

HAWAI'I CIVIL RIGHTS COMMISSION

CIVIL RIGHTS COMMISSION  
HONOLULU, HAWAII

STATE OF HAWAI'I

WILLIAM D. HOSHIJO, Executive	)	DOCKET No. 22-01-H-D-RET
Director, on behalf of the Complaint filed	)	
by	)	FINAL DECISION AND ORDER
	)	
TEREZA KRISTALL AND SIR	)	
JOSHUA JAMES KRISTALL-WAGNER	)	
	)	
Complainants,	)	
	)	
vs.	)	
	)	
ELIZABETH G. DUTDUT; DAVID &	)	
FLORELEE D LETARTE TRUST;	)	
GARDEN ISLAND REALTY LLC;	)	
BRYAN K. MIYAKE	)	
	)	
Respondents.	)	
	)	

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**FINAL DECISION AND ORDER**

This case involves a claim of discrimination based on disability in a real estate transaction. The Hearings Examiner filed Findings of Fact, Conclusions of Law and Recommended Order on January 23, 2023. The Executive Director filed exceptions on February 6, 2023. Neither party requested oral argument before the Commission and none was held. This is the Commission's Final Decision and Order in this matter.

Originally the case advanced two Counts, both of which alleged violations of the H.R.S. 515-16<sup>1</sup>. Count I charged a violation of H.R.S. § 515-16 (7) regarding alleged discriminatory

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<sup>1</sup> **§515-16 Other discriminatory practices.** It is a discriminatory practice for a person, or for two or more persons to conspire:

(1) 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; .....

(7) 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

*I hereby certify that the above document is a true and correct copy of the original on file at the Hawai'i Civil Rights Commission.*

*Robin Wurtzel*  
Robin Wurtzel - Chief Counsel, Hawai'i Civil Rights Commission

statements made in a phone call from Respondent Bryan Miyake/Garden Island Realty to Complainant Sir Joshua Kristall-Wagner. Count II charged a violation of H.R.S. § 515-16 (1) for alleged retaliation against complainant for filing a complaint with U.S. Department of Housing and Urban Development. Count I was dismissed during the proceedings, and prior to hearing. Hearing was held only on Count II. The hearing in this matter was held in person before an administrative hearings examiner, Judge Karl K. Sakamoto (ret), on November 21 and 22, 2022. The Hearing Examiner's findings and conclusions were issued on January 23, 2023.

### **I. FINDINGS OF FACT**

The Commission does not adopt the proposed Findings of Fact, and instead summarizes them. Based on the testimony of the witnesses at the evidentiary hearing and the exhibits admitted into evidence, prior motions hearings and the pleadings, and rulings made regarding credibility of witnesses, the following findings of fact are made. Should any of the findings in this summary be later deemed conclusions of law, they are hereby so construed:

1. Complainants Tereza Kristall and Sir Joshua Kristall-Wagner filed a complaint on February 20, 2019 with Housing and Urban Development against four respondents, Elizabeth G. Duttut, David and Florelee D. LeTarte Trust, Garden Island Realty LLC and Bryan K. Miyake alleging discrimination in a real estate transaction, based on disability, for refusal to rent the unit at 8920 Kekeha Road, in Kekaha, Hawai'i, on the island of Kauai. The complainants allege that Respondents refused to rent the unit because of Complainant Kristall's use of service dogs for her disability. ED-2, HCRC 00024-29.
2. The complaint was amended on August 9, 2019 alleging disability discrimination in a real estate transaction, and retaliation, based on a threat to blacklist the complainants from the rental market, after receiving the charge of discrimination. ED-3. HCRC 00030-32
3. The Letarte Trust and Mrs. Duttut are named Respondents in this case and are represented by attorney Anthony Aguinaldo.
4. The Letarte Trust, Mrs. Duttut and their attorney Anthony Aguinaldo initially participated in these proceedings, but their participation ended, without explanation, in roughly April of 2022.

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prospective real estate transaction, that indicates, directly or indirectly, an intent to make a limitation or specification, or to discriminate because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection.

5. The Letarte Trust, Mrs. Duttut and their attorney Anthony Aguinaldo have not provided the Hearings Examiner with any reason for failing to participate in these proceedings.
6. The Letarte Trust, Mrs. Duttut, and their attorney Anthony Aguinaldo did not attend any of the motions hearings as to Count I, or the evidentiary hearing held on November 21 and 22, 2022 as to Count II.
7. Bryan Miyake and Respondent Garden Island Realty, LLC (“GIR”) were represented by the Klein Law Group, through the appearances of Kurt Klein and James M. Yuda.
8. Bryan Miyake is the owner of GIR. And the property manager for the downstairs rental unit at 8920 Kekeha Road, in Kekaha, Hawai‘i, on the island of Kauai. ED 6, HCRC 00141; Pleading 4.
9. Complainant Tereza Kristall is a person with a disability. She is Deaf and communicates using American Sign Language. She also communicates in written English. FIR/ED-1 00002. TSD1 33-34. Complaint in ED 2 and ED 3, HCRC00024-00032.
10. Complainant Tereza Kristall has two service dogs that she uses for alert and notification purposes. Complaint in ED 2 and ED 3, HCRC00024-00032.
11. The hearing held on November 21 and 22, 2022 was interpreted to American Sign Language.
12. Following the hearing on the Motion for Judgment on the Pleadings or in the Alternative for Partial Summary Judgment filed by GIR and Bryan Miyake, Count I was dismissed as to all Respondents, including the Letarte Trust and Mrs. Duttut, by Order filed on September 29, 2022.
13. Count II was orally dismissed by the Hearing Examiner as to all Respondents following the evidentiary hearing on November 21 and 22, 2022.
14. HCRC Investigator Constance DeMartino (“Constance” or “Ms. DeMartino”) submitted a Final Investigative Report (“FIR”) in this matter on February 25, 2020. Rp 2; ED 9. An addendum was submitted on May 19, 2021. ED 10.
15. The FIR was stipulated into evidence at the November 21, 2022, hearing.
16. Ms. DeMartino interviewed Sir Joshua Kristall-Wagner three times during the course of the HCRC’s investigation, and the substance of those interviews are reflected in the FIR. Rp 2; ED 9 .
17. Complainant Kristall-Wagner is Complainant Kristall’s adult son. *Id.*

18. Ms. DeMartino's first interview with Joshua Kristall-Wagner was conducted on July 31, 2019. *Id.* Ms. DeMartino's second interview with Joshua Kristall-Wagner was conducted on November 2, 2019. *Id.* Ms. DeMartino's third interview with Joshua Kristall-Wagner was conducted on November 21, 2019. *Id.*
19. A representative summary of email correspondences between Ms. DeMartino and Tereza Kristall are also included in the FIR. *Id.*
20. Ms. DeMartino subpoenaed AT&T call records for Bryan Miyake's cell phone, and for Joshua Kristall-Wagner's cell phone and the information from those records are included in the FIR. *Id.* Bryan Miyake's cell phone records are in evidence. R 35 Miyake 000517 – 000684.
21. In his response during the investigation of the Complaints' complaint, Mr. Miyake denied making a discriminatory statement to the complainants and denied saying that service animals were not permitted. ED 7, HCRC -00151-152; ED 8 HCRC 00177. Mr. Miyake wrote that he Mr Miyake denied making a a phone call to Complanant S. Joshua Kristall-Wagner on or about December 18, 2018.
22. Mr. Miyake denied informing the complainants that they were not chosen to rent the subject property. Respondent Miyake wrote that the property was vacant in December 2018 and January 2019 due to a plumbing issue. ED 9, HCRC 00177.
23. Mr. Miyake admitted calling Joshua Kristall-Wagner after receiving the complaint, and denied making the alleged retaliatory statements. ED 8, HCRC 00178.
24. Witnesses Tereza Kristall and S. Joshua Kristall-Wagner were sworn to tell the truth at hearing, Transcript of Day 1 of Evidentiary Hearing ("TSD1") at 10. Transcript of Day 2 of Evidentiary Hearing ("TSD2") at 1.
25. Mr. Pililaau, representing the Director, asked Complainant Kristall-Wagner: ".. where are you from? Or actually, where were you born?" and Complainant Kristall-Wagner responded, "I was born in Maui." TDS1 at 11.
26. Shortly thereafter, Mr. Pililaau asked Complainant Kristall-Wagner: "And Josh, you said that you were – you were actually born in Hawaii. Is that correct?" *Id.* at 21-22.
27. Complainant Kristall-Wagner's answer contradicted his prior testimony: "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.*
28. On cross-examination, Mr. Yuda asked Complainant Kristall-Wagner: “Okay. So, where were you actually born?” *Id.* at 66.
  29. Complainant Kristall-Wagner’s answer was: “I was born in Wilmington, Delaware.” *Id.*
  30. Complainant Kristall-Wagner attributed his incorrect answer that “I was born in Maui” to “A Freudian slip.” *Id.* at 65. Complainant Kristall-Wagner defined a “Freudian slip” as “when you misspeak.” *Id.* at 66.
  31. Complainant Kristall-Wagner’s contradictory answers regarding his place of birth raised concerns by the hearing officer regarding the credibility of Kristall-Wagner’s testimony.
  32. In December 2018, Miyake, 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, on Kauai. R 29 Miyake 000455-000457
  33. Tereza Kristall responded to the advertisement by email dated December 11, 2018. ED-11. R-19 Miyake 000295-000296.
  34. Tereza Kristall’s December 11, 2018, e-mail to Bryan Miyake included her phone number for texts and emails and Josh Kristall-Wagner’s cell phone number. *Id.*
  35. The AT&T call records for Miyake’s cell phone subpoenaed by Ms. DeMartino confirm that Bryan called Josh’s cell phone on December 14, 2018, the day before showing the unit to Complainants. R 2 Miyake- 00031. R 55 Miyake 000732.
  36. Another call was made on February 25, 2019. R 2 Miyake- 00031. R 55 Miyake 000781.
  37. The Complainants and Respondents dispute some of the substance of their communications regarding the rental unit, and whether Miyake made two calls or three calls to Complainant Kristall-Wagner. Miyake’s call records show only two calls made from Respondent Miyake to Complainant Kristall-Wagner. *Id.*
  38. Cell phone records from TracFone Wireless for Joshua Kristall Wagner’s number show that the line was not active and no records were found for the period between between December 14, 2018 and February 28, 2019. R 37 Miyake 000690. ED 10,
  39. On December 14, 2018, the day before Respondent Miyake showed the Kristalls the house on Kauai, Respondent Miyake texted Complainant Kristall-Wagner the address of the house: “Aloha address is 8920 Kekaha Rd. Kekaha”. Rp 1 Miyake 000001.
  40. Respondent Miyake showed the house to the Complainants. Tereza’s dog Leilani was

permitted on premises during the showing on December 15, 2018. HCRC 00025. ED-9 FIR at 2.

41. When asked if he heard back from Bryan Miyake following the property showing, Kristall-Wagner testified 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>.” TSD1 at 37.
42. Kristall-Wagner was asked: “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.
43. He testified that: “I answered the call . . . . He [Miyake] 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.*
44. Kristall-Wagner also stated that because of this call from Respondent Miyake, Kristall-Wagner told Bryan Miyake 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.
45. On December 20, 2018, Complainant Kristall sent two emails to Respondent Miyake at [gardenislerealty@gmail.com](mailto:gardenislerealty@gmail.com) . The first email stated:

*Aloha I was told by my son Josh that the owner of the home rejected my application because I have service dogs? Is that her reason for rejecting my application? Did you tell her that it is against the law to discriminated against people with service animals? I need to know why she rejected my application? Please let me know. Tereza. ED 16 HCRC 00058*

46. This was followed by a second e-mail asking that Mr. Miyake print the email and that if not chosen as a tenant, she would file a discrimination complaint. ED-17 HCRC 00059.
47. In written interrogatories served by Respondents regarding direct communication with Mr. Miyake, Kristall Wagner responded to Question 19: “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.” R 8, Miyake 000053.

48. Kristall-Wagner reaffirmed his prior answer to Question 19 in his testimony at hearing, saying “I had correctly stated that I had spoke to him three times.” TSD1 at 62.
49. Kristall-Wagner’s testimony on direct examination regarding receiving a phone call from Bryan a few days after the showing, including the alleged substance of that call and his and his mother’s reactions, is inconsistent with the AT&T call records subpoenaed by Ms. DeMartino. These records show no call was made from Miyake to Kristall-Wagner after the showing on December 15, 2018, until February, 2019. R-55 Miyake 000732-000781.
50. Kristall Wagner testified that he sent Bryan Miyake a text on December 20, 2018. TSDI at 44. The text read: “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.” Rp 1, Miyake- 000001.
51. Complainant Kristall-Wagner was asked on direct examination: “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?” Kristall-Wagner replied: “That is correct.” TSD1 at 44. Though minutes earlier he testified that though he was not positive, but thought he had received a call on December 18. *Id* at 37-38.
52. When asked on cross examination if he 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, Kristall-Wagner replied: “I was confused.” *Id* at 45.
53. There was additional testimony from Kristall-Wagner reiterating that the call from Bryan Miyake had to have been after December 20, 2018. *Id.* at 46.
54. Complainant Kristall-Wagner’s testimony that he received a call from Respondent Miyake on December 18, 2018, a few days after the showing on December 15, 2018 (*Id* at 37), contradicted his testimony that the call he received from Bryan after the showing “had to have been after the 20<sup>th</sup> [of December 2018].” *Id* at 46.
55. Kristall-Wagner’s testimony was inconsistent with his written answered to interrogatories. He responded that he spoke with Bryan Miyake on December 20, 2018. R9 Bates Miyake 000051, Interrogatory 9. Subsequently he responded that he only communicated directly with Miyake: (1) by phone on December 13, 2018, two days before the showing; (2) at the showing on December 15, 2018 in person, and (3) by phone on February 25, 2019, the day on which Count II is based. R9 Bates Miyake 000051 Interrogatory 19.

56. Kristall-Wagner sent a text to Bryan Miyake on January 7, 2019, stating “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!” Rp 1 Miyake -000001.
57. After being questioned on the record regarding the text message, Joshua Kristall-Wagner asserted that he sent the text message after receiving the call from Bryan Miyake stating that the Kristalls could not get the house because of the service dog, which caused them to decide to “pursue it legally.” TSD1 at 48.
58. When asked why he sent the text message to Mr. Miyake, Josh replied: “To the best of my recollection, I was inquiring to a place to live.” TSD1 at 48.
59. Kristall-Wagner then was 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.* Kristall-Wagner responded, “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.
60. Joshua Kristall-Wagner testified that he had spoken to Bryan Miyake before January 7, 2019 on the phone during which he was told that the apartment would not be rented to him and his mother. TSD1 at 49.
61. Complainant Kristall-Wagner’s statements regarding his text to Miyake on January 7, 2019 after allegedly receiving a call denying them housing caused the Hearings Examiner to doubt the credibility of Kristall-Wagner’s testimony. *Hearings Examiner’s Findings of Fact, Conclusions of Law, and Recommended Order*, Pleading 57, p. 12, ¶70.
62. During the investigation Mr. Miyake stated that he never contacted the Kristalls to inform them they were not chosen as tenants. R19 Miyake 000304.
63. Significant inconsistencies in Kristall-Wagner’s testimony of his recollection of events were further compounded on cross-examination during which he testified that he received a call a couple of days after the showing in December, but then said the call was received after January 7, 2019, not in December or before the text of January 7, 2019. TSD1 at 123.
64. Kristall-Wagner testified that the confusion arose because “a couple of days” after



December 15<sup>th</sup> could mean up to a month. TDS1 at 122-127, 149.

65. On February 20, 2019, the Complainants filed a discrimination complaint (HUD complaint) against the Respondents.
66. The HUD complaint was served on the Respondents on February 25, 2019.
67. A phone call was made from Respondent Miyake to Complainant Kristall-Wagner on February 25, 2019, which is supported by the AT&T call record subpoenaed by Constance DeMartino. R 2, Miyake 000031
68. At hearing, Complainant Kristall-Wagner testified that Respondent Mikake was “livid” about the discrimination complaint filed, yelling into the phone, screaming obscenities, and that Miyake stated he would blacklist Complainants from renting on Kauai, inform his friends and prevent them from renting. TSD1 53-56
69. Complainant Kristall-Wagner testified he informed his mother of the substance of the February 25, phone call, in ASL. TDS1 56.
70. Complainant Kristall-Wagner stated that he and his mother were homeless at the time. He received the call while outside the library and his mother was inside the library. *Id.* at 55.
71. Complainant Kristall-Wagner testified he and Kristall were homeless for 4 months after December 2018. R-7 Miyake 044; TDS1 49.
72. Complainant Kristall-Wagner testified that he was upset and anxious when he heard Respondent Miyake’s cursing and threats, and that his mother, when told, was in hysterics, shaking and distraught. *Id.* at 55-56.
73. Tereza Kristall described the retaliatory conduct by Bryan Miyake or GIR as occurring on “February 25, 2019, phone call between Sir Joshua James and Bryan.” Rp 7, Miyake - 0045.
74. Tereza Kristall wrote, in response to interrogatories requesting a description of the retaliatory conduct, “It is hearsay since I was not on the phone with Bryan. It was Joshua talking to Bryan and he threatened us.” TSD2 at 32-33. R-7, Miyake - 000046. She also testified that everything she knew about the content of the phone call she knew from Joshua . TSD2 at 32-33.
75. In an email exchange between Tereza and the HCRC Investigator Ms. DeMartino, dated Monday July 29, 2019, the following questions 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?

R-27 Bates Miyake-000462.

76. At hearing, Ms. Kristall was asked: “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. She answered: “I don’t even remember that at all, but that was way back.” *Id.*
77. Ms. Kristall was then asked if she recalled telling the investigator Ms. DeMartino that she was told byher son that during that phone call Bryan Miyake threatened to kill her if he saw you again. *Id.* She responded: “No, I don’t.” *Id.*
78. At hearing Ms. Kristall could not recall her son telling her about the phone call, and that she forgot it. TSD2 at 28.
79. At hearing she said that she did not recall the death threat, but that she had read it on a paper given to her at hearing. *Id.* at 49. She was referring to R-27 Bates Stamp 0459-

0469, *See Id.* at 35. She signed it in ASL into the record. TSD2 at 46-47. (“Yes. He said everything in that conversation, blacklist, threatened to kill us, etc.”).

80. Complainant Kristall’s version of the phone call differs from Complainant Kristall - Wagner’s in location as well as content. Complainant Kristall stated that she was driving, that her son was a passenger when he received the call, that he was pale and shaking, and that Kristall pulled over to the side of the road. Her son then told her that Bryan Miyake was livid, yelled at them, and threatened to blacklist them, and kill her. TDS1 at 89-90 Kristall Wagner reading ED 20, R 28 Bates stamped Miyake 0484-0499. TSD2 at 32, Complainant Kristall reading from R7 Bates Stamp 0459. *See also* R 27 Miyake 0462. However, Kristall-Wagner said he received the phone call on February 25, 2019 while outside the library. TSD1 at 52-53.
81. Kristall-Wagner testified at hearing that Bryan Miyake did not threaten to kill his mother and that he did not communicate that to his mother. TSD1 at 58-60, 139.
82. Tereza Kristall had also questioned Ms. DeMartino about whether it was possible to file a police report regarding a death threat, though she had previously filed police reports twice when assaulted. TDS2 at 45.
83. Tereza’s interview in which she stated that Bryan threatened to kill her is inconsistent with and contradicted by: (a) Josh’s testimony that Bryan never made any threats of physical harm; and (b) Tereza’s testimony that she forgot all about any alleged death threat.
84. There was additional contradictory and inconsistent evidence regarding the number of calls and content with Tereza Kristall reading into testimony a November 13, 2019 e-mail she sent to Ms. DeMartino stating that Mr. Miyake made two threatening calls, not just one. TSD2 at 52-53 reading R 28 Miyake 000484.
85. The inconsistencies between interviews, emails, interviews with the investigator and the testimony were significant and bore directly on the issue of whether or not Respondent Miyake threatened or retaliated against them because of Complainants’ charge. The two witnesses gave directly conflicting and inconsistent testimony. These discrepancies and inconsistencies are even more substantial because they involve an alleged death threat, a frightening event that would not be forgotten like a mere statement. TSD2 at 64
86. There were “substantial issues of credibility.” TSD2 at 55, by Hearings Examiner.
87. The serious contradictions and inconsistencies of the Complainants rendered their

testimony not credible, and there was a lack of trustworthy evidence. TSD2 64.

88. The contradictory and inconsistent testimony on substantive facts caused an inability to determine the facts necessary to establish violations of law. TSD2 64.

## **II. CONCLUSIONS OF LAW**

Should any of these conclusions of law be more properly construed as findings of fact they are hereby so construed.

### **A. Jurisdiction**

On February 20, 2019 , Complainants Kristall and Kristall-Wagner filed a complaint in writing with Housing and Urban Development, which was then processed by the Hawai‘i Civil Rights Commission, alleging that Respondents had committed unlawful real property transaction discriminatory practices. The complaint was filed timely within the 180 day requirement under H.R.S.§ 368-11(c). The complaint was amended on August 9, 2019 to add a retaliation charge.

Respondents were the owners, resident and agent for this subject property and rental unit located at 8920 Kekaha Road, Kekaha, Kauai, Hawai‘i 96752 and were persons engaging in a real estate transaction within the meaning of H.R.S. 515-2 end H.A.R. 12-46-305 and 316, at all times relevant in this complaint. The Commission has jurisdiction to hear this complaint under H.R.S. § 368-3 and H.R.S. § 515-9.

### **B. Adoption of Conclusions of Law Regarding Determination of Credibility and Burden of Proof**

The Commission adopts the Hearing Examiner’s Conclusions of Law numbers 1 and 2 regarding determination of credibility and burden of proof.

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)).

The burden of proof in this matter is by a preponderance of the evidence, and that burden is on the State. H.A.R. 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.”

C. Adoption of Conclusions of Law Regarding Count II

Count I alleged that Respondents subjected Complainants to discriminatory advertising, statement and notices. Complainants alleged that Respondent Miyake made a call on or about December 20, 2018 to Complainant Kristall Wagner, in which Miyake made a discriminatory statement denying the complainants the housing requested based on disability. Count I was charged as a violation of H.R.S. §515-16(7).

Count II alleged that Respondents subjected Complainants to retaliation for reporting of discrimination, and was charged as a violation of H.R.S. § 515-16(1).

The Hearings Examiner dismissed Count I on September 29, 2022 in the *Order Granting in Part and Denying in Part Respondents Garden Isle Island Realty LLC And Brian K. Miyake's Motion for Judgment on the Pleadings, or in the Alternative for Partial Summary Judgment as to Count One filed on September 5.* (“Order”). Pleading 24. Count II was dismissed at hearing on November 22, 2022.

The Commission adopts the Hearings Examiner’s Conclusions of Law regarding Count II.

D. Reconsideration of Count I

The Commission agrees with the Executive Director that the Hearings Examiner erred in the dismissal of Count I as a matter of law.

Because the Hearings Examiner found critical inconsistencies in testimony at hearing, it is not necessary or appropriate to remand the case regarding Count I. The facts on which Count I were based were an integral part of the testimony provided by the witnesses at hearing on November 21 and 22, 2022 and, if adjudicated, Count I would be dismissed based on the failure to prove the claim by a preponderance of the evidence based on the record. Count I alleged that Respondent Miyake made a call on or about December 18, 2018 to Complainant Kristall Wagner, in which Miyake made a discriminatory statement denying the complainants the housing requested based on disability. Count I was charged as a violation of H.R.S. §515-16(7).

There were contradictions and inconsistencies in the evidence whether a call was made on or about December 18, 2018 from Miyake to Kristall-Wagner. Testimony was heard regarding the facts upon which Count I was based, and the allegations were not proven. Therefore, the case will not be remanded.

However, the Commission holds that the legal basis for the dismissal of the Motion was legally erroneous. The legal analysis set forth in the Order is inconsistent with the law and our previous interpretation of the same statute.

The Commission notes that the Executive Director's Exceptions to Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommended Order Dated January 23, 2023, filed on February 6, 2023 do not directly relate to the Hearings Examiners Findings of Fact and Conclusions of Law and Proposed Order. But we also note that on October 6, 2022 the Executive Director moved for Reconsideration of the original Order, and on October 28, 2022 requested the Hearing Examiner to certify this question of Law to the Commission. *The Executive Director's Request for Hearings Examiner to Certify to the Commission the Question of the Application of H.R.S. § 515-16(7) to Verbal Statements made in Connection with a Real Estate Transaction.* (Pleading 40).

The Hearings Examiner denied the Request for Reconsideration, and in the *Order Denying the Executive Director's Request for Hearings Examiner to Certify to the Commission the Question of the Application of HRS § 515-16 (7) To Verbal Statements Made In Connection With A Real Estate Transaction* stated "All issues raised in a hearing are reviewed by the Commission and can be revised in their final order." Pleading 54, page 2.

Therefore, we find that this is the only forum available to address this question of law. It is not a new issue, but one that was raised previously. The Commission addresses the issue of law herein.

E. Does H.R.S. § 515-16(7) Apply to Verbal Statements made in Connection with a Real Estate Transaction

H.R.S. § 515-16 (7) states that:

It is discriminatory practice for a person, or for two or more persons to conspire . . . . (7) 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 race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection.

The Hearings Examiner found that the statute did not apply to oral or verbal statements made in private, relying on the Merriam-Webster definition of “publish,” and finding that the statements must be written or made to a group to be in violation of H.R.S. § 515-16 (7). The Order in the present case stated that a “singular cellphone call to one person as factually asserted **is not a published statement** which is a public announcement, or a statement disseminated to the public.” [Emphasis added] Order, Pleading 24, p.4.

The Commission disagrees and finds that discriminatory statements made orally or verbally are discriminatory and prohibited under law, whether said in private or public. We held this previously in DN 18-001-H-S, *William D. Hoshijo, on behalf of Kiona E. Boyd vs. Jeffrey David Primack*, in which we held that Respondent was in violation of H.R.S. § 515-16 (7) and HAR § 12-46-310 (6), for making discriminatory verbal statements. In *Boyd v. Primack*, Respondent Primack made oral statements in addition to texts via cell phone. The verbal statements were made only to Kiona Boyd. The Commission held, “Respondent’s conduct was in violation of H.R.S. § 515-16(3),(6),(7), and HAR § 12-46-310(6), by making discriminatory verbal statements, and by sending text messages, including threats of violence, to the Complaining Party.”[emphasis added] Decision at 5.

We affirm our prior interpretation.

We find the Hearing Examiner’s interpretation of “published statement” only referring to written statements or public statements, as set forth in the Order, to be erroneous. A discriminatory statement should not be protected merely because no one other than the victim heard the statement. For example, use of discriminatory epithets is offensive whether people other than the intended hear, read or otherwise receive the statement. A statement made in a private, verbal cell phone call may be discriminatory. “A remedial statute, should be ‘liberally construed to suppress the perceived evil and advance the enacted remedy’ and should not be narrowly interpreted to ‘impede rather than advance the remedies’ provided by the statute.” *Kalima v. State*, 148 Haw. 129, 142, 468 P.3d 143, 156 (2020). As a remedial statute intended by the legislature to remedy perceived social harm, the housing discrimination statute should be liberally construed. Here, construing the statute liberally would require finding that

communication of discriminatory content is prohibited whether it is broadcast widely or merely communicated to the protected person directly.

The Order stated that a “singular cellphone call to one person as factually asserted is not a published statement which is a public announcement, or a statement disseminated to the public.” Order, p.4. To distinguish between a statement made to many and a statement made to one also minimizes the impact of discrimination. The harm in discriminatory utterances is the injury to an individual's sense of self-worth and personal integrity. See Cervelli v. Aloha Bed & Breakfast, 142 Haw. 177, 189, 415 P.3d 919, 931 (Ct. App. 2018); State v. Hoshijo ex rel. White, 102 Haw. 307, 317, 76 P.3d 550, 560 (2003).

Hawai‘i’s fair housing law was enacted prior to the federal Fair Housing Act, 42 U.S.C. 3601, *et seq.* As the Executive Director stated in the Exceptions filed February 6, 2023, the legislature enacted Act 31, c 2011 which moved the section of the statute in question from H.R.S. § 515-3 (6) to H.R.S. § 515-16 (7). When moving the prohibition “to print, circulate, post, or mail, or cause to be published a statement, advertisement, or sign ...that indicates ...an intent to make a limitation or specification or to discriminate...” based on a protected basis, the Legislature explained the purpose of the Act in Section 1, referring specifically to statements, “the exemptions do not apply to advertising, publications or **statements**...” [emphasis added]. The intent of Act 31, c 2011 was to include statements, though the language was not repeated in the statute.

Any other interpretation does not comport with the intention of the statute, and would prohibit signs or advertisements, but allow discriminatory utterances. It is an untenable interpretation to prohibit a landlord from posting a sign or ad that saying “No Irish (or the group of choice) need apply” but be able to verbally say the same statement to renters with impunity.

The alleged statement in the dismissed Count I, denying housing based on disability (the use of service dogs trained to do specific tasks by a person with a disability) is discriminatory. Based on the legislative history and the rules of statutory construction, we hold that H.R.S. § 515-16(7) applies to verbal statements as well as written.

The utterance of discriminatory statements is harmful, not just to the person against whom the discrimination is directed, but also to society in general. The Hearings Examiner



considered federal law, noting that 42 USC §3604(c)<sup>2</sup> uses different language than H.R.S. § 515-16(7). We agree that the state and federal statutes differ in their language, though they are substantially similar. However, the legislative history of the Hawai‘i statute includes the intent of the statute, and we look no further.

Because we hold that verbal statements are within the prohibitions of H.R.S. § 515-16(7), Count I should not have been dismissed. Charging Mr. Miyake pursuant to that statute was appropriate.

We do not need to reach whether Respondent Miyake could also be charged under H.R.S. § 515-3, because he was correctly charged for the discriminatory statement.

Whether such a statement was made by Bryan Miyake is a question of fact. Testimony regarding the number and content of telephone calls was taken and found to be unreliable. However, the issue of law, whether such a count could be prosecuted, is a different matter and one we find is possible. The evidence taken at hearing fails to prove by a preponderance of the evidence that a discriminatory statement was made by Miyake. Therefore, Count I is dismissed on a factual basis, not as a matter of law.

Discriminatory verbal statements can be prosecuted pursuant to H.R.S. § 515-16(7).

#### F. Response Filed by the Hearing Examiner

Lastly, we address the final pleading in the case, submitted by the Hearings Examiner, and not by a party. On February 27, 2023, the Hearings Examiner filed *Hearing Examiner’s Response to Executive Director’s Exceptions to Hearing Examiner’s Findings of Fact, Conclusions of Law, and Recommended Order Dated January 23, 2023*. The pleading is labelled a “response” and not an “order.” HAR §§ 12-46-54 and 12-46-55 set forth the procedures of the administrative process after hearing. After the Hearings Examiner files Findings of Fact, Conclusions of Law and Proposed Order, the non-prevailing party can file exceptions, and the prevailing party can subsequently file a statement in support of the decision. HAR § 12-46-55 then mandates the Hearings Examiner to transmit the record, decision, timely

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<sup>2</sup> 42 U.S.C. §3604 (c) ...it shall be unlawful to....(c) to make, print, or publish or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin or an intention to make any such preference limitation or discrimination.”

filed exceptions and any timely filed statement in support to the Commission. In this case, before forwarding the exceptions and record to the Commission, as required by the rule, the Hearings Examiner filed a response. There is no procedure for a response and it intrudes into the Commission's authority. If any party sought oral argument before the Commission, as permitted by HAR § 12-46-56, then parties would be permitted to argue. The Hearings Examiner is not a party and would not be permitted to argue at such a hearing. H.A.R. § 12-46-32 gives hearings examiners broad powers, including the power to issue subpoenas, hold hearings, rule on motions, submit in writing any decision together with findings of fact and conclusions of law and a proposed order to the commission for its consideration and final disposition. However, those powers do not include a response to a filing pursuant to H.A.R. § 12-46-53 regarding exceptions.

The response filed on February 27, 2023 is *ultra vires* (outside the authority of the Hearings Examiner) and falls outside the administrative rules. Based on that, the *Hearing Examiners Response to Executive Director's Exceptions to Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommended Order Dated January 23, 2023* will be stricken from the record.

### III. ORDER

This case is dismissed in its entirety. The Recommended Order was to dismiss Count II, and the Commission adopts and affirms the Recommended Order to dismiss Count II. The Commission finds that Count I was dismissed erroneously as a matter of law. The Commission reinstates Count I as a matter of law, but hereby dismisses Count I, because the evidence presented did not show that any of the four Respondents violated H.R.S. § 515-16 (7).

DATED: Honolulu, Hawai'i , April 24 , 2023.



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Liann Ebesugawa, Chair



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Joan K. Lewis, Commissioner



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Jon Matsuoka, Commissioner



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Arsima Muller, Commissioner



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William Puette, Commissioner

Copies sent by certified mail or hand delivery to: Eric Pillaau; James Yuda; Kurt Klein;  
W. Anthony Aguinaldo

Notice: Under H.R.S. § 368-16(a), a complainant and a respondent shall have a right of appeal from a final order of the Commission by filing an appeal with the circuit court within thirty (30) days of service of an appealable order of the Commission.