas that Complainant wanted to press charges against the University but that HPD determined the incident to be a civil "University matter". Primas told the officer that he [Primas] could no longer assist Complainant because Complainant had already left the arena. Sheriff, who normally writes reports on such incidents, did not make such a report because he thought the matter was personal and had been resolved by the parties. (Ex. 21 at 32; Ex. 25)

36. The next day at practice, Riley Wallace informed the basketball team that Respondent Wallace had used a racial slur towards a booster and that he [Respondent Wallace] wanted to apologize to the team for the incident. Riley Wallace then encouraged the team to put the incident behind them and to focus on the upcoming road trip. Respondent Wallace was not at the meeting and did not attend practice that day. He packed the team's travel bags for the road trip but did not accompany the team because it was the other student manager's turn to travel. (Tr. at 108, 328-329, 403-407; Ex. 41 at 19-24)

37. On or about Sunday, February 19, 1995 Complainant was questioned at work about the incident by several co-workers who had either observed the incident at the game, heard about the incident on the radio, or saw television footage of Complainant arguing with Sheriff and calling out to Riley Wallace. On or about that evening, an African American member of the team called Complainant.

He stated that some African American players were upset by Respondent Wallace's use of the word "nigger" and were unhappy that Respondent Wallace had not been disciplined, especially since an African American player had subsequently been suspended for swearing at a coach. He also informed Complainant that the coaches directed the players not to talk to him [Complainant] any more. (Tr. at 142-143, 154-156; Ex. 39 at 79, 93-94, 98-101)

38. Complainant became more upset and embarrassed about the incident and Respondent UH's handling of the matter. He felt that additional remedies, besides the private apology from Respondent Wallace, were warranted. Specifically, Complainant wanted: a) Respondent Wallace and Respondent UH to publicly apologize to him; b) Riley Wallace to immediately suspend Respondent Wallace; c) Riley Wallace and Respondent UH to conduct a formal and thorough investigation of the incident; and d) Riley Wallace to hold a team meeting and inform the team that he would not tolerate the use of racial epithets by or against team members. (Tr. at 143-144, 151, 205, 212; Ex. 17 at 43; Ex. 39 at 95-97, 101-102, 112-113)

39. On Tuesday, February 21, 1995 Complainant met with Riley Wallace at the airport while the team was leaving for the road trip. Complainant told Riley Wallace that he felt his civil rights were violated and that it wasn't fair for Riley Wallace "to do nothing". Complainant then asked Riley Wallace if he would suspend his son "to make him an example for the African Americans on the team". Riley Wallace stated that he considered the matter "closed" and would not take any further action because he felt his son had

"suffered enough". Riley Wallace then told Complainant to "go hire a lawyer and do what you have to do to feel good about this". (Tr. at 144, 148-149; Ex. 1; Ex. 39 at 94-95, 101-102)

40. Complainant felt slighted by Riley Wallace's attitude and comments. Complainant and his family then went to UH and asked Yoshida to take action against Respondent Wallace. Yoshida told Complainant that he thought the matter had been resolved, that no disciplinary action had been taken against Respondent Wallace but that he would discuss the matter with Riley Wallace. That evening Yoshida called Riley Wallace and they agreed to immediately suspend Respondent Wallace. On or about that day, Yoshida also asked Primas and Sheriff to submit written reports on the incident. (Tr. at 145, 149-150, 326-328; Ex. 17 at 42-43; 49-51; Exs. 22, 23, 25, 38; Ex. 39 at 102)

41. On Thursday, February 23, 1995 Yoshida met with Respondent Wallace, discussed the incident with him and informed him that he was suspended. Yoshida then called Complainant and said, "Your civil rights have been violated . . . if it's any consolation, Rob Wallace had been suspended." On Friday, February 24, 1995, Yoshida met with the Department's Athletic Advisory Board, who recommended that Respondent Wallace be terminated as a student manager. Yoshida then terminated Respondent Wallace as student manager for the remainder of the 1994-95 season. Respondent Wallace, however, retained his athletic scholarship for this school year. (Tr. at 89-90, 92-93, 145, 327-332; Ex. 12 at 77-80; Ex. 17 at 46-53; Ex. 23; Ex. 39 at 95)

42. At a team meeting held some time after the road trip, Riley Wallace announced that Respondent Wallace had been terminated. He asked two African American seniors how they felt about the incident and whether they wanted Respondent Wallace to be terminated. The two players expressed strong disapproval of Respondent Wallace's use of the word "nigger" but stated that they knew Respondent Wallace was not racist and they would support his return to the team. (Tr. at 407-409; Ex. 14 at 33-34; Ex. 15 at 27-28, 30)

43. About a week after the incident, Primas met with the arena staff, briefly discussed the incident and instructed the staff to "treat everybody with respect" and to remain calm and professional in such situations. To date, however, Respondent UH has not held any training sessions with its coaches, student athletes or arena staff about state or federal public accommodation laws or procedures for handling discrimination complaints. (Tr. at 262-265, 332-334, 407, 422-423; Ex. 17 at 55-58; Ex. 21 at 27-28)

44. Prior to this incident, no one had ever insulted Complainant by calling him "nigger" to his face. Since moving to Hawaii, Complainant has tried to hold himself out as a positive example of this state's small African American community. He is a very proud, self-made and self-reliant person. He has worked up to three jobs at a time to support himself and his family. He is respectful towards people of all races. (Tr. 163; Ex. 39 at 84, 86, 103-105)

45. After being called a "nigger", Complainant felt very angry, hurt, embarrassed, humiliated, sad and "sick inside". He felt bad about having to explain to his wife (who is from Japan) and daughter what the word "nigger" meant. He was also angry that UH personnel disputed his version of the incident and would not take his complaint or his civil rights seriously. He felt that Respondent UH treated him like a "little person" and did not appreciate his many contributions as a booster and long time supporter of the team. Since the incident, Complainant and his family have not attended UH men's basketball practices, games or booster events. Complainant continues to feel sad, hurt and withdrawn because he has not received a public apology from Respondents and because he is no longer involved with the basketball program. (Tr. at 133-134, 151, 156, 158-159, 220, 226- 227; Ex. 39 at 86, 102-106, 112-113)

46. After the incident, Respondent Wallace felt uncomfortable, ashamed and embarrassed when he was among his African American teammates and other African American students on campus. He decided he could no longer live in Hawaii because he felt his presence would create controversy for his father and the team. He transferred to a mainland school and currently lives and works in Las Vegas. (Tr. at 14, 16, 91-92, 101-102; Ex. 12 at 12-14, 80-81; Ex. 14 at 39-40; Ex. 17 at 47)

III. CONCLUSIONS OF LAW[3]

A. Jurisdiction

1. Respondent UH

Respondent UH, as the owner and operator of the Special Events Arena, admits that it is a place of public accommodation. It is therefore subject to the provisions of H.R.S. Chapter 489[4].

2. Respondent Wallace

Pursuant to H.R.S. § 489-3, this Commission has jurisdiction over Respondent Wallace only if he is an owner, operator, employee or agent of a public accommodation. See, House SCR No. 233-86, 1986 House Journal at 1086-1087 (H.R.S. Chapter 489 enacted to create state law similar to Title II of the Civil Rights Act of 1964) and Senate Report No. 872, 1964 USCCAN Vol 2 at 2359 (§ 201 of Title II applies to owners, operators or employees of public establishments); see also, Hearings Examiner's Order Denying Executive Director's Motion For Partial Summary Judgment filed on September 15, 1997. The Executive Director argues that Respondent Wallace was an employee and/or agent of Respondent UH. Respondents argue that he was neither.

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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.

[4] Respondent UH argues that this Commission does not have jurisdiction over it because: 1) as the State of Hawaii, it has not waived its sovereign immunity to be sued for monetary damages or to be sued for the unauthorized acts of its employees or agents under H.R.S. Chapter 489; and 2) even if it waived its sovereign immunity, jurisdiction is exclusively with the circuit courts. See, Respondent UH's Motion To Dismiss Complaint For Lack Of Subject Matter Jurisdiction filed on September 3, 1997. However, for the reasons stated in my September 15, 1997 order denying this motion, I disagree.

a. Whether Respondent Wallace was an employee

In the case of In Re Santiago / Iolani Swim Club, DR No. 92-007 (March 5, 1993), this Commission adopted the traditional economic realities test to determine whether a person is an employee under H.R.S. Chapter 378. I conclude that portions of this test are relevant in determining employee status under H.R.S. Chapter 489, particularly the following factors:

a) the degree of control the employer has over the means and manner of the worker's performance;

b) whether the parties believe they are creating the relationship of employer and employee;

c) whether the worker receives compensation in the form of salary or wages;

d) the manner in which the work relationship is terminated;

e) whether benefits, such as annual leave, retirement, health insurance, etc. are afforded;

f) whether the employer withholds taxes.

The Executive Director argues that Respondent Wallace was an employee of Respondent UH because: 1) he was under the control and supervision of Respondent UH's coaches; 2) his duties involved the use of Respondent UH's equipment and facilities; 3) his duties were part of Respondent UH's regular business of intercollegiate athletics; 4) he received compensation in the form of a full athletic scholarship; and 5) he could receive some health care from the Department's training room.

However, the weight of the evidence shows that Respondent Wallace was a student-athlete on full scholarship, not an employee of Respondent UH. The contracts between Respondent Wallace and

Respondent UH are titled "Athletic Agreement" and make no mention of an employment relationship or payment of wages or salary. (Exs. 32, 32-A, 32-B) Instead, the contracts grant "financial aid" to a "student-athlete". Respondent UH kept monies for such financial aid in a separate account from its payroll monies, and administered such monies through the Department, not its personnel office. The record also shows that Respondent Wallace was subject to policies contained in the Student-Athlete Handbook, not an employee personnel manual. The Handbook makes numerous references to being a "student", an "athlete", a "student-athlete" and a participant in intercollegiate athletics competition. It makes no reference to being an "employee". (Ex. 27) Both Respondents considered Respondent Wallace to be a student athlete, not an employee. (Tr. at 96, 113) Respondent Wallace did not receive any annual leave, workers' compensation or medical insurance benefits. Finally, Respondent UH did not assign Respondent Wallace an employee identification number and did not withhold taxes for him.

For these reasons, I conclude that Respondent Wallace was not an employee of Respondent UH.

b. Whether Respondent Wallace was an agent

An agency relationship is established when a principal delegates authority to an agent to do certain acts on the principal's behalf. Cho Mark Oriental Food v. K & K International, 73 Haw. 509, 515 (1992) (emphasis added). To establish an agency relationship in the present case, the Executive Director must show that Respondent UH delegated Respondent Wallace the authority to

deal with the public and/or spectators at basketball games on its behalf. See, Hearings Examiner's Order Denying Executive Director's Motion For Partial Summary Judgment filed on September 15, 1997.

Such delegation of authority may be actual or apparent. Actual authority may be created by: a) express agreement (oral or written agreement between the parties); or b) the implied conduct of the parties (whether the agent reasonably believes, because of the conduct of the principal, that the principal desired him so to act). Id. at 515-516. Apparent authority arises when the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had such authority. Id. at 516-517.

Respondents argue that Respondent Wallace was not an agent of Respondent UH because he did not have the authority to take tickets, seat, or monitor spectators at basketball games.[5] They contend that Respondent Wallace was present at the February 18, 1995 basketball game merely as a student athlete and/or the son of Riley Wallace. The Executive Director argues that Respondent Wallace was an agent because he was a member of the basketball team who was required to be at practices, games and fund-raisers, was considered to be a representative of Respondent UH at these events, and was authorized to provide entertainment to and interact with the public at these events. I agree.

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[5] The record shows that the arena staff, student ushers and security personnel were responsible for these duties. (Tr. at 238, 246; Ex. 21 at 26)

The record shows that Respondent UH considered student managers to be members of the basketball team. Respondent UH required all team members, including Respondent Wallace, to attend practices, games and fund-raisers.

Respondent UH expressly authorized basketball team members to be its representatives at these practices, games and fund-raisers. The Student-Athlete Handbook states: "[w]hen you participate in intercollegiate athletic competition, you are representing the University of Hawaii . . . By joining the UHM's intercollegiate athletic program, you have become a representative not only of your team, but of your University . . . As long as you are a student-athlete, you are representing the University . . ." (Ex. 27 at 7-8) Respondent Wallace confirmed that he understood himself to be a representative of Respondent UH when he was a student manager at practices, games and fund-raisers. (Tr. at 68-69)

The record also shows that although Respondent Wallace was not responsible for taking tickets, seating or monitoring spectators, he was authorized to provide entertainment to and interact with the public at practices, games and fund-raisers. Yoshida and Riley Wallace testified that a central purpose of the men's basketball team is to provide entertainment to the community. (Ex. 14 at 7; Ex. 17 at 7-8) Respondent Wallace testified that team practices were open to the public, that he and other team members were allowed to talk to spectators and were expected treat them courteously. (Tr. at 33-34, 58) Respondent Wallace also testified that he was required to participate in two annual fund-

raisers and was expected to socialize and mingle with the public who attended. (Tr. at 25-27) Finally, Respondent Wallace acknowledged that he was required to interact with spectators at basketball games in a positive manner, pursuant to the guidelines in the Handbook. (Tr. at 109-110) Accordingly, the Handbook states:

> . . . Remember that as a UHM student-athlete your actions and conduct in everything you do reflect upon the University and the Athletic Program . . .
> . . .
> The Department of Intercollegiate Athletics requires coaches, trainers, and staff to conduct themselves in a way which creates a positive image of the people, values and traditions associated with the University, the WAC and the NCAA. As a student-athlete, you are expected to uphold the same standards of conduct that have been adopted by the Department and the University.

(Ex. 27 at 7-8) The Handbook also prohibits student-athletes from: a) using obscene/inappropriate language or gestures towards spectators; b) physically abusing spectators; c) throwing objects at spectators; d) encouraging spectators to "boo"; or e) making public statements that are negative or controversial. (Ex. 27 at 4-5)

For these reasons, I conclude that Respondent UH delegated Respondent Wallace, as a member of the basketball team, the authority to provide entertainment to and interact with the public on its behalf at basketball practices, games and fund-raisers. During the February 18, 1995 basketball game, Respondent Wallace was an agent of Respondent UH, providing entertainment to Complainant, a spectator. He is 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 . . . " The statute prohibits single isolated instances of discriminatory conduct by a public accommodation or its owners, operators, employees or agents.[6] In Re Smith / MTL et. al., Docket No. 92-003-PA-R-S (November 9, 1993).

A violation of H.R.S. § 489-3 is established if the Executive Director shows, by a preponderance of the evidence, that an owner, operator, employee or agent of a public accommodation made a racial insult to a customer or about a customer in the course of serving that customer. Id.; King v. Greyhound Lines, Inc., 656 P.2d 349, 351 (Or. App. 1982). Any customer who must suffer racial insults 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.[7] Smith, supra; King, supra. This interpretation of H.R.S.

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[6] Therefore, contrary to Respondent UH's argument, the Executive Director is not required to show that Respondent Wallace's conduct created a severe or pervasive discriminatory environment.

[7] Respondents argue that this interpretation and application of H.R.S. Chapter 489 violates Respondent Wallace's First Amendment free speech rights. As stated in my September 15, 1997 order denying Respondent UH's Motion To Dismiss Complaint, this Commission and its Hearings Examiner cannot rule on the constitutionality of its statutes as written or applied. HOH Corp. v. Motor Vehicle Industry Licensing Bd., 69 Haw. 135, 141-143 (1987); H.R.S. § 91-14(g)(1); 4 Davis Administrative Law Treatise, § 26.6 (1983). Such authority is

§ 489-3 recognizes that

> . . . the chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity.

King, supra at 352.

In the present case, the Executive Director has shown by a preponderance of the evidence that Respondent Wallace insulted Complainant's race by using the slur "nigger" towards Complainant twice during the February 18, 1995 basketball game. Respondent Wallace contends that his use of the word "nigger" was not racially

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vested in the circuit courts of this state. HOH, supra; H.R.S. § 91-14(g)(1).

The U.S. Supreme Court has held that "fighting words", which by their very utterance inflict injury or tend to incite an immediate breach of the peace, are not protected by the First Amendment because they are not an essential part of any exposition of ideas, and are of slight social value clearly outweighed by interests in order and morality. Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L.Ed. 1031, 1035, 62 S.Ct. 766 (1941). In addition, the Court has held that a government employee's work place speech which does not relate to any matter of political, social or other community concern is not protected by the First Amendment. Connick v. Myers, 461 U.S. 138, 75 L.Ed.2d 708, 719-720, 103 S.Ct. 1684 (1983); see also, Black v. City of Auburn, 857 F. Supp. 1540, 1548-1549 (M.D. Ala. 1994) (police supervisor's derogatory name calling, i.e., use of the words "bitch", "whore" and "hen" when referring to women, was not a matter of public concern and was not protected speech). The Supreme Court has also indicated that a public employee's speech which impedes the proper performance of that employee's daily duties or interferes with the operation of government services may not be protected speech. Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed.2d 811, 819-820, 88 S.Ct. 1731 (1968). Finally, the Court has stated that because Title VII is directed at conduct, not speech, the use of sexually derogatory "fighting words" in a work setting can violate Title VII without running afoul of the First Amendment because such words are incidental to prohibited conduct. R.A.V. v. St. Paul, 505 U.S. 377, 120 L.Ed.2d 305, 322, 112 S.Ct. 2539 (1992).

In the present case, Respondent Wallace's use of the epithet "nigger", uttered to "hurt" Complainant and in the context of threats to "kick [Complainant's] ass", constitute "fighting words". Respondent Wallace's conduct was also derogatory name calling unprotected by the First Amendment and/or speech incidental to proscribed conduct. Finally, Respondent Wallace's use of the word "nigger" impeded his duty to provide Complainant entertainment in a positive manner and interfered with Respondent UH's mandate to extend its privileges to all persons without regard to race. See, H.R.S. § 304-1.

motivated because he is not biased against African Americans. However, Respondent Wallace knew that the word "nigger" was a racially derogatory term and would not have used the word if Complainant had not been African American. Furthermore, Respondent Wallace admitted he used the term because it was the "ugliest thing [he] could say" to "hurt" Complainant. Respondents also contend that Respondent Wallace's use of the epithet was provoked by Complainant's abusive comments about Riley Wallace. However, Sheriff testified that Complainant's comments were not so offensive as to merit any warning. (Ex. 21 at 11-13). In addition, both Respondent Wallace and Yoshida admitted that even if provoked, student athletes were prohibited from using racial slurs when speaking to spectators. (Tr. at 74, 339; Ex. 17 at 48) Thus, even if Respondent Wallace is not biased against African Americans, or even if he was defending his father, he nevertheless deliberately insulted Complainant's race and committed a discriminatory act. His conduct therefore violated § 489-3.

C. Liability

1. Respondent UH

The doctrine of respondeat superior is applicable to cases involving discriminatory acts committed by employees or agents of a public accommodation against their customers.[8] In Re

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[8] Respondent UH argues that pursuant to Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978) a government entity cannot be held liable under the doctrine of respondeat superior. However as stated in my September 15, 1997 order denying Respondent UH's Motion To Dismiss, Monell involved a civil rights action brought under 42 U.S.C. § 1983, which explicitly requires "state action". In contrast, the

Smith, supra, (bus company liable under H.R.S. Chapter 489 for acts of its bus driver); 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 club 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); King, supra, at 352 (bus company liable for actions of its ticket agent). Respondent UH is therefore liable for the discriminatory acts of its agents, regardless of whether the acts were unauthorized or prohibited. Because Respondent Wallace was an agent of Respondent UH when he committed the above violation, Respondent UH is liable for his conduct.[9]

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present case is brought pursuant to H.R.S. Chapters 368 and 489, which do not contain such requirement.

[9] Alternatively, if this Commission finds and concludes that Respondent Wallace was not an employee or agent of Respondent UH, Respondent UH can be liable for his discriminatory conduct as a third party if it knew or should have known of such conduct, had sufficient control over him, and failed to take immediate and appropriate corrective action. See, Neldaughter v. Dickeyville Athletic Club, ERD Case No. 9132522 State of Wisconsin Labor and Industry Review Commission (May 24, 1994, reprinted in attached Appendix B) (public accommodation may be liable for discriminatory act of third party patron if it has sufficient degree of control over patron).

Corrective action is immediate and appropriate if it: 1) involves a prompt and thorough investigation of the allegations; 2) ends the discriminatory conduct; and 3) deters future discriminatory conduct by the same offender or others. If no corrective action is taken, or if the corrective action attempted is inappropriate, liability will attach. Tseu/Collins v. Cederquist, Inc., Docket No. 95-001-E-R-S (June 28, 1996).

In the present case, Respondent UH knew of Respondent Wallace's discriminatory conduct moments after it occurred. During the game, Complainant told Riley Wallace that his son had used the "N" word. Right after the game, Complainant told Sheriff that Respondent Wallace called him "nigger" and Sheriff informed Yoshida about the incident. Respondent UH also had sufficient control over Respondent Wallace. Its coaches had the authority to supervise and discipline him.

The evidence also shows that although Primas quickly intervened and Yoshida

2. Respondent Wallace

The statutory language and legislative history of H.R.S. Chapter 489 are silent as to whether a manager, employee or agent of a place of public accommodation may be individually liable for violating H.R.S. § 489-3. However, other provisions within Chapter 489 indicate that individuals as well as public accommodations may be liable for prohibited discriminatory practices. H.R.S. § 489-5 prohibits two or more persons from conspiring to aid, abet, incite or coerce a person to engage in a discriminatory practice or to wilfully obstruct or prevent a person from complying with the chapter. H.R.S. § 489-7.5 allows a complainant to sue such persons for damages sustained. H.R.S. § 489-8 allows this Commission to assess civil penalties against individuals who violate Chapter 489 and states that such penalties shall be **cumulative** to other remedies available.

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ultimately terminated Respondent Wallace as student manager, Respondent UH did not properly and thoroughly investigate Complainant's complaint and did not take adequate steps to deter future discriminatory conduct. Sheriff initially responded to the matter by asking Complainant, "What the hell were you doing?". Sheriff and the arena security staff refused to allow Complainant to make a complaint and even argued with Complainant about whether the word "nigger" was used. The post-game meeting between Complainant and the Wallaces was initiated by Artie Wilson, who was not a UH employee or agent. Riley Wallace treated his son's conduct as personal matter - a son "defending his father", and at first refused to take any disciplinary action. Yoshida also felt the incident was a personal "reaction . . . in terms of a father-son relationship". He did not attend the meeting between Complainant and the Wallaces and did not fully investigate the incident or discipline Respondent Wallace until Complainant requested it. While Complainant's statements after the meeting with the Wallaces may have led Yoshida to believe the matter had been resolved, Respondent UH was still required to fully investigate the incident and insure that it would not recur. To date, Respondent UH has not met with its arena staff or athletic team members to express strong disapproval of such conduct and inform them of any sanctions for such behavior.

For these reasons, I alternatively conclude that Respondent UH is liable under H.R.S. § 489-3 because it failed to take immediate, appropriate corrective action.

In addition, other state public accommodation statutes which provide for damages allow complainants to seek such relief against individual employees or agents. See, Vermont Statutes Annotated, Title 9 §§ 4502, 4506; Oregon Revised Statutes §§ 30.670, 30.680.

For these reasons, I conclude that Respondent Wallace, as an agent of Respondent UH, is individually liable for violating H.R.S. § 489-3.

D. Remedies

The Executive Director requests that Respondents be ordered to pay Complainant $30,000 compensatory damages for emotional distress and be assessed a civil penalty of $10,000 each. The Executive Director also seeks various forms of equitable relief.

1. Compensatory Damages

Pursuant to H.R.S. §368-17, the Commission has the authority to award compensatory damages for any pain, suffering, embarrassment, humiliation, emotional distress, loss of enjoyment of life or other injury Complainant suffered as a result of Respondents' acts. The amount awarded as compensatory damages is generally based on a consideration of the extent to which Respondents' discriminatory conduct caused the harm and the extent to which other factors, if any, also caused the harm. It should also reflect the nature, severity and duration or expected duration of the harm. Restatement of Torts 2d § 905 (1979); Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. N 915.002 (July 14, 1992), EEOC

Compliance Manual § 603; Montalvo v. Lapez, 77 Haw. 282, 306 (1994).

In the present case, the record shows that Respondent Wallace's racial insults initially caused Complainant to feel extremely shocked, angry, hurt and embarrassed. Okai, Reznick and Sheriff observed that Complainant was extremely upset and angry after the incident. (Tr. at 290-291, 377; Ex. 21 at 16). Mrs. White confirmed that Complainant was upset and had difficulty sleeping that evening. (Tr. at 226-227) Complainant also testified that he felt very bad about having to explain the term to his wife and daughter and recounting the incident with his co-workers. For the next few days he continued to feel very hurt, sad, degraded as a human being and "sick inside". Considering these circumstances, I determine that $10,000 is appropriate compensation for Complainant's emotional distress caused by Respondent Wallace's discriminatory conduct.

The record also shows that Respondent's UH's defensive response and failure to take immediate, appropriate, corrective action[10] exacerbated Complainant's distress. Sheriff reacted to the incident by demanding, "What the hell were you doing?" and insinuating that Complainant was at fault. Sheriff also insisted that he couldn't do anything about the matter, refused to allow Complainant file a complaint and even argued with Complainant about whether the word "nigger" had been used. Okai observed that such actions made Complainant more angry and upset. (Tr. at 290-291)

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[10] See, footnote 9, supra.

Riley Wallace treated his son's conduct as a personal matter, initially refused to discipline him, instructed team members not to talk to Complainant and told Complainant to "go hire a lawyer and do what you have to do". After the incident, Yoshida also told Complainant that he thought the incident was a personal "reaction . . . in terms of a father-son relationship", permitted the Wallaces to meet alone with Complainant and did not fully investigate the matter or take disciplinary action against Respondent Wallace until Complainant requested it. Finally, Respondent UH has yet to apologize to Complainant for the incident.

Complainant had been a very proud, self-made and self-reliant person who struggled to make a life for himself and his family in Hawaii and who tried to be a positive example of the African American community in Hawaii. Complainant and Mrs. White credibly testified that Respondent UH's actions caused him to feel more hurt, embarrassed, worthless and like a "little person" whose civil rights were unimportant. Considering these circumstances, I determine that $10,000 is appropriate compensation for Complainant's emotional distress caused by Respondent UH's conduct.

2. Civil Penalties

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 Wallace called Complainant a "nigger" in a fit of anger without thinking. Immediately after the incident he admitted his actions to Yoshida

and Riley Wallace. He also explained his actions and apologized to Complainant. He is sincerely sorry for the incident and is not likely to engage in such conduct again. For these reasons, I determine that a penalty of $500 is appropriate.

The record also shows that although Respondent UH did not take immediate, appropriate corrective action, it subsequently investigated the incident further and disciplined Respondent Wallace. After Complainant met with Yoshida on February 21, 1995, Yoshida interviewed Respondent Wallace and suspended him, received statements from Primas and Sheriff, met with the Athletic Advisory Board and terminated Respondent Wallace within the next few days. Considering these circumstances, I determine that a penalty of $1,000 is appropriate.

3. Equitable Relief

The Executive Director also seeks to have the Commission order:

a) both Respondents to issue a public apology to Complainant to be published at least once in the Sunday edition of the Honolulu Advertiser;

b) Respondent UH to adopt a comprehensive policy prohibiting unlawful discrimination in its public accommodations that includes procedures for reporting incidents of alleged discrimination and for investigating and correcting any discrimination found;

c) Respondent UH to conduct training on such policy for the Department's employees, agents and student athletes;

d) Respondent UH to post notice of such policy in conspicuous places in its public accommodations;

e) Respondent UH to publish the results of this contested case hearing to the print, radio and television media; and

f) Respondent UH to keep records of all complaints of discrimination regarding the use of its public accommodations.

Because of the public nature and media coverage of the incident[11] I recommend that the Commission order both Respondents to issue a public apology to Complainant, which is reviewed and approved by the Executive Director, is issued as a press release and is published at least once in the Sunday edition of the Honolulu Advertiser.

Although H.R.S. § 304-1 mandates that no persons shall be deprived of the privileges of the University because of race, color, religion, sex, national origin or disability, Respondent UH does not have a specific written anti-discrimination policy for its public accommodations. I therefore recommend that the Commission order Respondent UH to develop and implement a written policy prohibiting discrimination in its public accommodations that includes procedures for: a) accepting complaints of alleged discrimination; b) fully investigating complaints and correcting any discrimination found; and c) retaining records of all complaints for at least one year from the date such complaints are made.

The Commission should also order Respondent UH to post notices of such policy in conspicuous places in the Department's places of

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[11] The record shows that during the February 18, 1995 basketball game, the incident was reported on the radio and the television broadcast showed Complainant and Sheriff arguing as well as Complainant calling out to Riley Wallace after the game. (Ex. 36; Ex. 39 at 79) On February 20, 1995 the Honolulu Advertiser reported on the incident. (Ex. 34) In addition, the Hearings Examiner notes that KGMB News reported on the incident and this contested case hearing on or about September 22, 1997.

public accommodation and to conduct training on such policy with the Department's employees and student athletes.

The best way to publicize this decision to the public is to publish the attached Public Notice (Attachment 1) in the Honolulu Advertiser Sunday edition and one following weekday in a newspaper having a general circulation in Honolulu, Hawaii within 10 days of the Commission's final decision in this matter.

IV. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondents Wallace and UH violated H.R.S. § 489-3 by denying Complainant the full and equal enjoyment of a place of public accommodation.

For the violations found above I recommend that, pursuant to H.R.S. §§ 368-17 and 489-8, the Commission should order:

1. Respondents Wallace and UH to jointly and severally pay Complainant $10,000 as damages in compensation for the emotional injuries caused by Respondent Wallace's unlawful conduct.

2. Respondent UH to pay Complainant $10,000 as damages in compensation for the emotional injuries caused by its conduct.

3. Respondent Wallace to pay a civil penalty of $500 to the State of Hawaii General Fund.

4. Respondent UH to pay a civil penalty of $1,000 to the State of Hawaii General Fund.

5. Respondents Wallace and UH to jointly issue a public apology to Complainant, as stated above.

6. Respondent UH to adopt a policy prohibiting unlawful discrimination in its public accommodations, as stated above.

7. Respondent UH to conduct training on such policy for the Department's employees and student athletes.

8. Respondent UH to post notices of such policy in conspicuous places in the Department's places of public accommodation.

9. Respondents Wallace and UH to jointly publish the attached notice (Attachment 1), as stated above.

Dated: Honolulu, Hawaii, February 2, 1998.

HAWAII CIVIL RIGHTS COMMISSION

LIVIA WANG
Hearings Examiner

Copies sent to:

Cheryl Tipton, Esq. HCRC Enforcement Attorney
Russell A. Suzuki, Esq. Deputy Attorney General
for Respondent State of Hawaii
Jeffrey S. Portnoy, Esq. Attorney for Respondent Rob Wallace

APPENDIX A

On August 17, 1995 Complainant Eric C. White filed a complaint with this Commission alleging that Respondent State of Hawaii, University of Hawaii (hereinafter "UH") denied him the full and equal enjoyment of a place of public accommodation by not allowing him to sit in a non-booster area. He amended the complaint on February 12, 1996 to include Rob Wallace as a Respondent and to allege that Respondents denied him the full and equal enjoyment of a place of public accommodation when Respondent Wallace used a racial epithet towards him during a basketball game.

On February 20, 1997 the complaint was docketed for hearing and a Notice Of Docketing Of Complaint was issued.

The Executive Director filed its Scheduling Conference Statement on February 28, 1997. Respondent UH filed its Scheduling Conference Statement on March 7, 1997 and Respondent Wallace filed his Scheduling Conference Statement on March 11, 1997. A scheduling conference was held on March 12, 1997 and the Scheduling Conference Order was issued on March 13, 1997. On May 13, 1997 an Amended Scheduling Conference Order was issued.

On April 17, 1997 the Executive Director filed a motion to withdraw its stipulation that Respondent Wallace was not an employee of Respondent UH. On April 30, 1997 the Hearings Examiner granted the Executive Director's motion.

On July 30, 1997 the Executive Director filed a Motion for Partial Summary Judgment on the issues of: a) whether Respondent

Wallace was an employee of Respondent UH; b) whether Respondent Wallace, as an employee, violated H.R.S. § 489-3;
c) whether Respondent Wallace, as an employee, is individually liable for violating H.R.S. § 489-3; d) whether Respondent UH is liable for the discriminatory acts of Respondent Wallace as its employee; e) whether Respondent Wallace was an agent of Respondent UH; f) whether Respondent Wallace, as an agent, violated H.R.S. § 489-3; g) whether Respondent Wallace, as an agent, is individually liable for violating H.R.S. § 489-3; h) whether Respondent UH is liable for the discriminatory acts of Respondent Wallace as its agent; i) whether Respondent Wallace violated H.R.S. § 489-8 even if he was not an employee or agent of Respondent UH.

On August 14, 1997 Respondents filed memoranda in opposition to the motion for partial summary judgment. On August 22, 1997 the Executive Director filed a reply memorandum. A hearing on the motion was held on September 3, 1997 at the Hawaii Civil Rights Commission conference room. Participating were: Enforcement Attorney Cheryl Tipton, on behalf of the Executive Director; Deputy Attorney General Russell A. Suzuki, on behalf of Respondent UH; and Jeffrey S. Portnoy, Esq. on behalf of Respondent Wallace. On September 8, 2997 the Executive Director filed a supplemental memorandum. On September 11, 1997, Respondent Wallace filed a supplemental memorandum. On September 15, 1997 the Hearings Examiner issued an order denying the Motion for Partial Summary Judgment.

On September 3, 1997 Respondent UH filed a Motion to Dismiss Complaint on the grounds that: a) the State has not waived its sovereign immunity to be sued for monetary damages or to be sued for the unauthorized acts of its employees or agents under H.R.S. Chapter 489; b) even if the State waived its sovereign immunity, jurisdiction is exclusively with the circuit courts; c) Respondent Wallace is not an employee or agent of Respondent UH; and d) Respondent UH cannot be liable for an employee's exercise of his/her First Amendment Rights in a public forum. On September 10, 1997 the Executive Director filed memorandum in opposition to the motion. On September 11, 1997 Respondent UH filed a reply memorandum.

A hearing on the motion was held on September 12, 1997 at the Hawaii Civil Rights Commission conference room. Participating were: Deputy Attorney General Russell A. Suzuki, on behalf of Respondent UH; Enforcement Attorney Cheryl Tipton, on behalf of the Executive Director; and Sarah O. Wang, Esq. on behalf of Respondent Wallace. On September 15, 1997 Respondent UH and the Executive Director filed supplemental memoranda. On September 15, 1997 the Hearings Examiner issued an order denying the Motion to Dismiss Complaint.

On September 3 and 16, 1997 the parties stipulated to extend the discovery cut off date.

On September 16, 1997 the Executive Director filed a Motion for Stay of Hearing Pending Interlocutory Appeal of Hearings

Examiner's Order Denying the Executive Director's Motion for Partial Summary Judgment and a correction to that motion. On September 18, 1997 the Executive Director withdrew this motion.

On August 29, 1997 notices of hearing and pre-hearing conference were issued. On September 10, 1997 Respondent UH filed its pre-hearing conference statement. On September 15, 1997 the Executive Director and Respondent Wallace filed their pre-hearing conference statements. On September 17, 1997 a pre-hearing conference was held and on that date a pre-hearing conference order was issued.

Pursuant to H.R.S. Chapters 91 and 368, the contested case hearing on this matter was held on September 22, 23 and December 2, 1997 at the Hawaii Civil Rights Commission conference room, 830 Punchbowl Street, room 411, Honolulu, Hawaii before the undersigned Hearings Examiner. The Executive Director was represented by Enforcement Attorneys Cheryl Tipton and April L. Wilson-South. Complainant White was present during portions of the hearing. Respondent Wallace was represented by Jeffrey S. Portnoy, Esq. and Respondent Wallace was present during portions of the hearing. Respondent UH was represented by Deputy Attorney General Russell A. Suzuki.

On December 19, 1997 the parties filed post-hearing briefs.

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STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION

5/24/94

STACIE NELDAUGHTER
318 North Blackhawk Avenue
Madison, Wisconsin 53705
Complainant

vs.

DICKEYVILLE ATHLETIC CLUB
255 - 2nd Avenue
Dickeyville, Wisconsin 53808
Respondent A

DENNIS CASPER
255 - 2nd Avenue
Dickeyville, Wisconsin 53808
Respondent B

SHARON KAISER
144 South Main Street
Dickeyville, Wisconsin 53808
Respondent C

ORDER
MEMORANDUM OPINION

ERD Case #9132522
(formerly ERD #8900539)

An administrative law judge (ALJ) for the Equal Rights Division of the Department of Industry, Labor and Human Relations issued a decision in the above-captioned matter on June 26, 1992. Complainant filed a timely petition for review by the commission and the parties submitted written arguments.

Based upon a review of the record in its entirety, the Labor and Industry Review Commission issues the following:

ORDER

The decision of the administrative law judge (copy attached) is affirmed and shall stand as the FINAL ORDER herein.

Dated and mailed

May 24, 1994
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Pamela I. Anderson
Pamela I. Anderson, Chairman

Richard T. Kreul
Richard T. Kreul, Commissioner

James R. Meier
James R. Meier, Commissioner

APPENDIX "B"

MEMORANDUM OPINION

This case came before the commission in 1991 following a decision by an Administrative Law Judge that the complaint concerning Respondents' failure to stop harassment did not state a cause of action under the Wisconsin Fair Employment Act. The commission remanded for further hearing based on the following analysis:

> It is well established in the context of employment discrimination law that an employer may be liable for discriminatory harassment committed by its employes if this harassment creates a hostile environment and the employer, after being placed on notice of the problem, does not take effective steps to resolve it. [Citations omitted]. The liability which can be imposed on employers in such cases is premised on the fact that they have the power to control the conduct of the offending employes. Because it is the power to control that is significant, it has been recognized that under some circumstances an employer may be liable for harassment of its employes even by non-employes. [Citation omitted]. The EEOC has promulgated guidelines . . . which provide that an employer may be held responsible for acts of harassment of its employes by non-employes when the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. Under these regulations, the facts concerning the extent of the employer's control over the conduct of the non-employes are significant. An argument may be made by analogy, that an operator of a public place of accommodation or amusement may be held liable for the harassment of patrons by other patrons, where the harassment creates a hostile environment and has the effect of denying the full and fair enjoyment of the facilities, if the operator knew or should have known of the harassment yet fails to take steps to stop it. As in the case of harassment in employment situations, the facts concerning the extent of control over the harassing patrons would be significant. (emphasis added)

The commission thus made it clear that a critical question in this case, was the degree of control the respondents had over the persons engaging in the harassment. The commission continued by noting some of the types of control issues that would have to be addressed:

> It is unclear . . . whether the Dickeyville Athletic Club actually owned the field where the alleged

harassment occurred. There is a suggestion in correspondence in the file that it was in fact owned by a local church. This would, if true, be a complicating factor since it would raise questions about the club's authority to exclude persons from the premises. If the club is not the owner of the facilities, but uses them under some kind of permissive arrangement with the owner, the club's rights to control access to the premises must be clarified. Another area in which the record is unclear is that of the relationship between the club and the persons described in the complaint as "supervisors," as well as the umpires, who may or may not have been the same. Thus it may be the case that the club had agents present at the facility with the authority to keep order; alternatively, it could be that the club only provided staff for the concession stand and announcer's booth. It may be the case that the umpire had the authority to award defaults based on misconduct by team members, and thus was in a position to coerce persons on other teams into not engaging in harassment. However, it may also be the case that the club's relationship with the umpires was such that it had no right to dictate to them the application of the rules (such as designation of a forfeit) and that the club thus could not exercise this authority.

The commission now affirms the decision of the ALJ herein because, entirely apart from the matter of the degree of Respondents' knowledge of the harassment, the commission believes that it was not adequately demonstrated, that Respondents had sufficient power to control the behavior of the persons engaging in the harassment that they can be held legally responsible for it.

Complainant invokes the doctrine of respondeat superior in an effort to charge Respondents with responsibility for inaction by umpires. However, it is clear that the relationship between the Respondents and the umpires did not involve any significant degree of control of the latter by the former. They were simply paid a certain amount per game to act as umpires in enforcing the rules of softball. The relationship of umpire to Respondents was in the nature of independent contract rather than employment.

Although Complainant acknowledges the general rule that the doctrine of respondeat superior does not apply to the relationship of principal and independent contractor, she asserts that the situation here is within an exception under which principals may be held liable for failing to properly supervise a contract, citing U.S. Fidelity & Guaranty Corp. v. Frantl Enterprises, 72 Wis. 2d 478, 241 N.W.2d 421 (1976). She also

asserts that liability could be found under the doctrine of "apparent authority," which concerns acts or omissions of an agent if the principal had knowledge of the acts and acquiesced in them, citing Pamperin v. Trinity Memorial, 144 Wis. 2d 188, 423 N.W.2d 848 (1988).

The commission disagrees. The cases Complainant cites to illustrate the "failure to properly supervise a contract" and "apparent authority" doctrines do not involve situations in which imputation of responsibility for violation of antidiscrimination laws is sought. The origin of the general rule, that respondeat superior does not apply to the relationship of principal and independent contractor, obviously has its origin in the fact that one characteristic looked at by the common-law test for determining independent contractor status is the extent to which the principal exercises control over the agent. Respondeat superior does not apply to the relationship of principal to independent contractor precisely because the essence of that relationship (as opposed to the relationship of employer and employe) is that the principal does not exercise any significant control. As noted above, the question of degree of control would be quite relevant to the question of whether responsibility would be visited on one party for not preventing the discriminatory conduct of another. Also, there is a flaw in Complainant's theory that "apparent authority" could be relied on here -- there is no evidence that Respondents were aware of and acquiesced in the acts of the agent (the umpire) which Complainant focuses on, i.e., the failure to try to stop the harassment. The question important to analyzing the situation under the doctrine of "apparent authority" is whether the Respondents knew that Complainant had gone to the umpire and asked him to do something about it and he had refused. The commission can not find that they did.

Whether or not the umpires might have been able to eject players from the game if they engaged in harassment, there is a real question about whether Respondents (whether acting through umpires or directly) could have ejected anyone -- either players or spectators -- from the property. The agreement between the church which owned the property and the respondents was oral. The uncontradicted testimony of Sharon Kaiser was that that agreement did not contain any instructions from the church concerning who could attend the games or play on the teams. In the absence of any specific grant of authority from the church to the Respondents to exclude persons from the church's property, there is simply no good basis for a conclusion that Respondent had a legal right to eject anyone.

The commission agrees with the view expressed by the administrative law judge, that the heckling that occurred in this

case created a hostile environment which had the effect of denying the full and fair enjoyment of a public accommodation to Complainant, and that the heckling can not be condoned. However, considering the unique facts of this case, the commission concludes that Respondents did not exercise a degree of control over the persons engaging in the harassment sufficient to allow finding that Respondent had responsibility for those persons' actions.

cc: Linda Monroe

STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS
EQUAL RIGHTS DIVISION

Stacie Neldaughter
318 North Blackhawk Avenue
Madison, WI 53705,

Complainant,

vs.

DECISION AND MEMORANDUM OPINION

ERD Case No. 9132522
(Formerly No. 8900539)

Dickeyville Athletic Club
255 - 2nd Avenue
Dickeyville, WI 53808,

Respondent A,

Dennis Casper
255 - 2nd Avenue
Dickeyville, WI 53808,

Respondent B,

Sharon Kaiser
144 South Main Street
Dickeyville, WI 53808,

Respondent C.

In a complaint filed with the Equal Rights Division (Division) of the Department of Industry, Labor and Human Relations on March 7, 1989, the Complainant, Stacie Neldaughter (Neldaughter), alleged that the Respondents, Dickeyville Athletic Club (Athletic Club), Dennis Casper (Casper), and Sharon Kaiser (Kaiser), violated the Public Accommodations and Amusements Act (Act), sec. 101.22, Wis. Stats. by denying her the full and equal enjoyment of a public place of accommodation or amusement because of her sexual orientation. An investigator for the Division concluded in an Initial Determination issued on May 11, 1989, that there was probable cause to believe that the Athletic Club, Casper, and Kaiser, had violated the Act by denying Neldaughter the full and equal enjoyment of a public place of accommodation or amusement because of her sexual orientation. Conciliation was unsuccessful and the complaint was consolidated with another complaint filed by Neldaughter with the Division on May 22, 1989, (ERD Case No. 8901183), against three other Respondents. The complaints were certified to hearing and a hearing was scheduled for July 11 and 12, 1990, before Administrative Law Judge John J. Doll. Before the hearing dates, Administrative Law Judge Doll issued a decision on November 30, 1990, dismissing both of Neldaughter's

complaints under Hatheway v. Gannett Satellite Network, 157 Wis. 2d 395, 459 N.W.2d 873 (Ct. App. 1990). Neldaughter filed a timely appeal with the Labor and Industry Review Commission. On July 31, 1991, LIRC issued an Order and Memorandum Opinion affirming Administrative Law Judge Doll's dismissal of ERD Case No. 8901183, but setting aside his dismissal of ERD Case No. 8900539 and remanding that complaint to the Division for further proceedings.

A hearing was held before Administrative Law Judge Deborah Little Cohn on Neldaughter's complaint against the Athletic Club, Casper and Kaiser, on March 20, 1992, in Lancaster, Wisconsin. Neldaughter appeared in person and was represented by Attorney Linda Monroe, Monroe Law Office, 121 South Hamilton Street, Madison, Wisconsin 53703. Casper and Kaiser appeared in person and without counsel on behalf of themselves and the Athletic Club.

Based upon the testimony taken at the hearing in this matter, the Administrative Law Judge now makes the following:

FINDINGS OF FACT

1. Dickeyville Athletic Club is a non-profit organization comprised of four volunteer officers (a president, a vice-president, a secretary, and a treasurer) and other interested persons in Dickeyville, Wisconsin. The purpose of the Athletic Club is to set up and run softball leagues for participating men's and women's softball teams in order to raise money to support a little league program.

2. During the summer of 1988, Casper was the president of the Athletic Club and Kaiser was its treasurer.

3. During the summer of 1988, the Athletic Club used a softball diamond owned by Holy Ghost Church in Dickeyville for the softball games that it sponsored. It also operated a concession stand on the grounds of the softball diamond. The club and the church did not have a written contract regarding the club's use of the softball diamond. They merely had a verbal agreement that the club would maintain the diamond and surrounding area in exchange for the use of the diamond. The church was not involved in any determination regarding who was allowed to play in the games or who attended the games.

4. Neldaughter is a lesbian. In 1987, Neldaughter played on the Mound View Cheese softball team in a softball league sponsored by the Athletic Club. When Neldaughter was not asked back to play on the Mound View Cheese team for the summer of 1988, she decided to form her own softball team called "Sapphos Sluggers." Neldaughter had seen advertisements in the Dubuque, Iowa newspaper seeking softball teams to join the Dickeyville Athletic Club leagues. Neldaughter called Laura Kuepers, the secretary of the Club, to inquire about joining the league. Neldaughter paid the $100.00 fee for her team to join the league. Initially, Neldaughter's team started out the season with 20 players, about 50 percent of whom were lesbians and 50 percent of whom were heterosexual women.

5. In the summer of 1988, Neldaughter's car, which she drove to the games sponsored by the Athletic Club, contained signs regarding lesbianism. Because Neldaughter was angry over the circumstances surrounding her departure from the Mound View Cheese softball team, she wore a softball

uniform that summer that stated, "Boycott Mound View Cheese, ten bigots on a field." When Neldaughter's team played the Mound View Cheese softball team, Neldaughter refused to shake the hands of that team's players.

6. From the time that Neldaughter's team began playing in the games sponsored by the Athletic Club, during the summer of 1988, Neldaughter and the members of her team experienced verbal harassment from both spectators of the games and players on other teams who shouted comments such as "fag," "dike," "queer," "go home," and "she's got AIDS." Sometimes, players on opposing teams would either refuse to shake hands with the members of Neldaughter's team or if they did shake hands, they would spit on their own hands afterwards. Spectators sometimes threw sticks, dirt, or cigarette butts at the players on Neldaughter's team. No one on any of the other teams that Neldaughter's team played was treated in a similar manner by the spectators or players.

7. Dickeyville Athletic Club has a list of 16 rules which it provides to teams that play in its leagues at the beginning of each season. The rules set forth the way in which games are to be conducted. Rule 11 states, "Unnecessary roughness may result in immediate ejection from the game at the umpire's discretion." Rule 16 states, "Any questions not covered in these rules will be handled by the umpires and league officials." During the summer of 1988, the Athletic Club arranged with a person named Don Burbach to umpire the games that were sponsored on Thursday nights. The Club did not have a written contract with Burbach. The Club paid him for each game that he worked. Burbach's primary responsibility was to control the game and to determine how the Club's rules should be administered. When Neldaughter asked him if he could do something about the harassment that she and her teammates were experiencing from the spectators and other players, he shrugged his shoulders. Neither Burbach or Neldaughter reported the harassment to Casper or Kaiser before July 28, 1988.

8. On the evening of Thursday, July 28, 1988, another umpire, Phil Rope, was working at the softball games sponsored by the Athletic Club for the first time. Neldaughter became angry during the game that her team was playing because of the loud epithets and grunting noises that spectators were directing at her and her team and because people were throwing objects and kicking dirt at them. As Neldaughter and her teammates were debating about whether to stop playing the game, Neldaughter threw a softball into an area of the bleachers. At that point, the umpire called the game.

9. On the evening of July 28, 1988, Kaiser was working in the concession stand operated by the Athletic Club as she often did on Thursday nights during the softball season. After the umpire stopped Neldaughter's team's game, Neldaughter, Kaiser, and the umpire had a discussion about Neldaughter's throwing of the ball into the stands. Neldaughter raised her concerns about the harassment based on sexual orientation that her team had experienced all summer. Kaiser became aware for the first time of the harassment during that conversation. Casper arrived at the softball diamond toward the end of the conversation. He had not been present on Thursday nights during any of the games that Neldaughter's team played because he played at another softball diamond at those times. Casper may have been aware of the harassment of the Neldaughter's team before July 28, 1988, because of comments people he knew had made to him

about it at a tavern. July 28, 1988, was the first time that Neldaughter reported the harassment to Casper and Kaiser. On the evening of August 4, 1988, the last night of the season, Neldaughter's team had only five or six players present which was short of the nine players required by the Athletic Club's rules. Presumably, Neldaughter's team forfeited that game.

10. The Mound View Cheese softball team organized a tournament during the summer of 1988 with three, non-Athletic Club sponsored softball teams. Neldaughter's team was not invited to play in the tournament. However, the Athletic Club did not participate in the organization of the tournament.

11. Before the beginning of the 1989 softball season, Casper attempted to telephone Neldaughter regarding whether her team wanted to participate in the Athletic Club's league that year. He was unable to reach her because her telephone was disconnected.

12. Dickeyville Athletic Club, Casper and Kaiser did not discriminate against Neldaughter by denying her the full and equal enjoyment of a public place of accommodation or amusement because of her sexual orientation.

Based upon the Findings of Fact made above, the Administrative Law Judge now makes the following:

CONCLUSIONS OF LAW

1. The softball diamond which is owned by Holy Ghost Church in Dickeyville, Wisconsin, and which Dickeyville Athletic Club used for the softball games it sponsored during the summer of 1988, is a place of recreation within the meaning of the Wisconsin Public Accommodations and Amusements Act.

2. Casper and Kaiser are persons within the meaning of the Wisconsin Public Accommodations and Amusements Act.

3. Neldaughter has failed to prove by a preponderance of the evidence that Dickeyville Athletic Club discriminated against her by denying her the full and equal enjoyment of a public place of accommodation or amusement because of her sexual orientation.

4. Neldaughter has failed to prove by a preponderance of the evidence that Dennis Casper discriminated against her by denying her the full and equal enjoyment of a public place of accommodation or amusement because of her sexual orientation.

5. Neldaughter has failed to prove by a preponderance of the evidence that Sharon Kaiser discriminated against her by denying her the full and equal enjoyment of a public place of accommodation or amusement because of her sexual orientation.

Based upon the Findings of Fact and Conclusions of Law made above, the Administrative Law Judge now issues the following:

ORDER

1. That the complaint in this matter is hereby dismissed.

Stacie Neldaughter

Dated at Milwaukee, Wisconsin JUN 2 6 1992

Deborah Little Cohn
Administrative Law Judge

DLC:ER4755:02

MEMORANDUM OPINION

At the beginning of the hearing on March 20, 1992, the Complainant's attorney moved for summary judgment in favor of the Complainant based on the Respondent's failure to file an answer to the complaint. The Administrative Law Judge denied the motion and now notes that Wisconsin case law has held that a Respondent's failure to file a timely answer does not justify summary judgment for the Complainant when the Respondent has stated its position at earlier stages in the complaint process. Bullock v. Milwaukee County (LIRC, 10/15/82). Ind 89.15 of the Wisconsin Administrative Code requires each Respondent to file an answer to the allegations of the complaint within ten days after the date of the Notice of Hearing on the Merits. Although the Respondents failed to file an answer in this case, the file contains a letter from Casper and Kaiser dated March 14, 1989, to the Division investigator who investigated this complaint, addressing the complaint's allegations.

The Administrative Law Judge finds that Neldaughter was subjected to harassment based on her sexual orientation by the spectators and opposing players at the softball games her team played during the summer of 1988 at the softball diamond used by the Dickeyville Athletic Club. She finds that the softball diamond where Neldaughter and her teammates played during that summer is a "public place of ... amusement" as defined by the Act. She also finds that the harassment that occurred of Neldaughter and her teammates created a hostile environment that had the effect of denying the full and fair enjoyment of the softball diamond to Neldaughter. However, the Administrative Law Judge is not convinced that Neldaughter has proven by a preponderance of the evidence that Dickeyville Club, Casper, and Kaiser exercised sufficient control over the harassing spectators and opposing players to the extent that she can find them liable under the Act based on their failure to attempt to stop the harassment. The Athletic Club was an organization comprised of volunteers. Moreover, it did not own the softball diamond where the games were played. Its arrangement with the church that owned the diamond was based on a verbal agreement that provided only that the Club would maintain the grounds in exchange for the use of the diamond. The Club did not exercise a tight rein over the behavior of the umpires who worked at the games. The Club merely paid them a small fee for each game they worked. Neldaughter herself admitted at the hearing that she did not approach Casper and Kaiser about the harassment until July 28, 1988. The Administrative Law Judge is not convinced that Casper and Kaiser were fully aware of the harassment or Neldaughter's concerns about it until that date. Neldaughter has not alleged that any harassing activities occurred toward her team after that date. It appears from the record that her team forfeited the last game of the season on August 4, 1988. Finally, the testimony at the hearing was clear that the Club and its officers were not responsible for setting up the tournament in which Neldaughter's team was not invited to participate.

Although the Administrative Law Judge does not condone the harassment which Neldaughter experienced during the softball games and believes that Kaiser and Casper could have reacted more sensitively when they learned of the harassment than they did, she does not believe that Neldaughter has proven by a preponderance of the evidence that Dickeyville Athletic Club's or Kaiser's or Casper's failure to attempt to stop the harassment constitutes discrimination because of Neldaughter's sexual orientation in violation of the Wisconsin Public Accommodations and Amusements Act.

DLC:ER4744:02

cc: Complainant
Respondent
Linda Monroe, Attorney for Complainant
EEOC

ATTACHMENT 1

PUBLIC NOTICE

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

After a full hearing, the Hawaii Civil Rights Commission has found that Respondent State of Hawaii, University of Hawaii and Respondent Rob Wallace violated Hawaii Revised Statutes Chapter 489, Discrimination In Public Accommodations, when Rob Wallace, then a student manager of the University of Hawaii men's basketball team, denied a spectator the full and equal enjoyment of a place of public accommodation by using racial epithets towards that spectator during a basketball game held on February 18, 1995 at the Special Events Arena. (William D. Hoshijo, Executive Director, on behalf of the complaint filed by Eric White, v. State of Hawaii, University of Hawaii and Rob Wallace, Docket No. 97-001-PA-R, [date of final decision] 1998).

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

1) pay that spectator a monetary award to compensate him for the emotional injuries he suffered;

2) pay a civil penalty to the State of Hawaii general fund;

3) issue a public apology to that spectator.

The Commission has also order the State of Hawaii, University of Hawaii to:

4) adopt a policy prohibiting unlawful discrimination in its public accommodations, conduct training on such policy for its employees and student athletes, and post notices of such policy in its places of public accommodation.

DATED: _____

BY: _____
Authorized Agent for State of Hawaii,
University of Hawaii

BY: _____
Rob Wallace