

HAWAI'I CIVIL RIGHTS COMMISSION  
STATE OF HAWAI'I

WILLIAM D. HOSHIO, Executive	)	DOCKET No. 22-01-H-D-RET	
Director, on behalf of the Complaint filed	)		
by	)		
	)	<b>HEARINGS EXAMINER'S</b>	
TEREZA KRISTALL AND SIR	)	<b>FINDINGS OF FACT,</b>	
JOSHUA JAMES KRISTALL-WAGNER	)	<b>CONCLUSIONS OF LAW, AND</b>	
	)	<b>RECOMMENDED ORDER</b>	
Complainants,	)		
	)		
vs.	)		
	)		
ELIZABETH G. DUTDUT; DAVID &	)		
FLOREEE D LETARTE TRUST;	)		
GARDEN ISLAND REALTY LLC;	)		
BRYAN K. MIYAKE	)	Hearings Examiner: The Honorable Karl	
	)	K. Sakamoto (Ret.)	
Respondents.	)		
	)		

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HAWAI'I CIVIL RIGHTS COMMISSION  
HONOLULU, HAWAII

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

**I. PROCEDURAL HISTORY**

This case before the Hawai'i Civil Rights Commission ("HCRC" or "State") was initiated by Complainant Tereza Kristall ("Tereza") filing a Housing Discrimination Complaint with the United States Department of Housing and Urban Development ("HUD") (HUD No. 09-19-5608-8) on February 20, 2019. The HCRC took jurisdiction pursuant to Hawai'i Revised Statutes ("HRS") §§ 515-9 and 368-3, -11, -13. HCRC is represented by counsel, Eric Pilila'au and Heather McVay.

The HCRC's Amended Complaint, filed August 9, 2019 (HCRC No. RE-K-1202), added Sir Joshua James Kristall-Wagner ("Sir Joshua", "Josh", or "Joshua") as a Complainant (with Tereza, collectively "the Kristalls"). The Respondents are the David & Floreee Letarte Trust

(“**Letarte Trust**”), Elizabeth Dutdut (“**Mrs. Dutdut**”), Garden Island Realty LLC (“**GIR**”), and Bryan Miyake (“**Bryan**”) (collectively “**Respondents**”). Respondent Garden Island Realty LLC and Bryan Miyake are represented by Robert G. Klein, Kurt W. Klein, David A. Robyak, and James M. Yuda.

The property at issue is a duplex located at 8920 Kekaha Rd., Kekaha, HI 96752 (“**the house**”). Respondents were charged with violating HRS §§ 515-16(7)<sup>1</sup> (“**Count 1**”) and 515-16(1) (“**Count 2**”). The violation in Count 1 was alleged to have occurred on December 20, 2018. The violation in Count 2 was alleged to have occurred on February 25, 2019.

Count 1 is not the subject of these Findings of Fact (“**FOF**”) and Conclusions of Law (“**COL**”) based on a prior dismissal of Count 1 by the Hearing Examiner. Count 1 was the subject of Respondents’ Motion for Judgment on the Pleadings, or in the Alternative for Partial Summary Judgement (“**Motion**”), which was heard via Zoom on September 26, 2022. The Hearings Examiner, the Honorable Karl K. Sakamoto (Ret.) (“**Judge Sakamoto**”), granted in part and denied in part Respondents’ Motion and dismissed Count 1 by Order filed September 29, 2022. However, because the events surrounding Count 1 are inextricably linked to Count 2, the alleged facts surrounding Count 1 appear prominently in the record and are addressed in the FOFs and COLs here.

Count 2 came on for evidentiary hearing before Judge Sakamoto on November 21 and 22, 2022. HRS § 515-16(1)<sup>2</sup>. At the close of the evidentiary hearing on November 22, 2022, Judge Sakamoto dismissed Count 2. Judge Sakamoto orally ruled as follows:

As I mentioned in the first motion brought after the State’s case, the nature and extent of inconsistencies in this case, in the Commission’s case, were extensive.

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<sup>1</sup> HRS § 515-16(7) reads in pertinent part as follows: “Other discriminatory practices. It is a discriminatory practice for a person, or for two or more persons to conspire: To print, circulate, post, or mail, or cause to be published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, that indicates, directly or indirectly, an intent to make a limitation or specification, or to discriminate because of . . . disability.

<sup>2</sup> The pertinent statute at issue in Count 2, reads as follows: “It is a discriminatory practice for a person, or for two or more persons to conspire: To retaliate, threaten, or discriminate against a person because of the exercise or enjoyment of any right granted or protected by this chapter, or because the person has opposed a discriminatory practice, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this chapter[.]”

Uh, the inconsistencies I would say were profound. The example of a threat, a threat that was made against, uh, Ms. Kristall, was that a comment about Miyake killing her, that is a serious allegation. If in fact it was made, it is reasonable to believe that you would never forget a threat against your life of that nature. But here it was forgotten like a mere statement. That's just an example of critical inconsistencies that exist in this case. So, these inconsistencies deprive me of the ability of determining what, if any, comments were made during these critical conversations. I wouldn't know what exactly was said in terms of whether or not a violation occurred. So, ultimately, the State doesn't have reliable and trustworthy evidence.

*See* Transcript of Day 2 of Evidentiary Hearing, November 22, 2022 (“**TSD2**”) at 64.

Judge Sakamoto requested that James Manjiro Yuda (“**Mr. Yuda**”), counsel for Bryan and GIR, prepare proposed FOFs and COLs and submit them by December 22, 2022. Mr. Yuda did not submit the proposed FOFs and COLs by December 22, 2022, and thereafter requested that he be allowed to submit them no later than January 12, 2023. Eric Pililaau (“**Mr. Pililaau**”), counsel for the HCRC, had no objection to this request and it was granted by Judge Sakamoto.

To the extent that any finding of fact is more properly characterized as a conclusion of law, it is adopted as such. To the extent that a conclusion of law is more properly characterized as a finding of fact, it is adopted as such.

## **II. FINDINGS OF FACT**

Based on the evidence presented at the evidentiary hearing, including the testimony of the witnesses, the following findings of fact are made:

1. The Letarte Trust and Mrs. Dutdut are named Respondents in this case and are represented by attorney Anthony Aguinaldo.
2. The Letarte Trust, Mrs. Dutdut, and their attorney Anthony Aguinaldo initially participated in these proceedings, but their participation ended, without explanation, in roughly April of 2022.
3. The Letarte Trust, Mrs. Dutdut, and their attorney Anthony Aguinaldo have not provided the Hearings Examiner with any reason for failing to participate in these proceedings.
4. The Letarte Trust, Mrs. Dutdut, and their attorney Anthony Aguinaldo did not attend any of the motions hearings as to Count 1.
5. The Letarte Trust, Mrs. Dutdut, and their attorney Anthony Aguinaldo did not attend the evidentiary hearing as to Count 2.

6. Following the hearing on the Motion for Judgment on the Pleadings or in the Alternative for Partial Summary Judgment filed by Klein Law Group, counsel for GIR and Bryan, Count 1 was dismissed as to all Respondents, including the Letarte Trust and Mrs. Dutdut, by Order filed on September 29, 2022.
7. Count 2 was orally dismissed by the Hearing Examiner as to all Respondents, including the Letarte Trust and Mrs. Dutdut, following the evidentiary hearing on November 21 and 22, 2022.
8. HCRC Investigator Constance DeMartino (“**Constance**” or “**Ms. DeMartino**”) submitted a Final Investigative Report (“**FIR**”) in this matter on February 25, 2020. *See* R-2.
9. The FIR was stipulated into evidence at the November 21, 2022 hearing.
10. Ms. DeMartino interviewed Josh three times during the course of the HCRC’s investigation, and the substance of those interviews are reflected in the FIR. R-2
11. Ms. DeMartino’s first interview with Josh was on July 31, 2019. *Id.*
12. Ms. DeMartino’s second interview with Josh was on November 2, 2019. *Id.*
13. Ms. DeMartino’s third interview with Josh was on November 21, 2019. *Id.*
14. Email correspondences between Constance and Tereza are also included in the FIR. *Id.*
15. Ms. DeMartino also subpoenaed AT&T call records for Bryan’s cell phone, and those records are part of the FIR. *Id.*
16. Josh swore to tell the truth, the whole truth, and nothing but the truth at the hearing on November 21, 2022. *See* Transcript of Day 1 of Evidentiary Hearing (“**TSD1**”) at 10.
17. The third question Mr. Pililaaui asked Joshua was: “Um, where are you from? Or actually, where were you born?” *Id.* at 11.
18. Josh’s answer was: “I was born in Maui.” *Id.*
19. Shortly thereafter in his direct-examination, Mr. Pililaaui asked Josh: “And Josh, you said that you were – you were actually born in Hawaii. Is that correct?” *Id.* at 21-22.
20. Josh’s answers to this were: “I’ve spent my entire life – my earliest formidable memories are here in Hawaii”. *Id.* at 22. “My physical location to where I was born is in Wilmington, Delaware.” *Id.* “But from the time I was an infant all the way to now I was living here in Hawaii.” *Id.*
21. On cross-examination, Mr. Yuda asked Josh: “Okay. So, where were you actually born?” *Id.* at 66.

22. Josh's answer was: "I was born in Wilmington, Delaware." *Id.*
23. Josh did not provide reliable and trustworthy testimony when, to Mr. Pililaau's third question, he answered: "I was born in Maui".
24. Josh attributed his untruthful answer that "I was born in Maui" to "A Freudian slip." *Id.* at 65.
25. Josh defines a "Freudian slip" as "when you misspeak." *Id.* at 66.
26. On cross-examination, Mr. Yuda asked Josh: "The answer to Mr. Pililaau's third question was untrue?" *Id.* at 67.
27. Josh's response to whether his answer to Mr. Pililaau's third question was untrue, after being asked numerous times due to his answers being non-responsive, was ultimately: "If you're going textbook definition." *Id.*
28. Josh's explanations of "Freudian slip" and "textbook definition" to his answer to Mr. Pililaau's third question compounded doubts of his testimonial reliability and trustworthiness.
29. In December 2018, Bryan, in his capacity as real estate agent for Mrs. Dutdut, posted an advertisement on Craigslist for the rental of the downstairs unit of Mrs. Dutdut's house located at 8920 Kekaha Rd., Kekaha, HI 96752.
30. Tereza responded to the advertisement by email dated December 11, 2018. *See* ED-11.
31. Tereza's December 11, 2018, email to Bryan included Josh's cell phone number of [REDACTED] *Id.*
32. The AT&T call records for Bryan's cell phone subpoenaed by Ms. DeMartino show that Bryan called Josh's cell phone on December 14, 2018, the day before the showing. *See* R-2, Bates Miyake- 31.
33. The AT&T call records for Bryan's cell phone also show that Bryan called Josh on February 25, 2019. *Id.*
34. The AT&T call records for Bryan's phone only show calls from Bryan to Josh on December 14, 2018, and on February 25, 2019; the call records do not show any other calls made from Bryan to Joshua. *Id.*
35. When Ms. DeMartino interviewed Josh on November 21, 2019 and informed him that the discrimination charged in Count 1 alleged to have occurred during a phone call from Bryan to Josh on December 20, 2018, had no record from AT&T of any such call, Josh told Ms.

DeMartino that he “believes it is very easy for a person to make deletions to the call record.” *See* R-2, Bates Miyake 018.

36. On December 14, 2018, the day before Bryan showed the Kristalls the house, Bryan texted Josh the address of the house: “Aloha address is 8920 Kekaha Rd Kekaha”. *See* R-1 Bates 01.
37. Bryan showed the house to the Kristalls, including Tereza’s dog Leilani, on December 15, 2018.
38. On direct-examination, Mr. Pililaau asked Josh: “Did you ever hear back from Bryan following the property showing?” TSD1 at 37.
39. Josh answered that: “I received a phone call a few days afterwards”, and that “I’m not 100%, but I believe it was on the 18<sup>th</sup>.” *Id.*
40. Mr. Pililaau asked Josh: “And Joshua, can you please take us through what was said during this phone call from the moment you answered the call?” *Id.* at 39.
41. Josh answered that: “I answered the call . . . . He stated that he has spoken to the owner of the property. At that time, I left my bedroom, went to the living room where my mother was, and he said that we were not going to be able to rent the property because of the dog.” *Id.*
42. Josh also stated that because of this call from Bryan, Josh told Bryan that he and his mother would be “pursuing it legally”, and that he “was upset”, “was disheartened”, “was confused, a little bit angry, but primarily . . . distraught, saddened”, that he “was with his mother, interpreting as I was on the phone”, and that his mother “was borderline hysterical, crying, sobbing, shaking like a leaf.” *Id.* at 39-41.
43. In written interrogatories, Josh was asked the following as Question #19: “From 2018 to present, state all dates and times that You communicated directly (i.e., not through a third-party) to Respondent Miyake.” *See* R-8, Bates Miyake 53.
44. Josh’s answer to Question #19 was as follows: “To the best of my recollection I myself only communicated directly with Mr. Miyaki [sic] three times, the first and last time were over the phone on the 13<sup>th</sup> of December 2018 and the 25<sup>th</sup> of February 2019 respectively. We met and spoke in person during and after the rental viewing on December 15<sup>th</sup> 2018.” *Id.*

45. Josh confirmed his answer to Question #19 during direct-examination. Mr. Pililaaau asked Josh: “And do you recall what your response was to that interrogatory?” TSD1 at 62.
46. Josh answered that “I had correctly stated that I had spoke to him three times.” *Id.*
47. Josh’s testimony on direct examination regarding his receiving a phone call from Bryan a few days after the showing, including the alleged contents of that call and his and his mother’s reactions, are inconsistent with Josh’s answer to Question #19. Josh answered that he only communicated with Bryan on December 13, 2018, two days before the showing, at the showing on December 15, 2018, and on February 25, 2019, the day on which Count 2 is alleged.
48. Josh’s testimony on direct examination regarding his receiving a phone call from Bryan a few days after the showing, including the alleged contents of that call and his and his mother’s reactions, are inconsistent with the AT&T call records subpoenaed by Ms. DeMartino that do not show any call made from Bryan to Josh a few days after the showing on December 15, 2018.
49. On direct-examination, Mr. Pililaaau asked Josh: “Joshua, do you recall sending Mr. Bryan Miyake a text message on December 20, 2018?” TSD1 at 44.
50. To which Josh answered: “I do.” *Id.*
51. The text message that Josh sent to Bryan on December 20, 2018 is as follows: “Hi there, this is Josh. I’m just following up on the Kekaha unit. We’ve been waiting to hear back Lol. I’ll be at work later today but feel free to text me if anything. Mahalo.” *See* R-1, Bates Miyake- 01.
52. Mr. Pililaaau then asked Josh: “Okay. So, at that point, on December 20<sup>th</sup>, you had not heard back from Bryan since the property showing. Is that correct?” TSD1 at 44.
53. To which Josh replied: “That is correct.” *Id.*
54. To which Mr. Pililaaau then asked: “You had earlier testified that you had believed that Bryan had called you following the property showing on December 18<sup>th</sup>.” *Id.* at 45.
55. To which Josh replied: “I was confused.” *Id.*
56. To which Mr. Pililaaau then asked: “So, earlier, your testimony was that Bryan had called you shortly after the property showing on December 18<sup>th</sup>.” *Id.*
57. To which Josh replied: “That is correct.” *Id.*

58. To which Mr. Pililaau then asked: “Right? But based on your December 20, 2018, text message, it appears that you hadn’t heard back from Bryan since the property showing”, and “Joshua, have you ever been certain when this phone call happened from Bryan shortly following the property showing?” *Id.* at 45-46.
59. To which Josh answered: “It had to have been after the 20<sup>th</sup>.” *Id.* at 46.
60. Josh’s testimony that he received a call from Bryan on December 18, 2018, a few days after the showing on December 15, 2018, is inconsistent with Josh’s testimony that the call he received from Bryan after the showing “had to have been after the 20<sup>th</sup> [of December 2018].”
61. Mr. Pililaau then showed Josh the text message Josh sent to Bryan on January 7, 2019. *See* R-1.
62. Josh read that text message on the record. TSD1 at 48.
63. That text message from Josh to Bryan, sent on January 7, 2019, reads as follows: “Hi there, this is Josh. I hope you and your ohana had a great New Year’s Holiday. I was just trying to reach out and see if you’ve heard of anything in the way of an available place for my mother and I to rent? Let me know. Mahalo!” *See* R-1 Bate Miyake -01 .
64. Josh asserted that he received a call from Bryan stating that the Kristalls could not get the house because of the service dog, which caused them to decide to “pursue it legally”, and made Josh “upset, disheartened, confused, a little bit angry, but primarily distraught and saddened”, and made Tereza “borderline hysterical, crying, sobbing, shaking like a leaf”, yet Josh texted Bryan a couple of weeks later to wish Bryan and his ohana a “Happy New Year” with a “Mahalo” followed by an exclamation point (“!”).
65. Mr. Pililaau asked Josh: “Joshua, why did you send that text message to Mr. Miyake?” TSD1 at 48.
66. To which Josh replied: “To the best of my recollection, I was inquiring to a place to live.” *Id.*
67. To which Mr. Pililaau then asked: “Even after talking with Mr. Miyake over the phone a few days after the property showing, you still decided to go back to him and ask him about any available rentals?” *Id.*
68. To which Josh answered “At that time, things between us were not the way they are now. If I can clarify, I didn’t feel at that time that there was any animosity or any kind of



discrimination happening until he said that we weren't able to rent a place because of the dog." *Id.* at 48-49.

69. The issue of the chronology of events regarding the phone calls, text messages, and alleged discriminatory conduct in Count 1 continued in cross-examination. The following exchange demonstrates the significant inconsistencies in Josh's testimony, the significant inconsistencies in his recollection of events:

**Mr. Yuda:** So, your [sic] testifying that – well, let's do this in order.

**Josh:** Sure.

**Mr. Yuda:** The hearing was on December – the showing of the house was on December 15, 2018.

**Josh:** That sounds correct.

**Mr. Yuda:** There is – you're saying that Bryan called you a couple of days later.

**Josh:** That would be correct.

**Mr. Yuda:** There is no record of any call made from Bryan to you a couple of days after December 15, 2018.

**Josh:** I am aware.

**Mr. Yuda:** Okay. But you're saying that the call happened anyway.

**Josh:** Correct.

**Mr. Yuda:** And you're saying that when Constance asked you about this call, you told Constance that you were very upset at Bryan.

**Josh:** That is correct.

**Mr. Yuda:** And you told Constance you were going to give Bryan a piece of your mind.

**Josh:** That is correct.

**Mr. Yuda:** And you told Constance that Bryan – or you told Bryan that he would be hearing from someone.

**Josh:** That is correct.

**Mr. Yuda:** And all of that occurred after December 15, 2018, but before January 07, 2019?

**Josh:** Yeah – no, actually it happened after January 7<sup>th</sup>.

**Mr. Yuda:** I'm sorry?

**Josh:** That's where – that's where it is, right there.

**Mr. Yuda:** Wait, wait, wait, what?

**Josh:** I said that the call made by Bryan to me occurred after January 7<sup>th</sup>.

**Mr. Yuda:** Now I'm terribly confused because I went through this very clear chronology. We started on December 15, 2018, and you said a couple of days after that a call was made.

**Josh:** Yes, a few days.

**Mr. Yuda:** How many days is a couple of days?

**Josh:** Less than a month.

**Mr. Yuda:** Less than a month? Is that your definition?

**Josh:** That is my definition.

**Mr. Yuda:** A couple of days is less than a month, so a couple of days could be 29 days?

**Josh:** Could be two weeks.

**Mr. Yuda:** A couple of days could be two weeks?

**Josh:** Yes.

**Mr. Yuda:** A couple of days could be 30 days if there are 31 days in a month?

**Josh:** Now you're getting a little ridiculous.

**Mr. Yuda:** You're the one who just said a couple of days could – is less than a month.

**Josh:** That is correct. That is what I just said.

**Mr. Yuda:** If a month has 31 days, then according to your definition a couple of days, 30 days constitutes a couple of days?

**Josh:** No, actually it wouldn't.

**Mr. Yuda:** No? Not anymore?

**Josh:** That would be a month.

**Mr. Yuda:** So, let's go through this timeline again, because I would like to clarify. Again, you saw the house –

**Josh:** On the 15<sup>th</sup>.

**Mr. Yuda:** -- on December 15, 2018, right?

**Josh:** Correct.

**Mr. Yuda:** And you alleged that a phone call came from Bryan to your cellphone a couple of days after you saw the house.

**Josh:** Correct.

**Mr. Yuda:** Now, here is where it gets confusing, because according to your definition of a couple of days, it's probably very different from most people's definition of a couple of days. Would you agree?

**Josh:** I would.

**Mr. Yuda:** Okay. So, in your couple of days, does that mean – then what date are you talking about?

**Josh:** It had to have been after January 7<sup>th</sup>. Again, my recollection of the exact specific date is –

**Mr. Yuda:** Now you're saying that the first time Bryan Miyake called you after the showing was after January 7<sup>th</sup>?

**Josh:** We have the texts.

**Mr. Yuda:** We have the texts.

**Josh:** Yeah, we have the texts.

**Mr. Yuda:** I agree with you.

**Josh:** Because I did not hear back from him on the 20<sup>th</sup>. And I apparently didn't not hear back from him by the 7<sup>th</sup> either. I was wishing him a happy New Year's asking about where we can find a new place to rent if we weren't going to be able to stay there.

**Mr. Yuda:** Do you remember on direct examination when Mr. Pililaau asked you if Bryan Miyake called you on December 18<sup>th</sup>?

**Josh:** I do, yes.

**Mr. Yuda:** And you said, yeah, he called me on December 18<sup>th</sup>.

**Josh:** And I was incorrect about that.

**Mr. Yuda:** Holy moly. When are you correct because –

**Mr. Pililaau:** Judge, I'm gonna –

**Josh:** I am correct when people are not screaming at my face. That's when I'm correct.

**Mr. Yuda:** What?

**Mr. Pililaau:** Badgering the witness.

**Mr. Yuda:** I am trying to figure out what happened.

**Josh:** Yeah, and I'm better able to do that when he's not screaming in my face.

**Hearings Examiner:** Just ask questions.

**Josh:** Exactly. He doesn't have to be so animated.

**Mr. Yuda:** Okay, so – okay, when – I'm going to break the first rule of cross-examination. When, according to you, did Bryan Miyake call you after the showing?

**Josh:** A few days.

**Mr. Yuda:** Which means what?

**Josh:** After January 7<sup>th</sup>.

**Mr. Yuda:** And the showing was when?

**Josh:** On the 15<sup>th</sup>.

**Mr. Yuda:** Of what month?

**Josh:** December.

**Mr. Yuda:** Of what year?

**Josh:** 2018.

**Mr. Yuda:** Okay. So, according to your testimony, now – according to your evolving testimony –

**Josh:** My testimony has not evolved whatsoever.

**Mr. Yuda:** We all have different definitions – we all have our own definitions for days. Today is the first time I've heard a couple of days could be a month. So, anyway, when you texted Bryan on January 07, 2019, a text to which he did not respond, and you wished him a happy New Year, you're saying that he called you after that?

**Josh:** I was inquiring about whether we – we could have another place to live.

**Mr. Yuda:** But my question is you're saying he called you after that?

**Josh:** I do not recall.

**Mr. Yuda:** I thought you just said he called you after that.

*See TSD1 at 122-127.*

70. Josh's testimony accused Bryan of discriminating against him and asserted that his mother was, *inter alia*, "borderline hysterical" after hearing of the alleged discrimination. Josh informed the investigator that he was very upset with Bryan, was going to give Bryan a

piece of his mind and would be taking legal action against Bryan. Josh hearing testimony that he would text Bryan on January 7, 2019 and wish him a Happy New Year, and inquire about housing opportunities creates inconsistencies and doubt about Josh's credibility.

71. Josh also defined "a couple of days as "could be two weeks".
72. On re-direct-examination, Mr. Pililaau asked Josh: "When did that first phone call from Bryan following the property showing occur, as best you can recollect right here and now? TSD1 at 148.
73. To which Josh answered: "To the best of my recollection, it had to have occurred on the 20th. December 20, 2018. *Id.*
74. On re-direct-examination, Mr. Pililaau asked Josh: "But I'm gonna ask you again. When you say a few days – what do you mean by that?" *Id.* at 149.
75. To which Josh answered: "It can range between one day to 28 – let's put a number on it." *Id.*
76. Count 2 is the retaliation charge alleging a violation of HRS § 515-16(1). *See* ED-5.
77. On February 20, 2019, the complainants filed a discrimination complaint (HUD complaint) against the respondents.
78. The respondents were served with the HUD complaint on February 25, 2019.
79. Count 2 is alleged to have occurred on February 25, 2019, during a phone call made by Bryan to Josh. *Id.*
80. A phone call was made from Bryan to Josh on February 25, 2019, which is supported by the AT&T call record subpoenaed by Constance DeMartino. *See* R-2, Bates 31.
81. Determining what was said and/or not said during the call is was the primary issue of the evidentiary hearing for Count 2.
82. Tereza, in Bryan's First Request for Answers to Interrogatories, was asked the following: "Identify the date and time you were subjected to retaliatory conduct by (a) Respondent Miyake, or (b) Respondent GIR." R-7, Bates Miyake - 045.
83. Tereza answered: "February 25, 2019, phone call between Sir Joshua-James and Bryan." *Id.*
84. Tereza, in Bryan's First Request for Answers to Interrogatories, was asked the following: "Describe in your own words, in full detail, the retaliatory conduct you have identified

herein, if any, by (a) Respondent Miyake, or (b) Respondent GIR.” R-7, Bates Miyake - 046.

85. Tereza answered:

It is hearsay since I was not on the phone with Bryan. It was Joshua talking to Bryan and he threatened us. Bryan got a letter or he was served with documents and he was very livid and so angry that he call my son, started yelling at him, saying that he will blacklist us so that we will never find a place to live. He threatened to sue us and take everything we have, and I am not sure what else was being said. I only know what Joshua told me.

*Id.*

86. On cross-examination, Mr. Yuda asked: “So, Tereza, with regard to the alleged threats that were made by Bryan Miyake through Joshua, they were made – allegedly made directly from Bryan Miyake to Joshua, right?” TSD2 at 32-33.

87. To which Tereza answered: “Yes”. *Id.* at 33.

88. Mr. Yuda then asked: “They were never made to you, right?” *Id.*

89. To which Tereza responded: “No.” *Id.*

90. Mr. Yuda then asked: “And in fact, you just testified that everything I know about those threats, I know from Joshua, right?” *Id.*

91. To which Tereza responded: “Right.” *Id.*

92. The alleged threats made by Bryan were never communicated directly from Bryan to Tereza.

93. The alleged threats made by Bryan could have only been communicated from Josh to Tereza.

94. Tereza clearly states with regard to any alleged threats made that “I only know what Joshua told me.”

95. The HCRC records clearly reflect complainant allegations that Bryan verbally threatened to kill Tereza during the February 25, 2019 call.

96. The record is replete with inconsistencies in Josh’s and Tereza’s recollection of whether Bryan ever made death threats against Tereza.

97. It is inconceivable that Josh would forget a death threat made against his mother.

98. It is inconceivable that Tereza would forget a death threat made against her.

99. Josh either forgot that a death threat was made by Bryan against his mother or lied to his mother that Bryan had made such a threat, or, if Tereza did not learn from Josh that Bryan made a death threat against her, then Tereza lied to Ms. DeMartino when she said that Bryan threatened to kill her.

100. In an email exchange between Tereza to HCRC Investigator Ms. DeMartino, dated Monday July 29, 2019, the following were asked and answered:

**[CONSTANCE:]** 9. In your email to me, you stated that after you filed a complaint against Bryan Miyake and the homeowner, your son received a second phone call from Bryan Miyake who was very angry at me, he threatened that if he sees me out in the street he is going to kill me. He also say that I am blacklist on all island of Hawaii and that I will never ever find a place to live and that he will make sure that my family and I remained homeless forever.”

a. When did the second call occur?

**[TEREZA:]** I am not sure. I would have to asked my son or you can asked him.

**[CONSTANCE:]** b. When did you son tell you about the second call?

**[TEREZA:]** I was driving the car, my son picked up his cell phone because it had rang, and I turned to looked at him, his face was very pale and his whole body was shaking. I was concerned, I pulled off the side of the road and I said who is that? What’s the matter- thinking someone had died or something. My son hanged up on Bryan and told me what Bryan had said. I was so angry and so shocked that he had the gall to called us, attacking us, and threatening us. He stated if I sue him, he will sue me for everything I have got and that we are blacklist and he will make sure we will never ever find a place to live and that we will be homeless forever and that if he sees us, he will kill me and that we had better hope he doesn’t see us ever.

**[CONSTANCE:]** Did you/your son file a police report re: the threat to kill you? If so, can you/your son please provide a copy?

**[TEREZA:]** No. I did not know we could do that? Is it too late to file police report?

*See R-27 Miyake-000462*

101. Tereza clearly states in writing to HCRC Investigator Constance DeMartino that Bryan told Josh that Bryan was going to kill Tereza.

102. Tereza also clearly states in writing to HCRC Investigator Constance DeMartino that she did not know that she could file a police report based on an alleged death threat made against her.

103. On cross-examination, Mr. Yuda asked Tereza: “Now, Ms. Kristall, you also testified that

- while you were homeless you were assaulted twice?” TSD2 at 45.
104. To which Tereza answered: “Yes.” *Id.*
105. Mr. Yuda asked Tereza: “Did you file any police reports for these assaults?” *Id.*
106. To which Tereza answered: “Yes, I did.” “Yeah, the person was arrested.” *Id.*
107. Mr. Yuda asked: “Did you file – how many police reports did you file?” *Id.*
108. To which Tereza answered: “Twice, two different people.” *Id.*
109. Mr. Yuda asked: “Do you know what the police did, if anything?” *Id.*
110. To which Tereza answered: “They took the police report. They went to – I went to the ER, and I found out that they had arrested him – or the person.” *Id.*
111. Based on two prior filed police reports, Tereza understood how to file a police report, but did not file a police report after Josh told her that Bryan threatened to kill her and she claimed to the investigator she was unaware of the process to file a police report.
112. On direct-examination, Mr. Pililau asked Josh: “Did you ever tell – did you ever tell your mom that during that February 2019 phone call with Bryan that Bryan threatened to kill her the next time he saw her? TSD1 at 58.
113. To which Josh answered: “No.”
114. On direct-examination, Mr. Pililau asked Tereza: “Do you – do you remember when Joshua was communicating the details about this phone call, do you remember if Joshua communicated to you that during that phone call Bryan threatened to kill you if he saw you again?” TSD2 at 27.
115. To which Tereza answered: “I don’t even remember that at all, but that was way back.” *Id.*
116. Mr. Pililau then asked: “Do you remember telling the HCRC investigator that you were told by Joshua that during that phone call Bryan threatened to kill you if he saw you again?” *Id.*
117. To which Tereza responded: “No, I don’t.” *Id.*
118. Mr. Pililau followed up on his direct-examination of Tereza on the subject of the alleged death threat. Mr. Pililau asked Tereza: “Why did you tell the HCRC investigator that you were told by Joshua, that during that phone call with Bryan, that Bryan threatened to kill you if he saw you again?” TSD2 at 28.
119. To which Tereza answered: “Probably because he told me that.” *Id.* “And soon after that I just forgot all about it.” *Id.*



120. To which Mr. Pililaau asked: “Who told you that?” *Id.*
121. And to which Tereza answered: “Joshua.” *Id.*
122. On cross-examination, Mr. Yuda asked Tereza: “So, when did Joshua tell you that Bryan said he was going to kill you?” TSD2 at 46.
123. To which Tereza answered: “That day that Bryan called and was yelling at him.” *Id.*
124. Mr. Yuda then asked: “So, on the same day that Bryan threatened to sue you?” *Id.*
125. To which Tereza responded: “Yes. He said everything in that conversation, blacklist, threatened to kill us, etc.” *Id.* at 46-47.
126. To which Mr. Yuda asked: “Was it kill us or kill you?” *Id.* at 47.
127. To which Tereza answered: “I think it was kill us.” *Id.*
128. Tereza’s testimony that Bryan threatened to kill both her and Josh is inconsistent with: (1) Josh’s testimony that Bryan never made any threats of physical harm; (2) Tereza’s email to Constance alleging that Bryan threatened to kill only her; (3) Tereza’s testimony that she forgot all about any alleged death threat.
129. Mr. Pililaau began his line of questioning regarding Count 2 by asking Josh: “Where were you when you got this phone call?” TSD1 at 52.
130. To which Josh answered: “At the . . . Public Library.” “In the parking lot.” *Id.* at 52-53.
131. Mr. Pililaau then asked: “. . . when you got this phone call and during this phone call, was your mom present with you?” *Id.* at 53.
132. To which Josh answered: “To the best of my recollection, no, she was not. She was inside of the library while I was outside.” *Id.*
133. Mr. Pililaau then asked: “And Joshua, can you please take us through this phone call from when you picked up the call?” *Id.*
134. To which Josh answered: “Yeah, I answered the call and Bryan was livid, for lack of a better word. He was yelling in the phone saying how dare we file this complaint he just received, that we don’t know what it is that we’re doing, because this is an older lady with disabilities and he’s a real estate agent, you know, with connections in real estate . . . and that he would blacklist us basically. And he said that, uh, ‘I’m gonna contact my friends and you’re not gonna be able to rent a place on Kauai ever again.’ He was just yelling into the phone, you know, fuck us, how dare we, you know, this is not gonna go away easily,

- he's gonna countersue us if we take this far, and clean us for what we have in a countersuit he would try to file." *Id.* at 53-54.
135. Mr. Pililaau followed up with: "Um, did you say anything to him during this phone call?" *Id.* at 54.
136. To which Josh answered: "No." *Id.*
137. Mr. Pililaau then asked: "Why not?" *Id.*
138. To which Josh answered: "I was shocked. I'm listening to this, um, processing it, um, in like a fight or flight mode at that point, with so much anxiety and adrenaline, you know? I believed everything he said at face value what he was saying, you know, he was gonna call his friends to make sure that we're not gonna be able to rent a property in Kauai ever again. I believed him that it was gonna be even more difficult from that day on to get a place. He also said that, uh, should he pursue . . . , he would do his best to fight it, all of that." *Id.*
139. Mr. Pililaau asked: "And how were you feeling during this phone call?" *Id.* at 55.
140. To which Josh answered: "Very anxious. To be frank, I felt a little scared. I felt, um, a bit hopeless too. You know, there was so much to process at that time. I took his word at face value and believed that he was gonna do what he said he was gonna do, so I was worried that we weren't going to be able to find a place. Started catastrophizing in my mind, had so much anxiety." *Id.*
141. Mr. Pililaau asked: "What did you do immediately after this phone call?" *Id.*
142. To which Josh answered: "I informed my mother of what happened." *Id.*
143. Josh then testified that his mother was in the library and "I went to her; I told her I just received a phone call from Bryan. Hey, I just received this phone call from Bryan. He was really pissed off, screaming into the phone saying that he received the complaint from the HCRC and that he was gonna fight about against it, how dare we do this to him, this property owner who was an older lady, that we don't know what it is that we were doing at that time, he'll blacklist us, he's gonna call all of his friends and make sure that we're not gonna be able to rent a property on Kauai ever again, and that . . . for a lack of a better word, he was just screaming obscenities and I told my mother everything that he said." *Id.* at 56.
144. Tereza's email to Constance dated July 29, 2019, alleges that the threats on which Count 2 is based were made when Tereza was driving the car, that Josh was a passenger when he

received the call, that Josh was pale and shaking, and that Tereza had to pull over to the side of the road. According to Tereza, Josh then told her what Bryan had said, including “that we will be homeless forever and that if he sees us, he will kill me and that we had better hope he doesn’t see us ever.”

145. Tereza’s version is clearly inconsistent with Josh’s testimony that he received the call and the threats from Bryan when he was in the library parking lot and Tereza was in the library. Both complainants testified in a detailed and confident manner.

146. This inconsistency between complainants’ testimonies was addressed in Josh’s cross-examination.

147. Mr. Yuda asked: “So, according to you, you were at the library when you got that call, right?” TSD1 at 137.

148. To which Josh answered: “That is correct.” *Id.*

149. Mr. Yuda then asked: “According to your mother, she was driving the car, right?” *Id.*

150. To which Josh answered: “That is correct, but can I speak as to why she was say?” *Id.*

151. Mr. Pililaau asked Josh: “Okay. What was Mom’s demeanor like as you were explaining to her what was said during this phone call?” *Id.*

152. To which Josh answered “It was like that first phone call all over again, when we were informed we were not gonna get the property because of the dog. She was sobbing, in hysterics, shaking like a leaf, very blotched, pale.” “Like she was about to collapse almost. She was very distraught like I was.” *Id.* at 56-57.

153. The following exchange between Mr. Pililaau and Josh took place regarding Bryan making death threats against Tereza:

**Mr. Pililaau:** Joshua, during any of your – any of your conversations with Bryan, did Bryan every [sic] threaten to cause any type of physical harm to you or to your mom?

**Josh:** No.

**Mr. Pililaau:** Did you ever tell – did you ever tell your mom that during that February 2019 phone call with Bryan that Bryan threatened to kill her the next time he saw her?

**Josh:** No.

**Mr. Pililaau:** Did you ever tell anyone that Bryan threatened to kill your mom during that phone call?

**Josh:** No.

**Mr. Pililaau:** If you can recall, when was the first time that you were put on notice of this alleged threat by Bryan during that phone call?

**Josh:** I don't understand the question.

**Mr. Pililaau:** Okay. Um, when was the first time that you were asked about that alleged threat by Bryan to kill your mom?

**Josh:** Again, there was no threat to kill my mom ever made by Bryan. I received a phone call interview with the Hawaii Civil Rights Commission. Exactly when that occurred, I can't recall.

**Mr. Pililaau:** Was that when you were asked about that alleged threat?

**Josh:** It had to have been, yes.

**Mr. Pililaau:** Let me ask you this, do you remember being asked about this alleged threat during the Hawaii Civil Rights – the Hawaii Civil Rights Commission's investigation of this complaint?

**Josh:** I do recall being asked about that, yes.

**Mr. Pililaau:** Do you recall what your response was to that specific question about the alleged threat?

**Josh:** I do, and it's the same response I'm giving now, that I do not – I never received a threat from Bryan. My mother never received a physical violence threat from Bryan, that solely this is about him saying he was gonna blacklist us, and that's all.

**Mr. Pililaau:** But you know, Joshua, that's not what you responded to the investigator when she asked you about that.

**Josh:** I don't, no.

**Mr. Pililaau:** When you were asked about that alleged threat by the investigator, why did you state that you, um, don't recall?

**Josh:** Because I didn't recall. At that time that I was asked by – I believe her name is Constance DeMartino the investigator for HCRC, some time has passed and I did not recall – I still don't recall. I'm not comfortable saying a threat was made or not, but I confidently don't feel there was one.

*See TSD1 at 58-60.*

154. Tereza's testimony is not reliable and trustworthy. The following exchange took place between Mr. Yuda and Tereza:

**Mr. Yuda:** Do you remember this email correspondence between you and Ms. DeMartino?

**Tereza:** No. I don't remember this.

**Mr. Yuda:** Okay, please read it from the top. It's in evidence. Um, please read it and sign what you're reading the way you did with the last document.

**Tereza:** This is too much for me to sign. I can't see it very well.

**Mr. Yuda:** Is there anything that we can provide you that would assist you in seeing it better?

**Tereza:** What is it that you want me to read?

**Mr. Yuda:** I would like you to read not even the full first page.

**Tereza:** It says, "Aloha, my statement is correct. Joshua said he got confused because it was not the incident that we were threatened by this person, Bryan. The first one that I just stated above was correct. The second incident was he called my son when we were in the library. I was not aware of that incident. My son did not want to tell me, because he knew I was very upset and stressed out by Bryan's threatening to us. I will let you know if we move and give you the new forwarding address."

**Mr. Yuda:** Please continue. Or you can begin where it says, "Hi, Tereza".

**Tereza:** "Hi, Tereza. Can you please verify the statement in your email to HCRC dated July 29 – dated 07/29/29." That's the wrong date. "With regard to a phone call from Bryan threatening to blacklist you and Joshua. This is needed and were not consistent with the statements by Joshua during an HCRC interview on July 31, 2019."

**Mr. Yuda:** Please continue.

**Tereza:** "You said in your email to HCRC, 'I was driving the car. My son picked up the cellphone because it had rung, and I started to look at his face and was very pale, and his whole body was shaking, and I was concerned. I pulled over to the side of the road, and I said who is that, what's the matter, thinking someone had died or something. My son hung up on Bryan, and he told me what Bryan had said. I was so angry and shocked that he had the gall to call us and attack us and threaten us. He said if I – if I sue him, he would sue me for everything I have – got, and that we are blacklisted and he would make sure that we never found a place to live, that we would be homeless forever, and that if he sees us, he would kill me, and that we had better hope he doesn't see us ever.'"

**Mr. Yuda:** Thank you. Ms. Kristall, now do you remember your son telling you that Bryan told you – excuse me, let me start again. Now, do you remember your son telling you that Bryan said he was going to kill you?

**Tereza:** No.

**Mr. Yuda:** Okay. Nothing further.

See TSD2 at 53-54.

155. Josh’s testimony and Tereza’s testimony regarding the alleged threats made by Bryan to Josh over the phone on February 25, 2019, and later communicated from Josh to Tereza, are inconsistent and contradictory.
156. The testimonies of Josh and Tereza are unreliable and untrustworthy.

## **II. CONCLUSIONS OF LAW**

Based on the above FOFs, Hearings Examiner Judge Sakamoto makes the following conclusions of law:

1. An appellate court will not disturb the Hearings Examiner’s (*i.e.*, the trial judge) decisions with respect to the credibility of witnesses and the weight of the evidence, nor will the appellate court attempt to reconcile conflicting evidence, because this is the province of the judge. Thus, it is for the Hearings Examiner as factfinder to assess the credibility of witnesses and to resolve all questions of fact; the Hearings Examiner may accept or reject any witness’s testimony in whole or in part. As the trier of fact, the Hearings Examiner may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the Hearings Examiner will not be disturbed unless clearly erroneous. *See Kerr v. Silva*, 129 Hawai‘i 268, 297 P.3d 1124 (App. 2013) (citing *State v. Yamada*, 116 Hawai‘i 422, 173 P.3d 569, 589 (App. 2007)).
2. The burden of proof in this matter is by a preponderance of the evidence, and that burden is on the State. *HAR Rule 12-46-36(b)* reads as follows: “Except as otherwise provided by law, the burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence.”

3. HCRC alleged in Count II that the respondents violated HRS 515-16(1) by retaliating against the complainants for their filing of the HUD complaint on February 20, 2019. Respondents were served the complaint on February 25, 2019.
4. HCRC alleged that the respondents violated the statute following the service receipt of the HUD complaint when Respondent Miyake called Complainant Joshua on February 25, 2019, to threaten to blacklist the complainants from finding a place to live in the Kauai rental market and to threaten complainants, which included a specific threat to kill complainant because they had filed the HUD complaint.
5. The nature and extent of the inconsistent testimonies of the complainants were extensive and profound.
6. There were critical inconsistencies in the HCRC's case, the primary example being that the alleged threat made by Bryan to kill Tereza was simply forgotten or denied by the Kristalls during the evidentiary hearing. The investigative records were inconsistent to the complainants' testimonies at the hearing.
7. The extensive, profound, and critical inconsistencies in the HCRC's case deprived the Hearings Examiner of the ability to determine the nature and extent of any comments made during the phone call on February 25, 2019, between Bryan and Joshua.
8. The testimony of Joshua and Tereza were unreliable and untrustworthy, and cannot form the basis of proving a violation of HRS § 515-16(1).
9. HCRC did not present reliable and trustworthy evidence to support a finding that Bryan Miyake violated HRS § 515-16(1).
10. The HCRC has not met its burden of proving by a preponderance of the evidence that a violation of HRS § 515-16(1) occurred in Count 2.

### **III. RECOMMENDED ORDER**

Based on the matters set forth above, I recommend that the Commission find and conclude that:

1. Count 2 is dismissed.
2. HCRC shall issue a press release regarding the results in this matter.

3. The HCRC shall post the decision on their website.

DATED: Honolulu, Hawai'i, January 23, 2023.

A handwritten signature in black ink, appearing to read 'K. Sakamoto', written over a horizontal line.

KARL K SAKAMOTO  
Hearings Examiner