

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  
HEARINGS EXAMINER'S  
**AMENDED** FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDED  
ORDER; APPENDIX A

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CIVIL RIGHTS COMMISSION  
HONOLULU, HAWAII

HEARING OFFICER'S **AMENDED** FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND RECOMMENDED ORDER<sup>1</sup>

I. INTRODUCTION

A. Chronology of the Case

The issues of this case are fairly straightforward.<sup>2</sup> On or about October 3, 2013

Respondent posted an advertisement on Craigslist to hire "active full-time undergraduate (BA)

<sup>1</sup> **This amended decision reflects corrected transcript cites which were affected due to a formatting change of the final transcript. With the addition of this footnote, adjustments were also made to a few footnote references.**

<sup>2</sup>While the issues are simple, this case has been highly contested and contentious. Numerous pleadings requesting continuances, a stay and dismissals, including a motion to dismiss presented at the commencement of the hearing on May 17, 2017, have been filed. See Appendix A for a detailed procedural chronology.

The Respondent also filed a concurrent federal court lawsuit personally suing the HCRC enforcement attorney and the investigator. See *Morning Hill Foods, LLC vs. William D. Hoshijo, as Executive Director for the Hawai'i Civil Rights Commission; Robin Wurtzel; Robin Rudolph, et al.*, Civil No. 17-00042 DKW-KSC filed January 31, 2017, approximately four days after the filing of the Executive Director's First Motion for Summary Judgment.

students UH Manoa.” A few months later, Respondent posted a sign in its storefront restaurant window again advertising for “UH (Manoa) students.”

Ms. Serena Kyi-Yim, who was seeking employment in October 2013, inquired about the position, was informed to apply on line, then saw the Craigslist advertisement. She then filed a complaint with the Hawaii Civil Rights Commission (HCRC). A few months later she saw a sign in Respondent’s storefront window seeking UH Manoa students and again notified HCRC.<sup>3</sup>

Although Respondent admits that a middle age woman came to inquire about the position on October 3, 2013 at the store, Respondent’s owner adamantly insists that it was not the Complainant. This has been Respondent’s position from the outset of the case.<sup>4</sup>

Despite Respondent’s position, the record contains evidence of negotiations between Respondent’s prior counsel, Naomi Cole, and HCRC’s investigator, Ms. Rudolph. However, a settlement agreement was never finalized.<sup>5</sup>

The matter was then docketed on December 6, 2016. The Executive Director (ED) filed

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<sup>3</sup>By this time Ms. Kyi-Kim was employed full time by the Honolulu Police Department. See Finding of Fact #22.

<sup>4</sup>Mr. Asaoka testified that he is between “99.5 and 99.9 percent” sure that Complainant was not the woman who came on October 3, 2013 to inquire about the position. “10,000 to 1 possibility.” Tr. at 62.

<sup>5</sup>Subsequent settlement attempts likewise failed with Respondent’s substitute counsel and ED’s counsel. Mr. Asaoka testified that he thought there was a settlement by his first attorney. However, he became concerned about Complainant’s status as a member of the Neighborhood Board and felt that her filing of a complaint with HCRC was improper. Tr. at 59-61. See also Exhibit 6 “Our True Thoughts” in which Mr. Asaoka details three reasons why he is not satisfied with “some crucial facts of this issue.” Presumably those crucial facts were impediments to finalizing a settlement as some of those facts have been raised at the hearing including the main issue which is that Complainant was not the person who inquired about the job opening on October 3, 2013.

its First Motion for Summary Judgment As to All Claims or For Partial Summary Judgment (“ED’s Motion for Summary Judgment”) on January 27, 2017.<sup>6</sup>

The motion was argued on March 16, 2017. A Decision and Order Granting Executive Director’s First Motion for Summary Judgment was issued the following day. This hearings examiner found that the Craigslist advertisement and the subsequent signage in the window of Respondent’s eatery seeking UH college students amounted to age discrimination in violation of H.R.S. §378-2(a)(1)(c) and H.A.R. §12-46-131 and 133.<sup>7</sup> Further, no bona fide occupational qualification (BFOQ) existed to justify the hiring of only college students.<sup>8</sup>

Thus, the only remaining issue is one of damages. On May 17, 2017, a hearing was held on that issue. Two persons, complainant Serena Kyi-Yim and Respondent’s owner, Manabu

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<sup>6</sup>On January 30, 2017 the Executive Director filed a 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.

<sup>7</sup>See Decision and Order Granting Executive Director’s First Motion for Summary Judgment filed March 17, 2017.

<sup>8</sup>Generally a party admits that the party engaged in the alleged 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. However, Respondent does not admit to age discrimination. Instead, Respondent argued in response to the ED’s Motion for Summary Judgment that his musubi business has a “specific business model which is imperative for his employees to fully understand and execute.” Asaoka Deposition dated February 22, 2017, Tr. at 56-57. In his judgment as an entrepreneur and business owner, Mr. Asaoka determined that current undergraduate students were 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.” See Asaoka Deposition dated February 22, 2017, Transcript at 56. This hearings examiner found that such an assertion failed to meet the legal standard required for a bona fide occupational qualification. Decision and Order Granting Executive Director’s First Motion for Summary Judgment, pgs. 4-5.

Asaoka, testified.<sup>9</sup>

B. Summary of Parties' Contentions

The Executive Director requests an order directing Respondent to pay Complainant \$1,080 in lost wages<sup>10</sup>; \$10,000 in compensatory damages; \$3,000 in punitive damages as well as taking "certain remedial and preventative measures" to prevent future discrimination in the event Respondent opens another business in the State of Hawai'i.<sup>11</sup>

Respondent reasserts its main argument that Complainant was not the person who inquired about the job opening and did not speak with Respondent's owner, Mr. Asaoka, concerning the position on October 3, 2013. Accordingly, Respondent reasons that Complainant lacks "legal standing" to seek *any* damages.<sup>12</sup>

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<sup>9</sup>During the hearing, Respondent's owner, Mr. Asaoka, was assisted by Japanese language interpreter, Ms. Yukiko Hata.

<sup>10</sup>The Executive Director calculates lost wages as follows: 12 hours a week at \$9 an hour for 10 weeks. The ten week period began on October 5, 2013 following Complainant's filing of her complaint with HCRC and ran until Complainant commenced full time employment on December 16, 2013. The amount of hours Complainant would have worked on a part time basis is based on the payroll records of four cashiers from January 1, 2014 to December 31, 2013. See Exhibit 5. In her cross examination of Respondent, Ms. Wurtzel mentioned an additional cashier's name, Kelly Kastuwara, but that name does not appear on the payroll records provided by Naomi Cole, Respondent's previous counsel. Tr. at 63.

<sup>11</sup>See Executive Director's Proposed Findings of Fact, Conclusions of Law and Recommended Decision, dated June 2, 2017, at 9, ¶¶40, 41. Respondent does not appear to oppose such a request. See Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Decision, at 13, last paragraph.

<sup>12</sup>Respondent's counsel contends that Complainant's motivation for filing the complaint with HCRC was financially driven. On cross-examination of Complainant at the May 17, 2017 hearing, Respondent's counsel pursued that line of questioning. Tr. at 39-42. However, the record does not support what can be best characterized as an insinuation.

In Exhibit 3, Complainant states that she learned about HCRC from Carol Lee Kubo, Director of HR, City and County, Honolulu, WDD. However, there is nothing in the record to

## II. FINDINGS OF FACT<sup>13</sup>

In cases where there are only two witnesses, with diametrically opposed recollections as to what occurred, what was said, who said what and so forth, credibility becomes the ultimate issue. Certain credibility principles guide the fact finder in making the ultimate determination. A credible witness is one whose testimony is believable or trustworthy. A witness can be found to be credible or believable as to one matter and not another. Witnesses often provide inconsistent and sometimes contradictory testimony at different times. Contradictory or inconsistent testimony itself does not automatically render a witness' testimony less believable. The existence or non-existence of documentation is another factor that may be relied upon to assess credibility as memories are not always reliable.

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indicate that Complainant learned from Ms. Kubo that there was a possibility that she could recover monetary compensation by filing a complaint with HCRC and prevailing on the claim.

In Respondent's letter to City Councilwoman Ann Kobayashi, Mr. Asaoka asserts that Ms. Rudolph, the HCRC investigator, and Complainant were neighbors or lived in close proximity to each other. See Exhibit 6. Again, there is nothing in the record to suggest that Ms. Rudolph informed Complainant that she could recover monetary compensation by filing a complaint and prevailing on the claim.

Finally, at the hearing, Respondent's counsel showed Complainant a print out from Ho'ohiki, the State of Hawaii Judiciary's data base, showing a lawsuit by Portfolio Recovery Associations against her filed on April 9, 2014. Complainant testified, however, that she was unaware of this lawsuit for debt collection matters, as she had not been personally served. Tr. at 37-38 and 46. Thus, there is insufficient evidence in the record to support the contention that Complainant was financially motivated in pursuing this complaint.

<sup>13</sup>To the extent that any of the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

It is the fact finder's responsibility to identify all disputed facts; summarize the evidence as to the different versions and explain why one version is believed over the other or, as in this case, which facts from the various versions are believed.

In this case, the briefest of interactions occurred when Complainant inquired about the position at Respondent's shop on October 3, 2013. Complainant has given statements at least four different times as to what occurred : the pre-complaint filed the day after the incident (Exhibit 3), the charge of discrimination filed within a few months of the incident (Exhibit 4), Complainant's declaration dated March 8, 2017 and filed on March 10, 2017 and Complainant's May 17, 2017 testimony, Tr. at 20-45.<sup>14</sup>

On the other hand, Respondent contends that no such interaction ever occurred between Complainant and himself, although he does recall a middle age woman coming in to inquire about the position, which interaction lasted under 30 seconds.<sup>15</sup> Mr. Asaoka's statements of what occurred on October 3, 2013 are contained in his deposition, a portion of which was attached to Respondent's Memorandum in Opposition to Memorandum in Opposition (sic) to Executive Director's First Motion for Summary Judgment filed on March 14, 2017 attached as Exhibit 1 and Mr. Asaoka's May 17, 2017 testimony.<sup>16</sup> There are no other witnesses.

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<sup>14</sup>There is also Complainant's deposition testimony, but that is not part of the record, except as to testimony cited in a pleading.

<sup>15</sup>Tr. at 53-54.

<sup>16</sup>In Respondent's Memorandum in Opposition to Memorandum in Opposition (sic) to Executive Director's First Motion for Summary Judgment, Respondent did not file a declaration of Manabu Asaoka contending that Complainant was not the person who came on October 3, 2013 to apply for the position to rebut the Notice of Finding of Reasonable Cause to Believe that Unlawful Discriminatory Practices Have Been Committed, Exhibit 7 to the ED's Motion for Summary Judgment.

In reviewing the exhibits, assessing the parties' respective demeanor and evaluating their testimony, this hearing examiner determines the following:

1. Respondent Morning Hills Foods LLC, dba Manu Bu's is a Limited Liability Corporation wholly owned by Manabu Asoaka, the president. Tr. at 51. Respondent owns a musubi "boutique" shop in Moili`ili and sought part-time employees in the Fall of 2013 and the Winter of 2014. The store's location is 1618 S. King Street in Honolulu, Hawai`i. Exhibits 1 and 2.

2. Respondent is an employer within the meaning of H.R.S. §378-1. As Respondent conducted business in the State of Hawai`i, Respondent is subject to the provisions of H.R.S. Chapter 378 and H.A.R. Title 12.<sup>17</sup>

3. On October 3, 2013, Complainant Serene Kyi-Yim was unemployed. Tr. at 19-20. She would turn 50 years old in two days. Tr. at 17.

4. Complainant has a college degree from the University of Hawai`i (UH) at Manoa. Tr. at 17 and 22.

5. Prior to becoming unemployed, Complainant had worked as a professional in social services case management positions for over 20 years. She started her professional employment with Alu Like, helping individuals further their education and find employment. She then worked with the City and County's First-to-Work program assisting welfare recipients obtain employment. She was also employed by Oahu Work Links which was with the State of Hawai`i assisting them with employment opportunities. She then worked for the Section 8 Housing

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<sup>17</sup>See Decision and Order Granting Executive Director's First Motion for Summary Judgment filed March 17, 2017.

section in the State Housing Office to help individuals obtain Section 8 housing. She had another job with Keiki O Ka `Aina. In these various positions, Complainant's job responsibilities included helping low-income and unskilled workers find housing and employment and to apprise them about Hawai'i's employment law, especially when being interviewed or applying for job positions.<sup>18</sup> Tr. at 17-18.

6. Complainant also worked in retail for thirteen years; had cashiering experience; was familiar with Japanese business values as she had studied the Japanese language and taken Japanese culture classes at the University of Hawai'i. Tr. at 22-23.

7. At the time, Complainant was also serving on her Neighborhood Board (Moilili-McCully), which is strictly a volunteer position.<sup>19</sup> Tr. at 18-19.

8. On October 3, 2013, Complainant went to Mana Bu's and saw a help wanted sign. She expressed interest in applying for the position.<sup>20</sup> Tr. at 21.

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<sup>18</sup>Complainant is currently employed by Housing Solutions, a non-profit company, providing case management services for homeless people in the transitional housing program. Tr. at 17-18.

<sup>19</sup>The dates of Complainant's service on the Neighborhood Board were never established.

<sup>20</sup>In the Pre-Complaint Questionnaire dated October 4, 2013, Complainant wrote that she noticed the help wanted sign and asked the female cashier how she could apply. She was informed to send her resume to [himusubi@yahoo.com](mailto:himusubi@yahoo.com). Complainant returned to the store an hour later and there was a man (with "really bad teeth") instead of the female cashier. She asked if he was the manager and he said he was. Complainant again asked about applying for the cashier's position; she was told that "they concentrate on hiring only UH students because they seem to learn faster....he told me he would not accept my resume because I was not a UH student/undergraduate, i.e. too old and how I shouldn't bother to apply." See Exhibit 3.

In the Charge of Discrimination filed on January 24, 2014, Complainant stated that her requests to apply for a job was denied by a male manager. She was told she "could not apply for the job because the positions were only for students attending the University of Hawaii in an undergraduate program." When asked why only students could apply, the "male manager said, "They learn faster."



9. Although there was contradictory testimony regarding whether Complainant actually spoke to Mr. Manabu Asaoka about the job opening, this hearing examiner finds Complainant's testimony credible that she inquired about the position on October 3, 2013 and spoke to Mr. Asaoka.<sup>21</sup> Tr. at 21. This testimony is also consistent with Exhibits 3 and 4.<sup>22</sup> See also

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In both of these statements, Complainant never mentioned that she spoke to the male manager outside of the store while he was on break smoking a cigarette. Instead according to these statements, the male manager was *inside* the store where the female cashier had been earlier.

In Respondent's Scheduling Conference Statement filed on December 14, 2016, pages 3 and 4, Respondent compares certain excerpts from the Notice of Finding with excerpts from the Amended Notice of Finding.

Specifically the following references were deleted:

- 1) that Complainant had her resume with her on October 3, 2013 when she inquired about work;
- 2) that Mr. Asaoka refused Complainant's resume; and
- 3) that Respondent discouraged complaint from applying for employment rather that he failed to accept her application and consider her for employment.

However, these amendments do not appear to be as a result of Complainant's changing her testimony. It is unfortunate that such discrepancies occurred in the Executive Director's filings as such inconsistencies necessitated Respondent to dispute Complainant's testimony and her credibility.

<sup>21</sup>At the May 17, 2017 hearing, Complainant testified on cross-examination that she spoke to Mr. Asaoka outside of the establishment while he was smoking a cigarette on break. Tr. at 35. Under further cross examination, Complainant admitted that she honestly doesn't remember if she was actually told that she was too old and that she shouldn't apply since she was not a UH undergraduate student but that's how she "felt." When pressed if Mr. Asaoka actually used those words, i.e. "too old," Complainant again reiterated that she honestly doesn't remember the conversation but if that's what she wrote in Exhibit 3 it's "the insinuation," the feeling that she got. Tr. at 31-33.

Mr. Asaoka is adamant that 1) he has never smoked in his entire life; 2) that smoking is not allowed as a policy matter because the smell would affect the quality of the merchandise; 3) that he never takes a break; 4) that he never spoke to Complainant about the job position; and 5) that the only time he remembers someone inquiring about the job position was a woman with a "small build who was very suntanned." He remembers this clearly because this woman reminded him of his mother-in-law in that she "had a shy demeanor and she kind of looked down." Tr. at 52-55. Mr. Asaoka testified that his shop gets about 300 customers a day. Tr. at 58.

Complainant's Declaration dated March 8, 2017 filed on March 10, 2017.

10. During their October 3, 2013 discussion, Mr. Asaoka asked Complainant if she was currently attending college or had already graduated. When Complainant replied that she already had her degree, Mr. Asaoka informed Complainant that he wanted active UH Manoa students because "they learned faster." Tr. at 21. See also Exhibit 3.

11. Complainant persisted and stated that she really needed a job and that she lived very close by. Exhibit 3.

12. Complainant was then informed that resumes were not accepted at the store and was directed to apply on line to an advertisement posted on Craigslist.<sup>23</sup> Tr. at 31-34.

13. On the internet, Complainant found the Craigslist advertisement which was authored and posted by Manabu Asoaka, owner of Morning Hills Foods, LLC, dba Mana Bu's.<sup>24</sup> See Exhibit 1; Tr. at 8.

The relevant portions of the Craigslist advertisement are as follows:

"CHEERFUL Morning Staff - *UH Manoa Students Welcome!*"

"Now we IMMEDIATELY need some *UH (Manoa) student staff* who can work more than three months."

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<sup>22</sup>Further, Mr. Asaoka admits that he spoke with a middle age woman about the position on October 3, 2013 but that woman's physical characteristics did not match those of Complainant. The exchange lasted approximately 30 seconds. Tr. at 54. See also Exhibit 6.

<sup>23</sup>Ultimately Mr. Asaoka did not tell Complainant she could not apply as was pointed out by Respondent's counsel on cross examination of the Complainant at the May 17, 2017 hearing. Instead, Complainant was directed to apply on line which is how she found the Craigslist advertisement. Tr. at 34.

<sup>24</sup>See Joint Stipulation to Entry in Evidence of Exhibits 1 and 2 filed on January 20, 2017.

“Since our employees are expected to have a high-level communication skill based on their sufficient educational background, the applicants *need to be active undergraduate (B.A.) students.*”

(REQUIREMENTS):

1. *Active full-time undergraduate (B.A.) Students, hopefully UH Manoa students.*

(Emphasis added.)

14. Complainant believed that she met all of the qualifications except for the fact that she already had her college degree. Tr. at 21-23.

15. Since she did not meet that last requirement and based on her earlier conversation with the manager, Complainant believed it would be “a waste of time” to apply since she already had a degree. Tr. at 23.

16. While reading the Craigslist advertisement, Complainant felt “outraged.” Tr. at 23. The more she thought about it, she felt “frustrated” and “mad” as she needed a job. Tr. at 23-24 and 43. As a result, Complainant had a hard time sleeping and was more irritable. Tr. at 24.<sup>25</sup>

17. Before inquiring about the job position at Respondent’s store, Complainant was already experiencing a number of stressful events in her life which affected her emotional state of mind. She had been unemployed for approximately nine months and her unemployment benefits either had ended or were about to end and she was “getting a little desperate.” Tr. at 20, 25 and 43. She felt “helpless” that she couldn’t help support her family of four. Tr. at 24-25.

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<sup>25</sup>At the May 17, 2017 hearing, Complainant testified that she felt “pissed” upon hearing Mr. Asaoka informing her that he was looking for active college students. Tr. at 21. However, since Complainant was inquiring about the job, it is more likely that she felt this way upon seeing the Craigslist advertisement.

She was “feeling a little weird” about turning the “big 5-0 soon.” Tr. at 17 and 20. Complainant also has a special needs son.<sup>26</sup> Tr. at 20 and 27. She was experiencing menopause which was making her a “little more irritable” than usual. Tr. at 24. The family had to “tighten its belt” which meant less opportunities to eat out. Tr. at 25.<sup>27</sup>

18. Despite being a professional, Complainant would have accepted Respondent’s job, which paid \$9 an hour and was only part time, because she was looking for “something to tie her over.” Tr. at 24-25. In addition, her special needs son worked nearby at Baskin-Robins which is right in front of Mana Bu’s so she could visit him more often. Tr. at 26 and 42. She was also hoping to find a job to “help boost” her self-esteem. Tr. at 24.

19. Complainant thought about the Craigslist advertisement a lot. Tr. at 24. Based on her own training, she knew Respondent’s advertisement wasn’t “right.” Tr. at 24. Complainant testified that, “All my life I tried to help people and now I couldn’t even help myself.” Tr. at 24.

20. On October 4, 2013, Complainant filed a complaint with the Hawaii Civil Rights Commission. Tr. at 20. See also Exhibit 3.

21. On December 16, 2013, Complainant began work in a full time clerical position with the Honolulu Police Department (HPD) in their Major Events Department. Tr. at 25-26.

22. Around the end of January 2014, Complainant visited her son at Baskin-Robins and decided to stop at Manu Bu’s. Tr. at 26.

23. Respondent was again advertising for workers and had posted a sign in the storefront

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<sup>26</sup>Complainant testified that her son, who was a junior in high school at the time, has ASD autism spectrum disorder. Tr. at 27.

<sup>27</sup>Complainant also testified that she couldn’t go “garage saleing.” Tr. at 25.

window which read in relevant part:

“Winter-Spring 2014  
NOW HIRING  
UH (Manoa) Students”

24. Although now employed full-time, Complainant felt “mad again.” The sign soliciting only college students “still bothered her.” Tr. at 27.

25. Complainant photographed the window ad and provided a copy to HCRC. Tr. at 26.

26. Just as Complainant was attempting to put this emotional experience behind her, she received a phone call on her cell phone from City Council woman Ann Kobayashi in late January or February 2014.<sup>28</sup> Tr. at 27-30.

27. The gist of the phone call was to convey Mr. Asaoka’s belief that this matter was a misunderstanding or miscommunication and that it would be everyone’s interest for Complainant to withdraw her complaint. Complainant believed being contacted by Ms. Kobayashi was “not

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<sup>28</sup>It is unclear from the record as to whether a conversation took place or just a voice mail message was left on Complainant’s cellphone. Complainant testified that she (Ann Kobayashi) “essentially was trying to *maybe*, explain to me that, that, that there was some misunderstanding, miscommunication about, and *trying to maybe* this, *persuade me to drop the, the complaint*. Tr. at 29. The reference to a “misunderstanding” and “miscommunication” is consistent with the language used by Mr. Asaoka in Exhibit 6.

In Complainant’s declaration dated March 8, 2017 and filed March 10, 2017, Complainant stated: “One day in January 2014, I received a call from Ann Kobayashi, who sits on the Honolulu City Council, about my complaint. Ms. Kobayashi said that Manubu’s was a small business and owned by a Japanese National, and she implied the owner did not understand Hawai’i law because of that. I understood the purpose of Council woman Kobayashi’s call was to convince me to withdraw my complaint. This served to upset and aggravate me even more, and I felt persecuted. I had difficulty sleeping and concentrating on my new job. It affected me emotionally and it affected my job performance. The issue was especially sensitive as I was employed by the City and County of Honolulu and worried if my new job was in jeopardy.”

right” and found the phone call “unsettling.”<sup>29</sup> Tr. at 29-30.

28. Receiving the phone call “brought up all the, the outrage and the, the feeling of frustration.” Tr. at 29. Complainant also worried if her new job was in jeopardy. Declaration of Serena Kyi-Yim in Support of ED’s Motion for Summary Judgment at ¶ 21.

29. Unbeknownst to Complainant at the time she received the call from Ms. Kobayashi, Mr. Asaoka had authored a letter dated February 3, 2014 to City Council woman Ann Kobayashi, who was also a customer of Respondent’s eatery. Tr. at 59 and 61. In that letter, Mr. Asaoka requested Ms. Kobayashi’s assistance in contacting Complainant regarding her complaint with HCRC. Mr. Asaoka notes that it would be in the best interests - for “Serena-san’s future”, the “community’s future” and the “local business environment, especially, family owned small businesses.” for her “to review this action by considering the upcoming negative effects.” See Exhibit 6.<sup>30</sup>

30. As a result of the Craigslist advertisement, Complainant also “had a hard time sleeping.” Tr. at 24.<sup>31</sup>

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<sup>29</sup>There is no evidence in the record that City Council woman Ann Kobayashi was aware that Complainant was employed by HPD, City and County at the time Ms. Kobayashi made the call to Complainant. Although Respondent was aware that the Complainant had found employment as of December 16, 2013, he also was not aware that she was employed by HPD. Tr. at 60. See also Exhibit 6.

<sup>30</sup>The pages of Exhibit 6 appear to be out of order in that they are numbered backwards. MHF0004 which appears as the first page of Exhibit 6 actually should be the last page of this 6 page document as it is the closing page of the letter bearing Mr. Asaoka’s name.

<sup>31</sup>The record is devoid of the specifics of Complainant’s inability to sleep. Given that this hearing focused on the issue of damages, it would have been helpful to know how long Complainant’s difficulty with sleeping lasted as well as the frequency and extent of her sleeping difficulties. Without such specifics, the amount of compensatory damages must be severely limited.

31. However, Complainant did not seek mental health counseling for this particular occurrence. Tr. 44-45.<sup>32</sup>

32. Respondent's discriminatory advertisements did not *cause* Complainant's emotional distress. However, the discriminatory ads *contributed* to Complainant's pre-existing emotional distress. That contribution, however, was *fairly insignificant based on the record in this case*, given the nature and extent of Complainant's current situation, e.g. being unemployed for nine months, having a special needs son, turning fifty, and experiencing menopause.<sup>33</sup>

33. Investigation of Complainant's complaint ensued; settlement negotiations were entered into but ultimately the matter was docketed on December 6, 2016. The hearing was held on May 17, 2017.

### III. CONCLUSIONS OF LAW<sup>34</sup>

Although liability was decided by the Decision and Order Granting Executive Director's

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Likewise in Complainant's declaration dated March 8, 2017 and filed on March 10, 2017, similar assertions are made as detailed in Footnote 27. The record is totally devoid of the details explaining how Ms. Kobayashi's call affected Complainant's ability to concentrate on her new job, how it affected her emotionally and how it affected her job performance and why she believed her new job was in jeopardy. With only mere general assertions concerning emotional distress, the amount of compensatory damages must be severely limited.

<sup>32</sup>Complainant testified that she did not seek the services of a psychiatrist or a psychologist. However, she testified that she spoke with social workers. However, no further details were brought out on cross examination or on re-direct (such as when she sought the treatment, how often she sought treatment, and whether she paid for treatment) so the record leaves this hearings examiner to conclude that any such "treatment" has not been substantiated.

<sup>33</sup>As explained in Footnotes 31 and 32, Complainant was not asked and did not testify as to the specifics of her emotional distress which she claims was caused by Respondent's discriminatory ads. Further, neither counsel briefed the issue of whether Complainant is entitled to claim any emotional distress as a result of the sign in Respondent's eatery as Complainant was employed full time and no longer seeking employment at that time.

First Motion for Summary Judgment dated, March 17, 2017, it is worthwhile to reiterate those determinations of law here.

1. H.R.S. §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;

## 2. AGE DISCRIMINATION UNDER H.A.R.

§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 an 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.

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<sup>34</sup>To the extent that any of the following conclusions of law also contain findings of fact, they shall be deemed incorporated into the findings of fact.



3. The Craigslist advertisement specified that applicants *need to be active undergraduate (B.A.) students.*” (Emphasis added). Such language violates H.R.S. Chapter §378-2(a)(1)(c) and H.A.R. §12-46-131 and §12-46-133.<sup>35</sup>

4. The language of the sign in Respondent’s window, seeking “UH (Manoa) students,” also violates H.R.S. Chapter §378-2(a)(1)(c) and H.A.R. §12-46-131 and §12-46-133.<sup>36</sup>

5. Without admitting age discrimination, Respondent raised a bona fide occupational qualification defense.<sup>37</sup> In his deposition, Respondent admitted that he sought students because they would, in essence, follow his instructions better.<sup>38, 39</sup>

6. However, Respondent failed to demonstrate that the hiring of current University of Hawai`i students met the legal standard for a bona fide occupational qualification under H.R.S. §187-3 and H.A.R. §12-46-112.<sup>40</sup>

#### IV. REMEDIES

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<sup>35</sup>See also Tr. at 5.

<sup>36</sup>See also Tr. at 5.

<sup>37</sup>As previously noted, the BFOQ defense generally follows an admission that the employer engaged in unlawful discrimination but that the nature of the position justifies the discrimination.

<sup>38</sup>Asaoka Deposition dated February 22, 2017, Transcript at 56, lines 9-19 and 21-24, cited in Respondent’s Opposition Memorandum to Executive Director’s First Motion for Summary.

<sup>39</sup>Respondent also argued that no ruling should issue on the ED’s Motion for Summary Judgment due to the recent filing of its federal lawsuit. See *Morning Hill Foods, LLC vs. William D. Hoshijo, as Executive Director for the Hawai`i Civil Rights Commission; Robin Wurtzel; Robin Rudolph, et al.*, Civil No. 17-00042 DKW-KSC.

<sup>40</sup>See also Tr. at 5.

The Executive Director requests that Respondent be ordered to pay Complainant lost wages of \$1,080, compensatory damages of \$10,000 and punitive damages in the amount of \$3,000. The Executive Director must demonstrate the extent and nature of the resultant loss or injury and Respondent must demonstrate any bar or mitigation to any of these remedies.

The Executive Director also requests certain “remedial and preventative” measures in the event Respondent’s owner should again operate a business in Hawaii.<sup>41</sup>

1. Lost Wages

Lost wages encompass the amount Complainant would have earned had she not been discouraged from applying for the position and been hired. Respondent has the burden to prove any offset to Complainant’s expected earnings.

The Executive Director calculates lost wages of \$1,080 based on 12 hours a week at \$9 an hour for 10 weeks. The ten week period began on October 5, 2013 and ran until Complainant commenced full time employment on December 16, 2013. The amount of hours Complainant would have worked on a part time basis is based on the payroll records of four cashiers from January 1, 2014 to December 31, 2013. See Exhibit 5.

Respondent steadfastly argues that Complainant was not the person who inquired about the job position on October 3, 2013 and therefore cannot pursue any claim for damages.<sup>42</sup>

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<sup>41</sup>Mr. Asaoka currently resides in Japan. He is not operating any business in Hawaii. Tr. at 67.

<sup>42</sup>In Exhibit 6, Mr. Asaoka writes “Intriguingly, they calculated the compensation amount based on the assumption that the applicant would have gotten hired by our company and would have been working at our workplace from right after her first visit (10/3/2013) to the date she claimed it to HCRC (1/27/2014), or if she still would not have job yet, the “period” would still continue.”

This hearing examiner has determined that Complainant inquired about the job position on October 3, 2013. Further, Complainant was discouraged from applying because of Respondent's desire to hire active college students and the unlawful and age discriminatory language of the Craigslist advertisement. Accordingly, Complainant is entitled to lost wages in the amount of \$1,080.

## 2. Compensatory Damages

Pursuant to H.R.S. §368-17, the Commission has the authority to award compensatory damages for any pain, suffering, embarrassment, humiliation or emotional distress Complainant suffered as a result of Respondent's discriminatory advertisements.

The Executive Director relies on *William D. Hoshijo, Executive Director, on behalf of the complaint filed by Hassam A. Hermaidan v. Life Support Systems, Hawaii, Inc.*, Docket No. 96-008-E-NO-MS decided on July 11, 1997; Final Decision and Order dated October 14, 1997 to support its request for \$10,000 for emotional or compensatory damages.

A brief review of the facts of the *Hermaidan* case is relevant.

Life Support Systems, Hawaii advertised for a shop helper. Mr. Hermaidan saw the ad and filled out an employment application form and obtained an interview date. Respondent asked questions regarding Mr. Hermaidan's ethnicity and marital status.<sup>43</sup> Respondent's owner admitted that he did not know such questions were discriminatory and unlawful but asserted that he asked these questions to "get to know Mr. Hermaidan and wanted to know if he was likely to stay in Hawaii as the company would have to invest over \$10,000 to train Mr. Hermaidan and get him certified to check their safety equipment.

Following the interview, Mr. Hermaidan became angry about the interview questions regarding his nationality, wife and family. He believed those questions were being used to screen out people of certain nationalities and those who were married, like himself.

When Mr. Hermaidan learned that he did not get the position, he became “more angry and upset and discouraged from continuing his job search. He became hostile, withdrawn and distant from his wife, son and friends and wanted to move back to Los Angeles.”

The Executive Director sought \$35,000 in compensatory damages for emotional distress. The hearings examiner found that the “major portion and extent of Complainant’s emotional distress stemmed from other factors, such as: a) Complainant’s mistaken assumption that Respondent would use such inquiries to screen him from the job because of his ancestry and marital status; b) his mistaken belief that Respondent did not hire him because of his ancestry and marital status; c) being unemployed for 10 months; and d) believing that he would not be able to secure a good job in Hawaii because of his ancestry. The hearings examiner determined that \$7,000 was appropriate compensation for Mr. Hermaidan’s emotional distress caused by Respondent’s unlawful inquiries.

In its Final Decision and Order, the Commission disagreed with the hearing examiner’s assessment. The Commission found that Mr. Hermaidan’s belief that the unlawful questions were factors in not being hired led to his emotional distress and was thus compensable as damages. The Commission increased the award from \$7,000 to \$10,000.<sup>44</sup>

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<sup>43</sup>Mr. Hermaidan was married and he and his family originally came from Lebanon to the United States.

<sup>44</sup>In *Hermaidan*, Complainant claimed that *solely* as a result of Respondent’s unlawful inquiries, he became upset and angry, lost his self esteem, became discouraged from continuing his job search, became distant from his wife, child and friends, lost his appetite, lost weight, lost

In *Hermaidan*, unlike this case, the complainant actually applied for the position and was asked a number of unlawful questions regarding marital status and ethnicity during the interview. Here, Complainant had but the briefest of interactions with Respondent's owner and was ultimately directed to apply on line. That's when she saw the Craigslist advertisement and became upset. Further, Complainant does not claim that Respondent's age discrimination was the sole cause of her emotional distress.

Instead Complainant testified candidly that there were a number of factors affecting her emotional state of mind at the time: 1) the length of time she had been unemployed; 2) unemployment benefits that had either run out or were running out; 3) a teenage son with special needs; 4) menopause; and 5) turning 50.

This hearing examiner concludes that the first three factors are clearly not compensable as any emotional distress did not result from Respondent's age discrimination advertisements. This is consistent with the holding in *Hermaidan*.

Arguably, turning 50 and experiencing menopause are related to age. However, Complainant testified that the thought of turning the big 5-0 was traumatic in itself which she was already experiencing *prior* to seeing Respondent's Craigslist advertisement.<sup>45</sup> Complainant also testified that menopause was making her more irritable.<sup>46</sup> Thus, these factors pre-existed before Complainant sought employment at Respondent's shop. At best, Respondent's

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sleep, argued with his wife almost every other day, argued once with his mother and felt stressed for approximately 2 -3 months after the April 26, 1994 interview. Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order, at 14-15.

<sup>45</sup>Tr. at 23-24 and 43 and 47.

<sup>46</sup>Tr. at 24.

discriminatory advertisements may have exacerbated Complainant's emotional distress but clearly were not the sole or even significant cause.

Complainant also experienced difficulty in sleeping as a result of the Craigslist advertisement. The advertisement offended her "sense of fairness."<sup>47</sup> As previously noted in Footnote 30, the record is devoid of the specifics related to Complainant's sleep difficulties. It would be a fair and reasonable assumption that once Complainant obtained a full time job with HPD on December 16, 2013, that her sleep difficulties subsided as did much of her emotional distress related to being unemployed and unable to contribute financially to her family's needs.

Likewise the claims that Ms. Kobayashi's January 2014 call affected Complainant's job performance and disrupted her sleep were also not specified. All the record shows is that as a result of the call, Complainant felt "unsettled" or that she "worried that her new job was in jeopardy."<sup>48</sup>

Thus, this hearings examiner finds that Respondent's age discrimination advertisements *exacerbated* what Complainant was already feeling but was not the underlying cause of her emotional distress. And without more substantive evidence, the extent of the exacerbation is minimal.

Further, Complainant's self worth and low self esteem were also raised as it relates to Respondent's age discrimination advertisements. Complainant testified that at the time she

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<sup>47</sup>Tr. at 24 and 47.

<sup>48</sup>As noted in Footnote 31, the focus of the May 17, 2017 hearing was on damages. The parties had known this would be the case since March 17, 2017, when the order granting the Executive Director's Motion for Summary Judgment was filed. However, the Complainant's testimony lacked specifics in which to enable a proper assessment and analysis of Complainant's emotional distress.

pursued the job position at Respondent's shop, she was hoping to find a job to boost her self-esteem.<sup>49</sup> She also testified that she would have taken the job at Manu Bu's had it been offered to her.<sup>50</sup>

However, under direct examination, Complainant testified that her self-esteem was already low when Ms. Kobayashi called her in January or February of 2014 and this was after she was fully employed with HPD.<sup>51</sup> Complainant testified that her self esteem was low because she was forced to accept a clerical position with HPD and was unable to get another professional type position like her prior employment.<sup>52</sup>

Thus, this hearings examiner does not find Complainant's testimony that her self esteem would have been significantly boosted by accepting and working at the \$9 an hour cashiering job at Manu Bu's to be credible. Alternatively, even if the job would have boosted her self esteem, such a boost would have been extremely temporary. And this is borne out by the fact that less than a month after finding full time clerical employment with HPD, Complainant was already experiencing low self esteem having been forced to accept a clerical position.<sup>53</sup>

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<sup>49</sup> Tr. at 24.

<sup>50</sup> Tr. at 24-25.

<sup>51</sup>Tr. at 29-30.

<sup>52</sup>Tr. at 29-30.

<sup>53</sup>Tr. at 29-30.

As previously noted, Complainant also did not seek mental health counseling for her emotional distress.<sup>54</sup>

As to the amount of compensatory damages sought by the Executive Director, Respondent's counsel contended in his closing argument that it's common knowledge that general damages are perhaps 2 or 3 times at most the amount of special damages.<sup>55</sup> However, counsel offers no legal authority for this proposition.<sup>56</sup>

Therefore, taking all the evidence as well as the lack of evidence into consideration, this hearings examiner recommends compensatory damages in the amount of \$1,000.

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<sup>54</sup>Complainant testified that she did not see a psychiatrist or a psychologist. She testified that she spoke with social workers. However, no further details were brought out on cross examination or on re-direct so the record remains devoid of any such treatment, leaving this hearings examiner to conclude that no treatment was received. Tr. at 44-45.

<sup>55</sup>Tr. at 74.

<sup>56</sup>This hearings examiner is unaware of any Hawaii case law that provides a formula for calculating general damages or that such a general rule of thumb exists. Based on this hearings examiner's experience as a civil litigator handling civil and complex cases, compensatory or emotional distress damages are determined either by a judge or a jury based on the particular facts of each case as well as assessing the credibility of the witnesses.



### 3. Punitive Damages

H.R.S. §368-17 also authorizes the Commission to award punitive damages. Punitive damages are assessed in addition to compensatory damages to punish a respondent for aggravated or outrageous misconduct, and to deter respondent and others from similar conduct in the future. *See Masaki v. General Motors Corp.*, 71 Haw. 1, 6 (1989).

Since the purpose is to punish and deter others, the inquiry focuses primarily on the respondent's mental state and to a lesser degree on the nature of his conduct.

Given the penal nature of punitive damages, the standard of proof is more stringent than the "preponderance of the evidence" standard employed in administrative hearings and civil trials. Rather the standard is "clear and convincing evidence," a higher standard, although less than "beyond a reasonable doubt," the burden of proof associated with most criminal cases.

Thus, the Executive Director has the burden of showing, by clear and convincing evidence, that Respondent acted either intentionally, or wantonly, oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful misconduct or entire want or care which would raise the presumption of a conscious indifference to consequences.

The Executive Director appears to argue that punitive damages should be awarded because of Mr. Asaoka's request for assistance from City Council woman Ann Kobayashi to ask Complainant to withdraw her complaint with HCRC and the reference to Complainant having "a little shady side." See Exhibit 6. Although this is arguably wrongful, it would appear to be, at most, a separate tort, of perhaps libel. But this matter is an action for age discrimination in hiring. For punitive damages to be justified, the Respondent's actions must relate to Mr.

Asaoka's age discrimination in his hiring. The ED fails to explain the connection between Mr. Asaoka's allegedly inappropriate communication with his councilwoman to the age discrimination issues of this action.

Thus, the ED has failed to show by clear and convincing evidence that Respondent acted wantonly, maliciously or with a conscious disregard for Complainant's rights *with regards to age discrimination*.<sup>57, 58</sup>

Accordingly, the Executive Director has failed to meet its burden of proof with respect to punitive damages and none will be awarded.

#### 4. Remedial and Preventative Measures

The Executive Director requests the following equitable relief:

- A. Respondent cease and desist from further discriminatory advertisements.
- B. Respondent submit to the Executive Director for approval a non-discrimination

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<sup>57</sup>The Executive Director failed to cite any case law and relevant facts to support an award of punitive damages. Tr. at 72.

<sup>58</sup>It is clear from the record that Respondent's owner was unaware of Hawai'i's discrimination laws, which is not a defense to the discrimination claims but is relevant to defending against a claim for punitive damages. Punitive damages are not awarded for mere inadvertence, mistake, or errors of judgment. Restatement (Second) of Torts § 908, comment b; Prosser, supra, at 10 cited in *Masaki v. General Motors Corp.*, 71 Haw. 1, (1989).

In his letter to City Council member Ann Kobayashi, Mr. Asaoka wrote:

"Although we initially did not agree their claim because we had never talked about applicants' age since 2008 but just had been interested in their education background, we eventually admit this claim by understanding that the problem was not what we presented but what the applicant felt....now we understand that, in this country, discrimination issues at workplaces are much more sensitive than those in our home country...."

#### Our True Thoughts

We totally understand that we must be more careful when we gather new employees. Even if our interest in applicants' education background (sic), we should avoid from using confusing words which might make prospective applicants feel discriminated. Through this claim, we have enlightened our sense of human rights in this country." Exhibit 6.

policy which includes the following:

- a. A clear and comprehensive statement defining all types of illegal discrimination enumerated in H.R.S. 378, Part 1, stating that such discrimination is prohibited by Respondent's policies and by federal and/or state law;
- b. A clear statement of an employee's right to complain about discrimination or harassment without fear of retaliation and a procedure for making such complaints;
- c. a procedure for promptly, fully, and objectively investigating such complaints and determining their merit;
- d. a statement that forceful and appropriate measures will be taken to punish offenders and guidelines and procedures for doing so;
- e. The policy shall inform employees that they may contact the Hawai'i Civil Rights Commission at 830 Punchbowl Street, Room 411, Honolulu, Hawai'i 96813, telephone number (808) 586-8636 if they have questions about discrimination.

C. If the Respondent opens a storefront again, or employs people in any capacity, Respondent is ordered to post the revised policy and conduct training of all managers and employees within ten (10) days for the Executive Director's approval of a submitted curriculum, to be taught by a person experienced and conversant with employment law. Said curriculum

must be submitted to the Executive Director prior to opening a storefront or hiring of employees.<sup>59</sup>

However, the facts of this case involve discrimination *in the hiring process* not *discrimination toward existing employees*.<sup>60</sup>

Therefore, this hearing officer recommends the following equitable relief as it applies to the hiring process:

a. Prior to resuming business in Hawai`i, Respondent must adopt a non discrimination hiring policy regarding all unlawful discrimination including age discrimination and submit it to the Executive Director for approval.

b. Such policy must be permanently posted at any future business operated by Respondent's owner in a conspicuous place on its premises.

c. All managers and employees must be trained by a person or company experienced in Hawai`i employment law. Arrangements for such training must be submitted to the Executive Director prior to opening a business or the hiring of employees. Evidence that such training has been conducted must be submitted to the Executive Director within fourteen (14) days following the training.

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<sup>59</sup>As previously noted, Respondent does not appear to dispute the ED's request for certain remedial and preventative measures to prevent future discrimination in the event Respondent opens another business in the State of Hawai`i.

<sup>60</sup>The record is devoid as to whether Respondent already had such information posted in his establishment, but presumably he did not.

V. RECOMMENDED DECISION

Based on the above matters, this hearings examiner recommends that the Commission find and conclude that Respondent Morning Hills Food engaged in age discrimination by virtue of its advertisement listed on Craigslist and the signage posted in its storefront window.

For these violations, this hearings examiner recommends that pursuant to HRS §368-17, the Commission should order:

1. Respondent to pay Complainant \$1,080 as lost wages;
2. Respondent to pay Complainant \$1,000 as damages in compensation for her emotional injuries caused by Respondent's unlawful advertisements;
3. Prior to resuming business in Hawai'i, Respondent must adopt a non discrimination hiring policy regarding age discrimination and submit it to the Executive Director for approval;
4. Such policy must be permanently posted at any future business operated by Respondent's owner in a conspicuous place on its premises; and
5. All managers and employees must be trained by a person or company experienced in Hawai'i employment law. Arrangements for such training must be submitted to the Executive Director prior to opening a business or the hiring of employees. Evidence that such training was conducted must be submitted to the Executive Director, within fourteen (14) days following the training.

Dated: Honolulu, Hawaii, October 9, 2017.

HAWAII CIVIL RIGHTS COMMISSION



LESLIE A. HAYASHI

Hearings Examiner

Copies sent to:

Robin Wurtzel or Enforcement Attorney Designee  
Andrew Daisuke Stewart, Respondent's Counsel

APPENDIX A  
CHRONOLOGY

On October 4, 2013, Complainant filed a Pre-Complaint Questionnaire against Respondent. See Exhibit 3.

At the January 13, 2014 Hawaii Civil Rights Commission Meeting, the Commission approved an extension of time to investigate all cases (including this matter) through July 31, 2014.

On January 27, 2014, Complainant signed a Charge of Discrimination. See Exhibit 4.

At the June 6, 2014 Hawaii Civil Rights Commission Meeting, the Commission approved an extension of time to investigate all cases (including this matter) through January 31, 2015.

At the December 15, 2014 Hawaii Civil Rights Commission Meeting, the Commission approved an extension of time to investigate all cases (including this matter) through July 31, 2015.

At the June 18, 2015 Hawaii Civil Rights Commission Meeting, the Commission approved an extension of time to investigate all cases (including this matter) through January 31, 2016.

At the January 22, 2016 the Hawaii Civil Rights Commission meeting, the Commission approved to an extension of time to investigate all cases (including this matter) through July 31, 2016.

At the April 27, 2016 the Hawaii Civil Rights Commission meeting, the Commission approved to an extension of time to investigate all cases (including this matter) through March 31, 2017.<sup>61</sup>

On December 6, 2016, this hearings examiner received a letter requesting to docket this complaint. On the same day, December 6, 2016, A Notice of Docketing of Complaint; Notice of Scheduling Conference and Order was filed. The Scheduling Conference was set for Friday, December 16, 2016 at 10:30 a.m.

On December 6, 2016, the Executive Director filed its scheduling Conference Statement.

On December 7, 2016, an Amended Notice of Scheduling Conference and Order was filed continuing the Scheduling Conference from December 16, 2016 to December 19, 2016 in order to accommodate Mr. Asaoka's schedule and to have a Japanese interpreter available.

On December 8, 2016, a Second Amended Notice of Scheduling Conference and Order was filed continuing the Scheduling Conference from December 19, 2016 to December 21, 2016.

On December 14, 2016, Respondent filed its Scheduling Conference Statement.

On December 15, 2016, Ground Rules for All Proceedings were issued in an effort to remind counsel that they must follow the Guidelines of Professional Courtesy and Civility of Hawaii Lawyers.<sup>62</sup>

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<sup>61</sup>Respondent contends that all of these extensions violated certain due process constitutional rights as argued in its December 23, 2016 Motion to Dismiss and again in its Motion to Dismiss filed on May 17, 2017.

<sup>62</sup>The level of acrimony and lack of civility between counsel led this hearings examiner to take the extraordinary step to remind counsel of their responsibilities and obligations as officers of the court. Apparently during one of their conversations an exchange was made that prompted Respondent's counsel to request that another enforcement attorney be assigned to the case. That request was denied by Executive Director William Hoshijo.



On December 15, 2016, the Executive Director filed its Motion to Strike noting that Respondent's Scheduling Conference Statement contained confidential settlement information.

On December 16, 2016, Respondent filed its Memorandum in Opposition to Motion to Strike Filed December 16, 2016 (sic) noting its rationale for disclosing the settlement discussions.

On December 21, 2016, the first Scheduling Conference was held following which a Scheduling Conference Order and Notice of Further Scheduling Conference was filed.

On December 22, 2016, an Order Granting in Part and Denying in Part Motion to Strike was filed. In accordance with this order, Respondent filed its First Amended (Redacted) Scheduling Conference Statement on December 23, 2016.

On that same date, December 23, 2016, Respondent filed its Motion to Dismiss Complaint arguing that the Executive Director's "Finding of Reasonable Cause" was filed 751 days after the filing of the complaint without an extensions.

Also on that date, December 23, 2016, Respondent filed a Motion to Have Deposition of Manabu Asaoka Taken by Telephone or Video Conference.<sup>63</sup>

On December 27, 2016, Executive Director filed its Reply to Respondent's Motion to Dismiss Filed December 23, 2016.<sup>64</sup>

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<sup>63</sup>This motion was subsequently withdrawn on December 28, 2016.

<sup>64</sup>Technically the Executive Director should have titled this document as a memorandum in opposition rather than a reply.

On that same date, December 27, the Executive Director filed its Opposition to Respondent's Motion to Have Deposition of Manabu Asaoka Taken by Telephone or Video Conference.

On December 28, 2016 a hearing was held regarding Respondent's Motion to Dismiss and its Motion to Have Deposition of Manabu Asaoka Taken by Telephone or Video Conference. Respondent withdrew the motion concerning Mr. Asaoka's deposition.

On December 29, 2016, the Order Denying Respondent's Motion to Dismiss was filed.

On December 30, 2016, a Settlement Conference Order was filed.

On January 20, 2017, parties filed a Joint Stipulation to Entry in Evidence of Exhibits 1 and 2.

Shortly thereafter on January 27, 2017, the Executive Director filed its First Motion for Summary Judgment as to all Claims or for Partial Summary Judgment.<sup>65</sup>

On February 2, 2017 Respondent filed its Motion to Stay Proceedings Pending Outcome of Related Federal Lawsuit.

On February 7, 2017 a Notice of Hearing on Executive Director's First Motion for Summary Judgment as to All Claims or for Partial Summary Judgment and Respondent's Motion to Stay Proceedings Pending Outcome of Related Federal Lawsuit was filed.

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<sup>65</sup>On January 30, 2017 the Executive Director filed a 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.

On March 10, 2017, a Declaration of Serena Kyi-Yim in Support of Executive Director's First Motion for Summary Judgment as to All Claims or For Partial Summary Judgment was filed.

On February 8, 2017, Respondent filed its Memorandum in Opposition to Executive Director's First Motion for Summary Judgment.

On February 9, 2017 a Notice of Status Conference in Lieu of a Settlement Conference was filed.

On February 9, 2017, the Executive Director filed its Response and Opposition to Respondent's Motion to Stay Proceedings Pending Outcome of Federal Lawsuit.

On February 13, 2017 a Status Conference was held.

On February 14, 2017 an Amended Notice of Hearing on Executive Director's first Motion for Summary Judgment as to All Claims or for Partial Summary Judgment and Respondent's Motion to Stay Proceedings Pending Outcome of Federal Lawsuit was filed.

On February 17, 2017 Respondent filed its Notice of Taking Deposition Upon Oral Examination of Serena Kyi-Yim.

On February 21, 2017, the Executive Director filed its Notice of Deposition Upon Oral Examination Pursuant to Haw. R. Civil P. Rule 30(b)(6) of Respondent Morning Hill Foods, LLC, dba Manu Bu's.

On February 22, 2017 Respondent filed its Final Naming of Witnesses  
On the same date, Executive Director filed its Witness List.

On March 8, 2017, Respondent filed a Motion to Continue the Hearing Date.<sup>66</sup>  
The Executive Director filed a Statement of No Position on March 10, 2017 and the Order Granting Respondent's Motion to Continue the Hearing was filed on March 16, 2017

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<sup>66</sup>On March 16, 2017 Respondent filed a Submission of Original Declaration of Manabu Asaoka (In Support of Respondent's Motion to Continue Hearing Date Filed March 8, 2017)

On March 14, 2017, Respondent filed its Memorandum in Opposition to Executive Director's First Motion for Summary Judgment.<sup>67</sup>

The ED's Motion for Summary Judgment was set for hearing on March 16, 2017; on March 17, 2017 a Decision and Order Granting Executive Director's First Motion for Summary Judgment was filed, leaving only the issues of damages, if any for the May 17, 2017 hearing.

On March 24, 2017 Respondent filed several discovery requests requesting responses by April 24, 2017.<sup>68</sup>

On March 29, 2017, an Amended Notice of Pre-Hearing Conference was filed.

On May 9, 2017 a prehearing conference was held. Parties did not wish to engage in any settlement discussions.

On May 17, 2017 the hearing commenced and concluded. Exhibits 3, 4, 5 and 6 were admitted into evidence.

At the outset of the hearing, Respondent filed another Motion to Dismiss; that motion was taken under advisement.

At the conclusion of the hearing, parties were directed to file their Proposed Findings of Fact, Conclusions of Law by Friday, June 2, 2017 no later than 4:00 p.m. and both parties complied.

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<sup>67</sup>Technically Respondent filed a second Memorandum in Opposition to the ED's Motion for Summary Judgment but on different grounds than the earlier one filed on February 8, 2017.

<sup>68</sup>The filing of these requests prompted a letter dated April 17, 2017 to this hearings examiner by the enforcement attorney requesting a clarification of the Scheduling Conference Order issued on December 22, 2017 which specified that discovery had to be completed by Friday, March 24, 2017. Discovery had to be completed by Friday March 24, 2017 which meant any responses were due by March 24, 2017 not that requests could be made by March 24, 2017.

On May 30, 2017, the Executive Director filed its Opposition and Response to Respondent's Motion to Dismiss Complaint.

On June 17, 2017, the Order Denying Respondent's Motion to Dismiss Complaint was filed.

On July 6, 2017, this hearings examiner issued Findings of Fact, Conclusions of Law and a Proposed Decision. Parties were informed that they could file exceptions within 15 days of receipt of the decision. After which time, the entire record would be transmitted to the Commission for its final decision.