

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO,)
 Executive Director, on)
 Behalf of the Complaint)
 Filed by Serena M.Y. Kyi-Yim)
)
)
 vs.)
)
 MORNING HILL FOODS,)
 LLC dba Manu Bu's,)
)
 Respondent.)

Docket No. 16-002-E-A

DECISION AND ORDER GRANTING
EXECUTIVE DIRECTOR'S FIRST
MOTION FOR SUMMARY JUDGMENT

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 HONOLULU, HAWAII

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 FIRST MOTION FOR SUMMARY JUDGMENT

This matter came on for hearing on March 16, 2017. Enforcement Attorney Robin Wurtzel on behalf of the Executive Director¹ and Andrew Daisuke Stewart, Respondent's Attorney, were present.

On January 27, 2017, Executive Director filed its First Motion for Summary Judgment as to All Claims or for Partial Summary Judgment. (ED's Motion for SJ).² Respondent filed its Memorandum in Opposition to Executive Director's First Motion for Summary Judgment.³

¹Enforcement Attorney April Wilson-South was also present.

²A Corrected page 12 of Memorandum in Support of Executive Director's First Motion for Summary Judgment as to All claims or for Partial Summary Judgment was filed on January 30, 2017.

³Respondent's second Memorandum in Opposition was filed on March 14, 2017 at 2:07 p.m. Per the Amended Notice of Hearings, the due date for memoranda in opposition was

This is a relatively straightforward case alleging age discrimination. The basic facts are not in dispute. Respondent owns a musubi “boutique” shop in Moili‘ili and sought part-time employees in the Fall of 2013 and Winter of 2014. Specifically Respondent advertised for part time help in the window of its shop in January 2014: “Winter-Spring 2014 Now Hiring UH (Manoa) Students.”

Respondent also advertised on the internet via Craigslist back in October 2013.

“REQUIREMENTS

1. Active full time undergraduate (BA)...”⁴

In his deposition, Respondent admitted that he sought students because they would, in essence, follow his instructions better.⁵

In its Motion for SJ, the Executive Director contends that these advertisements violate H.R.S. § 378-2(a)(1)(c) and H.A.R. § 12-46-131 and 133.⁶ The language itself is clear and

Tuesday, March 14, 2017 at 9:00 a.m., two days prior to the hearing. Respondent’s counsel admitted that he filed late thinking that the time was 4:00 p.m. which had been the deadline set for previous memoranda in opposition. Respondent had also filed an initial Memorandum in Opposition to Executive Director’s First Motion for Summary Judgment on February 17, 2017.

⁴Parties have stipulated to these two advertisements by way a Joint Stipulation to Entry of Evidence of Exhibits 1 and 2 Filed on January 20, 2017.

⁵Asaoka Deposition, Transcript at 56, lines 9-19 and 21-24, cited in Respondent’s Opposition Memorandum to Executive Director’s First Motion for Summary Judgment.

⁶§378-2 provides in part: Discriminatory practices made unlawful; offenses defined. (a) It shall be an unlawful discriminatory practice:

(1) Because of race, sex including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status...

(C) For any employer or employment agency to print, circulate, or cause to be printed or circulated any statement, advertisement, or publication or to use any form of application for employment or to make any inquiry in connection with prospective employment, that expresses, directly or indirectly, any limitation, specification, or discrimination;

unequivocal. Respondent admitted his desire to hire college students. Both the language of the advertisements and Respondent's intent are tantamount to age discrimination under the relevant statutes and agency regulations.

Respondent, however, disputes the Executive Director's conclusion by advancing two arguments. First, Respondent argues that complainant Serena Kyi-Yim was not the person who approached him inquiring about the position. This raises a "standing" issue. Second,

AGE DISCRIMINATION

§12-46-131 General policy. Chapter 378, HRS, prohibits any employer or other covered entity from discriminating in employment because of a person's age, except where age is a bona fide occupational qualification (BFOQ).

§12-46-133 Pre-employment practices. (a) Where an employer or other covered entity, as a part of its recruitment process, advertises job openings through the media, employment agencies, posting of notices, or through other means, it is discrimination on the basis of age for the employer to express or cause to be expressed a preference for individuals of a particular age or range of ages unless there is a BFOQ for the position. Phrases such as "young", "college student", "girl", "boy", "recent college graduate", "retired person", "supplement your pension", or others of a similar nature are prohibited unless there is a BFOQ for the position.

(b) No newspaper or other publication published within the State shall accept, publish, print, or otherwise cause to be advertised any notice of an employment opportunity from an employee or other covered entity containing any indication of a preference, limitation, or specification based on age, unless the newspaper or publication has obtained the approval of the department indicating that the preference, limitation, or specification is a BFOQ.

(c) Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to age shall be unlawful unless based on a BFOQ. An applicant shall not be:

(1) Asked his or her age or date of birth; or

(2) Required to produce proof of age in the form of a birth certificate or baptismal record.

Respondent asserts a bona fide occupational qualification (“BFOQ”) for the need to hire college students.

Assuming arguendo that there is a factual issue as to whether Ms. Kyi-Yim was the person who inquired about the position,⁷ under HAR §12-46-5(b), the Executive Director may bring an action without an actual complainant.⁸ Therefore, the Executive Director has “standing,” or the authority to bring such a complaint, regardless of whether Ms. Kyi-Yim is found to be the person who approached Respondent in response to the advertisements.

With respect to the BFOQ argument, generally a party first admits that they engaged in discrimination but seeks to justify such actions based on specific criteria associated with the employment, e.g. the hiring of female prison guards for women’s prisons; the hiring of a minister with a specific religious denomination for a particular church, and the like.⁹ The burden to prove

⁷In her declaration in support of ED’s First Motion for SJ, Ms. Kyi-Yim states that she approached the owner and inquired about the position. Respondent, however, contends in his deposition that the image he saw of Ms. Kyi-Yim in a neighborhood board video does not match the physical characteristics of the person who approached him.

⁸§12-46-5 Filing of complaint....

(b) The commission’s executive director may file a complaint whenever there is reason to believe that any person, employer, employment agency, or labor organization has engaged or is engaging in an unlawful discriminatory practice.

⁹HRS §378-3 Exceptions. Nothing in this part shall be deemed to:

(2) Prohibit or prevent the establishment and maintenance of bona fide occupational qualifications reasonably necessary to the normal operation of a particular business or enterprise, and that have a substantial relationship to the functions and responsibilities of prospective or continued employment;

HAR §12-46-132 Bona fide occupational qualification (BFOQ). (a) Whether occupational qualifications will be deemed to be “bona fide” to a specific job and “reasonably necessary to the normal operation of the particular business” shall be determined on the basis of all the pertinent facts surrounding each particular situation. This concept of a BFOQ shall have limited scope and application, and shall be narrowly construed.

a BFOQ lies with the employer under the relevant statutes, regulations as well as controlling case law.

In the instant case, according to its opposition memorandum, Respondent asserts that his musubi business has a “specific business model which is imperative for his employees to fully understand and execute. In Mr. Asaoka’s judgment as an entrepreneur and business owner, he determined that current undergraduate students are best suited for understanding and implementing his business model due to their communications skills and ability to follow directions, which are gained from being in classroom setting.”

The logic of this assertion does not withstand scrutiny. If Respondent wanted someone to follow instructions, he would hire someone with a military or law enforcement background, regardless of age. The military and law enforcement are two major institutions in which

(b) An employer or other covered entity asserting a BFOQ defense has the burden of proving that:

- (1) The age limit is reasonably necessary to the essence of the business; and either
- (2) All or substantially all individuals excluded from the job involved are in fact disqualified; or
- (3) Some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

If the employer or other covered entity’s objective in asserting a BFOQ is the goal of public safety, the employer or covered entity shall prove that the challenged practice does in fact effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

(c) An age requirement specified by law, rule, or regulation, shall be considered a BFOQ where the requirement is related to the work which the employee must perform.

following orders is paramount, and indeed a basis for punishment if orders are not followed. Instead, it is evident from his own deposition testimony and the wording of the advertisements, that Respondent sought to hire students. This is discriminatory and without justification, even looking at the evidence in the light most favorable to the non-moving party.¹⁰

Therefore, the Executive Director's First Motion for Summary Judgment is granted with respect to the following matters:

1) The two advertisements, one in the shop's window and the other on craigslist, are discriminatory and violate Hawaii Revised Statutes §378-2(a)(1)(c) and HAR § 12-46-131 and 12-46-133.

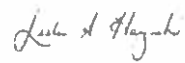
2) Respondent has failed to demonstrate that it is a Bona Fide Occupational Qualification (BFOQ) that his employees must be University of Hawai'i students under HRS §387-3 and/or HAR §12-46-132.

Thus, the only remaining issues for hearing on May 17-19, 2017 are damages, if any, and other relief sought by the ED.

¹⁰In deciding a motion for summary judgment, factual evidence and inferences drawn therefrom are to be viewed in the light most favorable to the non-moving party. *Tri-S Corp. v. W. World Ins. Co.*, 110 Hawai'i 473, 487, 135 P.3d 82, 96 (2006).

DATED: Honolulu, Hawaii, March 17, 2017.

HAWAII CIVIL RIGHTS COMMISSION



Leslie A. Hayashi
Hearings Examiner

Copies sent to:
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