CIVIL RIGHTS COMMISSION

STATE OF HAWAII

In the Matter of	DR 92-007
NORMA SANTIAGO, Complainant	HEARINGS EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER
IOLANI SWIM CLUB, Respondent.	

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

I. INTRODUCTION

On November 15, 1990 Norma Santiago filed a complaint alleging that Respondent Iolani Swim Club (hereinafter "ISC") unlawfully terminated her employment because of her pregnancy. On October 29, 1992 the Executive Director issued a final conciliation demand letter to Respondent ISC. No conciliation agreement was subsequently secured and on November 17, 1992 the complaint was docketed for hearing. In its scheduling conference statement, Respondent ISC contends that Complainant was an independent contractor who was not protected under H.R.S. Chapter 378.

On December 10, 1992 the Executive Director filed a Petition for Declaratory Relief with the Commission arguing that H.R.S. Chapter 378 protects independent contractors, or

alternatively, that the Commission adopt the economic realities test enunciated in Armbruster v. Quinn, 711 F.2d 1332, 32 EPD 33,702 (6th Cir. 1983) to distinguish covered employees from non-protected independent contractors. On December 30, 1992 the Commission assigned the petition to this hearings examiner. On January 19, 1993 Respondent ISC filed a Statement of No Position as to the petition.

Oral arguments on the petition were held on January 20, 1993. During the oral arguments, the Executive Director conceded that independent contractors are not covered under H.R.S. Chapter 378. It also modified its position on the standard for determining employee status and now urges the Commission to adopt a test which considers the factors in both the Armbruster economic realities test and the hybrid common law-economic realities test found in Spirides v. Reinhardt, 613 F.2d 826, 20 EPD 30,073 (D.C. Cir. 1979), with emphasis on whether the worker is economically dependent on the business of the employer. Respondent ISC urges the Commission to utilize the hybrid test found in Spirides, which stresses an employer's right to control the means and manner of the worker's performance.

The parties filed supplemental memoranda on January 29 and February 3, 1993.

Having reviewed and considered the petition and the arguments presented, this Hearings Examiner hereby renders the

following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT

For the limited purposes of this petition, the relevant findings of fact are as follows:

1. Respondent ISC is a competitive swimming program located in Honolulu, Hawaii. Its primary function is to provide swimming instruction to children and adults. Brian Lee was the director of Respondent ISC from at least November 1989 to August 1990.

2. On or about November 6, 1989, Complainant Norma Santiago began working as a swim instructor with Respondent ISC.

3. Some time during February 1990, Complainant informed Mr. Lee that she was pregnant and due to deliver in October, 1990.

4. From about August 25 to September 9, 1990, Respondent ISC was on a break from its instructional schedule. From about September 10 to September 14, 1990 Respondent ISC held membership try-outs.

5. Some time in August 1990 Complainant informed Mr. Lee that she wanted to return to work the last two weeks of September 1990 and then take a leave of absence to deliver her child.

6. Some time in August 1990 Mr. Lee informed Complainant that she would be replaced by another swim instructor beginning on or about September 10, 1990.

7. Complainant's services with Respondent ended on or about August 31, 1990.

III. CONCLUSIONS OF LAW

The purpose of H.R.S. Chapter 378 is to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment or membership in a labor organization without discrimination. S.C.Rep. 573, 1963 Senate Journal at 855, 868. Accordingly, H.R.S. § 378-2(1)(A) states that it shall be an unlawful discriminatory practice

> . . . For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment . . .

because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status or arrest and court record. (Emphasis added.) The statute prohibits discrimination in employment practices. Thus, a complainant must show some connection to an employment relationship in order to come under its protection.[1] Since independent contractual affiliations

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[1] Actions under Title VII must also have some connection to an employment relationship. See, Mitchell v. Frank R. Howard Memorial Hospital, 853 F.2d 762, 47 EPD 38,237 at 53, 381 (9th Cir. 1988); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883, 24 EPD 31,402 (9th Cir. 1980); Mathis v. Standard Brands Chemical

are not employment relationships, independent contractors are not covered under Chapter 378.

Employers, however, cannot evade Chapter 378's protections merely by classifying their employees as independent contractors. A worker's status must be determined from the facts of each case. Unfortunately, H.R.S. Chapter 378 does not define the term "employee" and its legislative history is silent regarding the test for distinguishing employees from independent contractors. The term has yet to be interpreted by the Hawaii appellate courts. The parties therefore urge the Commission to look at standards developed under Title VII caselaw for

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Industries, Inc., 10 EPD 10,306 at 5245-5247 (N.D. Ga. 1975); see also Schlei and Grossman, Employment Discrimination Law at 997 (2nd Ed. 1983).

The employment relationship required under Chapter 378, however, does not need to be current. It may be in the nature of potential employment, as in the case of an applicant, or past employment, such as a discharged worker or pensioner. H.R.S. § 378-2(1)(A); Mathis, supra.

Furthermore, the connection with an employment relationship may be indirect. It may involve situations where employer A interferes with the relationship between employer B and employer B's employee. See, Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (DC Cir. 1973) (hospital liable for interfering with employment relationship between male nurse (employee) and female patients (employers) when it refused to refer nurse to patients because of his sex); Puntolillo v. New Hampshire Racing Commission, 375 F.Supp 1089 (D. N.H. 1974) (racing commission liable for interfering with employment relationship between horse trainer (employee) and horse owners (employers) when it refused to issue a stall to trainer because of his national origin); Gomez v. Alexian Brothers Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1983) (hospital liable for interfering with employment relationship between doctor (employee) and medical corporation (employer) when it refused to award corporation contract to operate an emergency room because of doctor's national origin).

guidance.

A. Title VII Tests

Title VII defines "employee" in broad language. 42 U.S.C. § 2000e(f) states: "the term 'employee' means an individual employed by an employer . . . ." 42 U.S.C. § 2000e(b) defines an "employer" as "a person engaged in industry affecting commerce who has fifteen or more employees . . . ." Because these definitions are circular and do not detail the factors to be considered in determining employee status, federal courts have developed four main tests. These are: 1) the common law test; 2) the traditional economic realities test; 3) the Armbruster economic realities test; and 4) the hybrid common law-economic realities test.

1. The Common Law Test

A few federal courts utilize the common law test formulated in § 220 of the Restatement (Second) of Agency (1958). This test was originally developed to determine the scope of a master's vicarious liability for the acts of his servant. See, Restatement (Second) Of Agency § 220 comment c. § 220 of the Restatement states:

> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
>
> (2) In determining whether one acting for an other is a servant or an independent contractor, the following

matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant: and
(j) whether the principal is or is not in business.

Under this test, the employer's control or right to control the physical conduct of the person giving service is the most important and usually determinative factor. Restatement (Second) Of Agency § 220 comment d.

According to these courts, Congress' failure to specifically define "employee" in the language and legislative history of Title VII indicates that it intended to construe the term in accordance with common law agency principles. Smith v. Dutra Trucking Co., 410 F. Supp 513, 516, 13 EPD 11,460 at 6587 (N.D. Cal. 1976) affirmed 580 F.2d 1054 (9th Cir. 1978); Cobb v. Sun Papers Inc., 673 F.2d 337, 340-341, 20 EPD 32,610 at

24,739 (11th Cir. 1982).[2] In addition, these courts point to the use of the common law test to determine employee status under the National Labor Relations Act (NLRA)[3], which served as a model for Title VII. Smith, supra.

2. The Traditional Economic Realities Test

The traditional economic realities test was developed in the 1940s in a series of U.S. Supreme Court decisions which defined the term "employee" in the context of the NLRA, the Social Security Act (SSA) and the Fair Labor Standards Act (FLSA). In NLRB v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed 1170 (1944) a union representing newsboys brought suit against their employer under the NLRA. 88 L.Ed 1170, 1175. Relying on common law distinctions, the defendant publisher contended that the newsboys were not employees but independent contractors who were outside the protection of the NLRA. Id. at 1179. The Supreme Court disagreed. It stated that the use of the common law test would impede achievement of the objectives of the NLRA. Id. at 1181. Explaining that the term "employee" was not intended by Congress to be a term of art having a definite meaning, the Court stated that the word derives its meaning from the context of its statute, and that such statute

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[2] The Eleventh Circuit, however, conceded that the economic realities of the relationship between the employer and worker should also be considered. 20 EPD 32,610 at 24,739.

[3] As amended in 1947. See note 4, infra, and accompanying text.

"must be interpreted in light of the mischief to be corrected and the end to be attained". Id. The Court, however, did not completely reject the common law test, but stated that it should not be applied exclusively:

> It will not do. . . to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness . . . .
>
> . . . It cannot be taken, however, that the purpose [of the NLRA] was to include all other persons who may perform services for another or was to ignore entirely legal classifications made for other purposes.

Id. (Emphasis added.)[4]

In United States v. Silk, 331 U.S. 704, 67 S..Ct. 1463, 91 L.Ed 1757 (1947) the Court applied this Hearst analysis to determine whether coal unloaders and truck drivers who delivered

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[4] In response to this broad interpretation of "employee", Congress amended the NLRA in 1947 to specifically exclude independent contractors. The definition in relevant part now states:

> . . . the term "employee" shall include any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family of person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor. . .

29 USC § 152(3). Subsequently, courts have applied the common law test to determine employee status under the NLRA. See, NLRB v. United Ins. Co. of Am., 390 U.S. 254, 88 S.Ct. 988, 19 L.Ed.2d 1083, 1086 (1968); NLRB v. H & H Pretzel Co., 831 F.2d 650, 653 (6th Cir. 1987).

coal to retailers were employees under the SSA. The Court reiterated the importance of construing the term "employee" to accomplish the purposes of the SSA. 91 L.Ed 1957, 1768. It also considered common law principles, stating:

> Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling, nor is the list complete.

Id. at 1769.[5]

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[5] This test was affirmed in Bartels v. Birmingham, 332 U.S. 126, 67 S. Ct. 1547, 91 L.Ed 1947 (1947), another SSA case decided by the Court. The Court states:

> In United States v. Silk, (cit. om.) we held that the relationship of employer-employee. . . was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the services rendered . . . . Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render services. In Silk, we pointed out that permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss from the activities were also factors that should enter into judicial determination . . . It is the total situation that controls.

91 L.Ed 1947, 1953 (emphasis added). In response to the Silk and Bartels decisions, Congress amended the SSA to require the use of the common law test. 42 USC 410(j)(2) now defines "employee" as:

> . . . any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee . . . (emphasis added)

The Supreme Court applied the same economic realities test to determine employee status under the FLSA. Walling v. Portland Terminal Co., 330 U.S. 148, 67 S.Ct. 639, 91 L.Ed 809 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed 1772 (1947). In Walling, the Court examined a group of railroad brakemen trainees' circumstances together with common law factors to determine their status, stating:

> But in determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance.

91 L.Ed 809, 812-813 (emphasis added).[6]

At least one federal court has utilized the traditional economic realities test to determine employee status under Title VII. See, Mathis v. Standard Brands Chemical Industries, Inc., supra. In Mathis, the issue was whether a worker who performed industrial waste hauling services for a corporation was an employee. In identifying the test it used, the District Court

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[6] Unlike the NLRA and SSA, Congress chose not to amend the definition of "employee" under the FLSA. 29 USC § 203(e)(1) states in relevant part:

> Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

Courts determining employee status under the FLSA therefore continue to use the economic realities test enunciated in Hearst, Silk and Walling. See, Donovan v. Agnew, 712 F.2d 1509, 1513-1514 (1st Cir. 1983). It is also significant to note that the FLSA's definition of "employee" is identical to Title VII's.

of Georgia states:

> The distinction between "employment" and independent contractual affiliations depends on the economic realities of the relationship . . . . Among the considerations are whether the plaintiff received compensation in the form of salary or wages as opposed to profits derived from a contractual fee, the opportunities to increase profit by management of resources, the degree of control by the defendant over the manner and method in which the work is performed and the extent to which the plaintiff personally executed his tasks.

Mathis, supra, at 10,306 (emphasis added). The court also noted that the five factors mentioned in Silk should also be included in the determination of employee status under Title VII. Id. n. 3. Again, there was no emphasis on any one factor.[7]

3. The Armbruster Economic Realities Test

The traditional economic realities test was later broadened by the Fifth Circuit in Mednick v. Albert Enterprises, Inc. 508

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[7] At least one state court utilizes this test under its employment discrimination law. See, McCarthy v. State Farm Ins. Co., 428 N.W.2d 692, 694 (Mich.App. 1988). The Michigan Court of Appeals outlines its test as follows:

> . . . The economic reality test looks to the totality of the circumstances surrounding the performed work in relation to the statutory scheme under consideration. [cit. om.] While control of the worker's duties is to be considered under the economic reality test, other equally important factors include payment of wages, authority to hire and fire, and the responsibility for the maintenance of discipline.

428 N.W.2d 692, 694 (emphasis added). The test is also used by the Michigan courts to determine employee status under its workers' disability compensation act. Wells v. Firestone Tire & Rubber Co., 364 N.W.2d 670, 672-673 (1984).

F.2d 297 (5th Cir. 1975). In Mednick, the issue was whether a card room operator was an employee of an apartment-hotel complex under the FLSA. Id. at 298. In interpreting the Hearst, Silk and Bartels cases, the court discarded the use of any common law factors stating:

> The terms "independent contractor", "employee", and "employer" are not to be construed in their common law senses when used in federal social welfare legislation. [cit. om.]

Id. The court then developed its own economic realities test based on: 1) whether the plaintiff was the kind of person intended to be protected by the FLSA; and 2) whether the person was in business for himself or dependent upon the business of another for his living. Id. at 301.

The Mednick economic realities test was essentially adopted by the Sixth Circuit in Armbruster v. Quinn to define employees under Title VII.[8] In Armbruster, the issue was whether manufacturer's representatives were employees for the purpose of meeting Title VII's fifteen employee jurisdictional requirement. 32 EPD 33,702 at 30,366, 30,370-30,371. The court argued that the inclusion of a definition of "employee" in Title VII which does not limit the term to common law concepts shows that Congress intended a broad definition. Id. at 30,370-30,371. It also found no "tacit dichotomy between employee and 'independent

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[8] The court adopted the standard enunciated in Dunlop v. Carriage Carpet Co., 548 F.2d 139, 145 (6th Cir. 1977), which followed the same rationale and standard as Mednick.

contractor' enshrined in Title VII" because § 2000e(f) did not explicitly exclude independent contractors. Id. at 33,702. The court then held that the representatives must be counted as employees if they were "susceptible to the kind of unlawful practices that Title VII was intended to remedy". Id.

The Sixth Circuit suggested five factors relevant under this test: 1) the process used to hire and terminate; 2) the method of payment; 3) receipt of company paid benefits or advances; 4) the opportunity for advancement to positions within the company or its parent corporation; 5) whether the other products sold by the representatives were those of the parent corporation. Id. at 30,372 n. 9. Additional factors suggested by other courts and supporters of this test are: the worker's ability to obtain comparable employment; the nature of the disciplinary mechanism; the structure and nature of the employer's business; the degree of integration of the worker in the employer's business; whether the worker is hired for a particular skill or is unskilled or trained by the employer; whether the worker can hire others to perform the work without the employer's approval; and whether the worker provides equipment or other resources to perform the work. See, Ross v. William Beaumont Hospital, 678 F.Supp 655, 675 (E.D. Mich. 1988); Dowd, The Test Of Employee Status: Economic Realities And Title VII, 26 William and Mary Law Review 75, 113-114 (1984).

4. The Hybrid Common Law-Economic Realities Test

The hybrid common law-economic realities test looks at the economic realities of the relationship in light of common law principles of agency in order to determine employee status. Spirides, supra, at 11,357; Cobb, supra, at 24,738-24,739. Courts utilizing this test argue that because Title VII is remedial in character, the term "employee" should be liberally construed to effectuate the purposes of the act. Spirides, supra, at 11,356-11,357. At the same time, these courts have not adopted the broader Mednick/Armbruster test because the legislative history of Title VII does not contain statements comparable to those made by Senator Hugo Black during the debates on the FLSA that the term "employee" under the FLSA was given the "broadest definition that has ever been included in any one act". See, Cobb, supra, at 24,739.

Although the hybrid test requires consideration of several factors, emphasis remains on the extent of the employer's right to control the means and manner of the worker's performance. Spirides, supra; Cobb, supra; Lutcher, 633 F.2d 880, 883. Other factors to be considered are:

1) whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
2) the skill required in the particular occupation;
3) whether the employer furnishes the equipment used and the place of work;
4) the length of time the individual has worked;
5) the method of payment, whether by time or by the job;
6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or

without notice and explanation;
7) whether annual leave is afforded;
8) whether the work is an integral part of the business of the employer;
9) whether the worker accumulates retirement benefits;
10) whether the employer pays social security taxes; and
11) the intention of the parties.

Spirides, supra; Lutcher, supra, at 883 n. 4, 5. The test is a slight expansion of the common law test found in the Restatement. Four added factors are: consideration of three types of employee benefits (#7, #9, #10 listed above) and the manner in which employment may be terminated (#6). One factor omitted from the Restatement is whether or not the person is engaged in a distinct occupation or business. The test appears to be based on the post 1947 standard used by courts to determine employee status under the amended NLRA. Spirides, supra, at 30,073 notes 22, 23, 24, 25; Armbruster, supra, at 33,702 n. 7; see also note 4, supra.[9]

B. Employee Status Under H.R.S. Chapter 378

I conclude that the determination of employee status under H.R.S. Chapter 378 requires the use of the traditional economic realities test as enunciated in Hearst, Silk, Walling and Mathis. That is, the Commission, on a case by case basis,

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[9] The EEOC and most circuits, including the Ninth Circuit, have adopted this test. See, EEOC Compliance Manual § 605 Appendix H; Spirides, supra, (D.C. Circuit); EEOC v. Zippo Mfr. Co., 713 F.2d 32, 32 EPD 33,755 (3rd Cir. 1983); Mares v. Marsh, 777 F.2d 1066, 39 EPD 35,840 (5th Cir. 1985); Lutcher, supra, (9th Circuit); Oestman v. National Farmers Union Ins. Co., 958 F.2d 303, 305, 58 EPD 41,329 (10th Cir. 1992); Cobb, supra, (11th Circuit).

should consider the factors stated in the common law, hybrid and economic realities tests without any one factor controlling. This conclusion is based on: 1) the broad definition of the term "employment" found in § 378-1; 2) an analysis of all four federal tests; and 3) the Hawaii Supreme Court's adoption of the Hearst and Silk analysis and test to determine employee status under other state labor laws.

The fundamental starting point for interpreting a statute is the language of the statute itself. Schmidt v. AOAO of the Marco Polo Apts., 73 Haw. 526, 531 (1992); State v. Briones, 71 Haw. 86, 92 (1989). However, a court or agency's primary duty in interpreting statutes is to ascertain and give effect to the legislature's intention and to implement that intention to the fullest degree. Briones, supra. While H.R.S. Chapter 378 does not define the term "employee", it does contain a definition for the word "employment". § 378-1 states in relevant part:

> "Employment" means any service performed by an individual for another person under any contract of hire, express or implied, oral or written, whether lawfully or unlawfully entered into. Employment does not include services by an individual employed as a domestic in the home of any person.

Under this definition, an employee is therefore an individual who performs any service for another person under any contract of hire.

The adoption of such a broad definition evidences the legislature's intent to give the term a meaning more expansive than the common law definition. Bailey's Bakery v. Tax

Commissioner, 38 Haw. 16, 28-29 (1948); 2B Sutherland Statutory Construction §50.05 (5th Ed. 1991). In addition, Hawaii also recognizes that a remedial statue is to be construed liberally in order to accomplish the purpose for which it was enacted. Flores v. United Air Lines, Inc., 70 Haw. 1, 12 (1988); Roe v. Doe, 59 Haw. 259, 265 (1978).[10] Because H.R.S. Chapter 378 is remedial in nature, the term "employee" should be liberally construed to effectuate the purposes of the act. I therefore conclude that employee status under Chapter 378 is not limited to common law agency principles.

I also conclude that the hybrid economic realities-common law test is too narrow. This test follows the post 1947 NLRA standard, which emphasizes the common law right to control factor. Such emphasis is not warranted because unlike the post 1947 NLRA, Title VII and Chapter 378 do not explicitly incorporate the common law test in their respective definitions of "employee" and "employment". See, Armbruster, supra, at 33,702, 33,702 n. 7.[11] In addition, the hybrid test focusses

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[10] Remedial statues provide remedies, improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries, or involve modern social legislation. Flores, supra, quoting 3 Sutherland Statutes And Statutory Construction § 60.02 (4th Ed. 1986).

[11] The Sixth Circuit also criticized Spirides and Cobb for rejecting the FLSA standards based on Senator Black's remarks during Congressional debates on the FLSA. I agree that such remarks are not a sufficient basis for distinguishing Title VII coverage from that under the FLSA. See, 2A Sutherland Statutory Construction §§ 48.13, 48.16 (5th Ed. 1991)

primarily on the formal structure of the employment relationship. It does not give adequate consideration to the underlying nature of the relationship between the worker and employer, i.e., the extent of the employer's ability to affect the individual's ongoing working conditions, the standards imposed on ultimate performance, the structure of commission arrangements and the dependence of the worker on support functions performed by the employer. See, Dowd, supra, at 84-85.

On the other hand, I conclude that the Armbruster economic realities test is too broad. The Armbruster test is based on Mednick, which incorrectly interpreted Hearst, Silk and Bartels to conclude that common law principles should not be considered as part of the economic realities test. See, Davidson, The Definition Of "Employee" Under Title VII: Distinguishing Between Employees And Independent Contractors, 53 Cincinnati Law Review 203, 222-223 (1984). Furthermore, as the Executive Director conceded in oral arguments, the Armbruster test is vague and overly expansive. It can be read to include anyone who performs any service for another, since arguably all workers are vulnerable to discrimination. See also, Davidson, supra, at 224.

In light of the above and with due respect, I conclude that the correct approach to determining employee status under Title VII is the traditional economic realities test as stated and

applied in the Mathis case. (See discussion in section III.A.2., supra.) This test takes into account the broad definition of "employee" found in Title VII, construes the term liberally to accomplish Title VII's remedial purposes and accurately applies the economic realities test enunciated by the Supreme Court in Hearst, Silk and Walling. It examines both the formal structure and the substantive nature of the relationship between the employer and worker.

The Hawaii Supreme Court's use of this test in the context of the Hawaii Employment Security Law (HESL) also supports its use under Chapter 378. § 378-1's definition of "employment" is similar to that found in H.R.S. § 383-2[12]. In interpreting "employment" under HESL, the Hawaii Supreme Court adopted the U.S. Supreme Court's analysis in Hearst and Silk and determined employee status not only in the context of the common law test, but also in light of the mischief to be corrected and the end to be attained. Bailey's Bakery, supra, at 28. After extensively quoting the Hearst and Silk cases, the Court states:

> What the court held in the Silk case is not as important as the implications of its conclusions. Implicit in the decision in that case is the deduction that a beneficiary under the Act need not sustain

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[12] § 383-2(a) states in relevant part:

> As used in this chapter, unless the context clearly requires otherwise, "employment" subject to sections 383-3 to 383-9 means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

> common-law master-servant relationship and that the control test as applied to the vicarious liability of masters under the respondeat superior doctrine is not the controlling factor in determining the legal status of the worker. Applying the rationale of the Hearst and Silk cases to the Hawaii unemployment compensation law, we conclude that it is not sufficient to establish immunity from its terms and provisions to show that there had not been reserved to the master the extent of control necessary to establish the relationship of master and servant when measured by the technical standards of the common law. But it must appear that the worker is free from the direction or control both under his contract of service and in fact and is not within the class of workers that the law was designed to protect.

Id. at 49-50 (emphasis added). Thus, in determining whether certain bakery delivery drivers were employees, the Court considered both common law and economic realities factors.[13]

Furthermore, this test has been codified in the administrative rules defining "employment" in Hawaii's temporary disability insurance law (H.R.S. Chapter 392) and prepaid health law (H.R.S. Chapter 393). See, Department of Labor Administrative Rules §§ 12-11-1 and 12-12-1; Goto, Definition Of An "Independent Contractor" Under Hawaii's Labor Laws, Legislative Reference Bureau Report No. 1, 1987 at 25-28. These statutes' definitions of "employment" are also similar to Chapter 378's.[14] Given the use of the traditional economic

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[13] In fact, the court found that a bakery's delivery drivers were employees under the unemployment compensation act because the bakery had general control over the drivers. Id., at 32.

[14] § 392-3 states in relevant part:

> "Employment" and "employed" means service, including service in interstate commerce, performed

reality test in interpreting the term "employment" under Chapters 383, 392 and 393, it is likely that the Hawaii appellate courts would use the same test, as used in Mathis, to interpret "employment" under Chapter 378.

III. RECOMMENDED ORDER

Based on the above, I recommend that the Commission conclude that independent contractors are not protected from the discriminatory practices of employers under H.R.S. Chapter 378 since that statute requires the existence of an employment relationship.

I also recommend that the Commission adopt the traditional economic realities test utilized in Mathis v. Standard Brands Chemicals Industries, Inc., 10 EPD 10,306 (N.D. Ga. 1975) and Bailey's Bakery v. Tax Commissioner, 38 Haw. 16 (1948) to determine whether a person is an employee under Chapter 378. This test involves a case by case consideration of the factors outlined in the common law, economic realities and hybrid common

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for wages under any contract of hire, written or oral, express or implied, wit an employer, except as otherwise provided in sections 392-4 and 392-5.

§ 393-3(4) states:

"Employment" means service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, expressed or implied, with an employer, except as otherwise provided in sections 393-4 and 383-5.

law-economic realities tests, as discussed but not limited to the above. In addition, no factor shall be controlling and the presence or absence of any one factor may be overcome by the weight of the other factors. Such test will best reveal the total circumstances of the work relationship at issue.

Dated: Honolulu, Hawaii February 10, 1993.

LIVIA WANG
Hearings Examiner
HAWAII CIVIL RIGHTS COMMISSION

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HAWAI'I CIVIL RIGHTS COMMISSION
888 MILILANI STREET, 2ND FLOOR HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 586-8692

February 10, 1993

CERTIFIED MAIL

Karl K. Sakamoto, Esq.
Hawaii Civil Rights Commission
Enforcement Section
888 Mililani Street, 2nd floor
Honolulu, Hawaii 96813

Howard K.K. Luke, Esq.
Grosvenor Center
PRI Tower, Suite 1800
733 Bishop Street
Honolulu, Hawaii 96813

Re: DR 92-007; In Re Santiago/Iolani Swim Club

Dear Counsel:

YOU ARE HEREBY NOTIFIED that pursuant to Administrative Rule Section 12-46-73, I have filed the enclosed Findings of Fact, Conclusions of Law and Recommended Order with the Hawaii Civil Rights Commission on February 10, 1993.

Any party adversely affected by this proposed decision may file written exceptions to the whole or any part of the proposed decision and request an opportunity to present oral argument before the Commission. The exceptions shall specify the portions of the record and/or authorities relied on to sustain each point. Exceptions must be filed with the Commission within fifteen (15) days after the receipt of this letter and the attached proposed decision, and served upon the hearings examiner and all other parties. Extensions of time to file written exceptions may be granted by motion to the Commission for good cause shown.

Within fifteen (15) days after receipt of any written exceptions, any party supporting the proposed decision may file a written statement in support of the proposed decision. Statements in support shall be filed with the Commission and served upon the hearings examiner and all other parties.

If written exceptions are timely filed, all parties to the proceedings shall be given the opportunity to present oral argument to the Commission concerning the proposed decision. The Commission shall personally consider the whole record or portions of the

record as may have been cited by the parties either in support of or in opposition to the decision. All parties shall be served with notice of the time and place of argument at least five days prior to the time for argument.

Within a reasonable time after argument has been heard, the Commission will issue a written final decision and order, either adopting, modifying, or reversing, in whole or in part, the hearings examiner's decision.

If written exceptions are not filed, the Commission, within a reasonable time after the hearings examiner's proposed decision has been filed, will issue a written final decision and order, either adopting or modifying or reversing, in whole or in part, the hearings examiner's decision.

In the final decision, the Commission will state with specificity the reasons for any modification or reversal, in whole or in part, of the hearings examiner's decision.

Should you have any questions, please contact John Ishihara, Chief Counsel, at the above address and telephone number.

Sincerely yours,

Livia Wang
Hearings Examiner

Enclosure

cc: John Ishihara, Chief Counsel