

THIRD CIRCUIT COURT
STATE OF HAWAII
FILED

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
State of Hawaii

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Hawaii Civil Rights Commission
888 Mililani Street, 2nd Flr.
Honolulu, Hawaii 96813

CHARLENE K. OKAWA
CLERK

John Ishihara 1456-0
Attorney for Appellee Hawaii Civil Rights Commission

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

VOLCANO ISLAND FARMS, INC.)
dba The Hawaiian Hemp Company,)
and DWIGHT KONDO,)

CIVIL NO. 95-105
(Agency Appeal)

Respondent-Appellants,)

ORDER AFFIRMING IN PART AND
MODIFYING IN PART THE FINAL
DECISION OF THE HAWAII CIVIL
RIGHTS COMMISSION

vs.)

HAWAII CIVIL RIGHTS)
COMMISSION;)

Agency-Appellee.)

-----)
STEVEN DAVIS, Executor and)
Sole Beneficiary of the Estate)
of Diane Davis,)

Complainant-Appellant,)

vs.)

HAWAII CIVIL RIGHTS)
COMMISSION;)

Agency-Appellee.)

DATE: November 3, 1995
TIME: 9:00 a.m.
JUDGE: Greg Nakamura

and)

VOLCANO ISLAND FARMS, INC.)
dba The Hawaiian Hemp Company,)
and DWIGHT KONDO,)

Respondent-Appellants,)

I hereby certify that this is a full, true and
correct copy of the original on file in this office.


Clerk, Third Circuit Court, State of Hawaii

ORDER AFFIRMING IN PART AND MODIFYING IN PART
THE FINAL DECISION OF THE HAWAII CIVIL RIGHT COMMISSION

Oral argument in the above-entitled case being held on November 3, 1995, at 9:00 a.m., before the Honorable Greg Nakamura, and Appellants Volcano Island Farms, Inc., dba The Hawaiian Hemp Company, and Dwight Kondo being represented by Dana Ishibashi, Esq., Appellant Steven Davis, as Executor and Sole Beneficiary of the Estate of Diane Davis, being represented by David Simons, Esq., and Appellee Hawaii Civil Rights Commission being represented by John Ishihara, Esq., and the Court having read the briefs, hearing oral argument of the parties, and after conducting a de novo review of this appeal under H.R.S. § 368-16(a);

The Court makes the following Findings of Fact and Conclusions of Law:

1) The employment discrimination law, Chapter 378, H.R.S., carries out the public policy declaration against employment discrimination because of race in H.R.S. § 368-1, as well as the constitutional mandate that "[n]o person shall . . . be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race," Haw. Const. Art. I, Sect. 5;

2) As the agency with jurisdiction and expertise over matters involving civil rights, the Civil Rights Commission has the authority to interpret its laws, and the Commission's interpretation is entitled to judicial deference, Aio v. Hamada, 66 Haw. 401 (1983);

3) H.R.S. § 378-2(1)(A) prohibits all forms of racial discrimination in employment;

4) Racial harassment occurs when verbal or physical conduct creates a hostile or offensive work environment because of race, Rogers v. EEOC, 454 F.2d. 234 (5th Cir. 1971), cert. den. 406 U.S. 957 (1972);

5) The Commission's Final Decision adopted the following elements to establish racial harassment in this case:

a) The employee was subjected to racial slurs or other verbal, or physical conduct relating to his or her race;

b) The conduct was unwelcome in the sense that the employee regarded the conduct as intimidating, hostile, or offensive; and

c) The conduct was sufficiently severe or pervasive to alter the conditions of employment, such as having the purpose or effect of creating an intimidating, hostile or offensive work environment, of unreasonably interfering with the employee's work performance, or by otherwise adversely affecting the employee's employment opportunity;

6) Employees are entitled to work in an environment free from racial harassment, Rogers v. EEOC, supra, which is a form of racial discrimination because the harassing conduct constitutes discrimination in the terms, conditions, or privileges of employment because of race, and thus racial harassment violates H.R.S. § 378-2(1)(A);

7) The Commission was acting in its "adjudicatory capacity" because it was determining whether Appellants' conduct constituted racial discrimination, and the Commission complied with all statutory adjudication requirements under the Administrative Procedures Act ("APA"), Chapter 91, H.R.S.;

8) The Commission was not engaged in rulemaking and was not required to provide notice of rulemaking or hold public hearings for comment under the APA;

9) The APA and the Commission statute require the Commission and Hearings Examiner to prepare findings of fact and conclusions of law which may include standards for determining whether certain conduct constitutes racial harassment, and the Commission's adoption of such standards did not violate the APA;

10) "The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner," Price v. Zoning Bd. of App. of Honolulu, 77 Haw. 168, 172 (1994) (citations omitted);

11) Appellants were on notice that racial harassment was the issue in the case, had a meaningful opportunity to be heard on the propriety of the standards used in determining racial harassment, and thus there was no denial of due process by the adoption of the racial harassment standards;

12) "The rules of evidence governing administrative proceedings are much less formal than those governing judicial proceedings," Loui v. Board of Medical Examiners, 78 Haw. 21, 31 (1995) (citations omitted), and the test for admissibility is

relevance to the issues, id.;

13) In a contested case, the right to cross-examine may be limited if such examination is not required for "a full and true disclosure of the facts," H.R.S. § 91-10(3);

14) Allowing into evidence the deposition of the direct examination of Diane Davis which had been tested by cross-examination complied with the statute because Appellants had extensively cross-examined Davis, it was not an abuse of discretion to place the burden on Appellants to show which parts of her direct testimony should be excluded because of the inability to complete her cross-examination due to her death, and Appellants' failure to make such a showing establishes that the statutory right to cross-examine was not violated;

15) The testimonies of Appellant Dwight Kondo and Diane Davis regarding Kondo's use of racial slurs were in conflict, thus credibility was an issue, and evidence relating to credibility was relevant;

16) In making the credibility determination, the Hearings Examiner had the opportunity to observe the demeanor of Kondo (in person) and Davis (via a videotape of her deposition) and heard the testimonies of other witnesses regarding Davis' prior consistent statements;

17) Such testimonies were relevant to the issues of racial harassment and Davis' credibility because they demonstrated that Davis had previously told others about a particular incident and that she did not make it up for the hearing;

18) Relevant hearsay testimony is admissible in an administrative hearing, Price v. Zoning Bd. of App. of Honolulu, 77 Haw. at 176, n.8; Shorba v. Bd. of Education, 59 Haw. 388, 397 (1978), and the admission of such evidence was proper;

19) Kondo disavowed making any racial slurs toward Davis despite admitting that the words "fucking", "haole", and "fucking haole" are part of his normal vocabulary and that he had directed such comments toward other persons;

20) Because Kondo denied ever telling Davis that she was a "fucking haole", his prior use of those words toward others was relevant to the issue of intent to discriminate because of race;

21) Even under the more stringent Hawaii Rules of Evidence, evidence of prior acts which are probative of intent to discriminate is admissible, Rule 404(b);

22) Together with the testimony of Kondo's girlfriend that he used the terms "haole", "fucking", and "fucking haoles" on company premises and the testimony of other witnesses regarding his regular use of such racial slurs on company premises, there was ample basis to conclude that Davis was more credible than Kondo;

23) There was no error in admitting relevant evidence of discriminatory practices which may have occurred prior to 180 days before Davis filed her complaint because the earlier instances of racial harassment were part of an ongoing pattern of discriminatory practice and encompassed within her complaint under H.R.S. § 368-11(c)(2);

24) A trier of fact must determine credibility, Shinn v.

Edward Yee Ltd., 57 Haw. 215 (1976), and the Hearings Examiner's conclusion that Davis was more credible than Kondo is supported by the evidence in the record;

25) Kondo racially harassed Davis on four occasions by calling her a "fucking haole";

26) The first incident occurred in the spring of 1992 during a fashion show when Kondo called Davis a "fucking haole bitch" during a disagreement over how long it was taking her to sew a dress;

27) The second incident occurred in April 1993 when Davis began receiving medical benefits after a long period of insisting that such benefits be provided as required by law, she picked up an extension phone and heard Kondo say "fucking haoles bleeding me dry;"

28) The third incident occurred in May 1993 when Kondo stopped Davis in the stairwell, prevented her from moving, appeared to be under the influence of some substance, started yelling at her about several things, and called her a "fucking haole bitch;"

29) The fourth incident occurred in June 1993, as Davis left the company premises on her last day of work, Kondo said, "Out of here you fucking haole bitch;"

30) In addition, Davis heard Kondo call other caucasian employees and volunteers "fucking haole", "fucking haole bitch", and "haole bitch" at least a dozen times;

31) Kondo's racist comments upset Davis and made her cry, she was depressed, demoralized, and degraded and felt "like a piece of

dirt" and a "non-person" by his treatment of her;

32) The Commission concluded, based upon the evidence, "it was more likely than not that Kondo" made racial slurs toward Davis constituting racial harassment, and Appellants had violated H.R.S. § 378-2(1)(A),

33) The Commission's conclusion is fully supported by the record;

34) There was no error in substituting Steve Davis as the complainant on the basis of him being the Executor for the Estate of Diane Davis because Hawaii Administrative Rules § 12-46-24 specifically allows substitution when a party dies;

35) Kondo's racist comments to Davis and others before the third incident in the stairwell created a hostile work environment because of race in violation of H.R.S. § 378-2(1)(A);

36) The Commission awarded \$2,500.00 in compensatory damages primarily for the third incident in the stairwell because the earlier incidents were not as serious and Diane Davis quit her job a few weeks later;

37) The amount of compensatory damages should be increased to a total of \$5,000.00 to fully compensate Davis for the hostile work environment which existed prior to the third incident;

38) The other relief awarded by the Commission is appropriate and reasonable; and

39) Diane Davis was not constructively discharged.

IT IS HEREBY ORDERED that the Final Decision is Modified in part to increase the amount of compensatory damages from \$2,500.00

(Two Thousand Five Hundred Dollars) to \$5,000.00 (Five Thousand Dollars) and the remainder of the Final Decision is Affirmed.

IT IS HEREBY FURTHER ORDERED that any and all claims not addressed herein are hereby dismissed.

DATED: Honolulu, Hawaii JAN - 4 1996

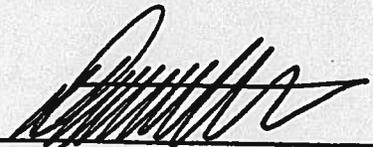
GREG K. NAKAMURA
JUDGE OF THE ABOVE-ENTITLED COURT



APPROVED AS TO FORM:



Dana Ishibashi, Esq.
Attorney for Appellants Volcano
Island Farms, Inc., dba The Hawaiian
Hemp Co., and Dwight Kondo



David Simons, Esq.
Attorney for Appellant Steve Davis,
as Executor and Sole Beneficiary for
the Estate of Diane Davis