

LAB/15

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of	)	CASE NO. OSAB 99-005 (H)
ELLEN MOONEY,	)	(DISCRIMINATION COMPLAINT)
Complainant,	)	
	)	
vs.	)	
	)	
HAWAIIAN SUNSHINE NURSERY,	)	
Respondent,	)	
	)	
and	)	
	)	
DIRECTOR, DEPARTMENT OF LABOR	)	
AND INDUSTRIAL RELATIONS.	)	

FILED  
LIR APPEALS BOARD  
STATE OF HAWAII

'01 JUN 18 AM 0:56

ORDER ADOPTING LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD'S PROPOSED DECISION AND ORDER

On May 31, 2001, the Labor and Industrial Relations Appeals Board filed its Proposed Decision and Order. Certified copies of the Proposed Decision and Order were served on the parties the same day and received shortly thereafter. The parties were afforded ten (10) working days in which to file written exceptions to the Proposed Decision and Order. No exceptions were filed.

Having considered and reviewed the record, the Labor and Industrial Relations Appeals Board hereby adopts the Proposed Decision and Order in toto.

Dated: Honolulu, Hawaii, JUN 18 2001.

*Excused*

\_\_\_\_\_  
RANDALL Y. IWASE, Chairman

*Carol K. Yamamoto*  
\_\_\_\_\_  
CAROL K. YAMAMOTO, Member

*Vicente P. Aquino*  
\_\_\_\_\_  
VICENTE P. AQUINO, Member

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

*[Signature]*  
\_\_\_\_\_

NOTICE TO EMPLOYER:

You are required to post a copy of this Order Adopting Labor and Industrial Relations Appeal's Board's Proposed Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted.

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on JUN 18 2001.



LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

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 DIRECTOR, DEPARTMENT OF LABOR )  
 AND INDUSTRIAL RELATIONS. )  
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CASE NO. OSAB 99-005(H)  
(DISCRIMINATION COMPLAINT)

FILED  
LIR APPEALS BOARD  
STATE OF HAWAII

01 MAY 31 AM 0:15

PROPOSED DECISION AND ORDER

This Occupational Safety and Health case is before the Board on appeal by HAWAIIAN SUNSHINE NURSERY ("HSN") from the decision of the Director of the Department of Labor and Industrial Relations, dated January 12, 1999. In that decision, the Director determined that HSN discriminated against ELLEN MOONEY ("Mooney") for exercising a protected activity, in violation of Hawaii Revised Statutes ("HRS") §396-8(e). The Director awarded Mooney backpay in the amount of \$4,144.00 and assessed a penalty of \$1,000.00 against HSN.

The issues on appeal are:

- (1) Whether Respondent unlawfully terminated Claimant in violation of HRS §396-8(e); and
- (2) If so, whether the award of \$4,144.00 in backpay to Mooney and the \$1,000.00 penalty assessed against HSN were appropriate.

For the reasons stated below, we reverse.

## FINDINGS OF FACT

1. HSN is in the business of cultivating and selling plants. HSN is owned and operated by David Fell ("Fell") and Sandy Kasman ("Kasman"). Fell is in charge of sales and business/economic projections. Kasman is in charge of the day-to-day operations of HSN.

2. Kasman hired Mooney in March of 1998 to work for HSN.

3. Diane Jamila Dandini ("Dandini") was another employee of HSN who was in charge of greenhouse #4 ("GH4") and who knew Mooney as a friend before the latter joined HSN.

4. In April of 1998, Dandini became pregnant. In anticipation of her maternity leave in the fall, HSN's owners agreed to allow Dandini to train Mooney with the intention that Mooney would assume Dandini's duties in GH4 when the latter took her maternity leave.

5. We find from the testimony and/or written statements of coworkers and staff of HSN, including that of Sherla Bertelmann ("Bertelmann"), Jill Rieta, Carolyn Hedberg ("Hedberg"), Mark Campbell, Alex Gamsky, Bernie Rasay, and even Dandini, that although Mooney was intelligent and enjoyed caring for plants, she did not perform her job up to HSN standards, that she was difficult to work with, that she repeatedly did not follow instructions, that she had an attitude problem and was rude and inconsiderate of others at work, that she had personality conflicts with the owners, as well as, with many of

her coworkers, that she was disrespectful and criticized her bosses openly in front of others, and that she was not suited for work in a commercial business environment.

6. Mooney knew that Fell and Kasman were not happy with her work, as she had been counseled numerous times regarding her failure to follow directions, her attitude, her lack of motivation, and her mistakes. Mooney, however, did not hide her contempt for Fell and Kasman and her discontent with her job at HSN. Mooney made it clear to everyone at HSN that she would only stay until after Dandini returned from maternity leave in November of 1998.

7. Dandini trained Mooney to care for GH4 until she took maternity leave on August 11, 1998. After Dandini left, Bertelmann became Mooney's immediate supervisor and Mooney worked in GH4. Kasman supervised both Mooney and Bertelmann.

8. Within a month after Dandini left, Kasman became aware that things were not in order with GH4 because of Mooney. At that time, Kasman was entertaining thoughts about assigning someone else to work in GH4.

9. In late August or early September of 1998, Kasman received news from Dandini that the latter was seriously thinking about not returning to work for HSN. Dandini had apparently sent some paperwork to Kasman seeking her help with starting a child care business at home.

10. Kasman tried to contact Dandini several times about her intentions to return to work. Dandini did not return

Kasman's telephone calls or her September 4, 1998 letter regarding her plans to come back to work.

11. Dandini's failure to respond led Kasman to believe that she was probably not coming back to work at HSN.

12. Some time in September of 1998, Kasman, who was unhappy with Mooney's performance, began to reduce Mooney's responsibilities in GH4. Kasman brought in other workers and had them rotate duties in GH4.

13. In light of Mooney's continuing poor attitude and unsatisfactory job performance, together with Kasman's realization that Dandini would not be coming back to HSN, Kasman, in mid-September of 1998, made the decision to terminate Mooney. Kasman did not want to terminate Mooney at that time, because Dandini was out and there was an upcoming out-of-state trade show that the owners had to attend in October of 1998. HSN would be even more short-handed if Mooney left in mid-September. Kasman decided that she would assign Mooney simple tasks in GH4, such as feeding and watering, and keep her on until after her business trip in October of 1998. Kasman and Fell agreed that when they returned from their trip, they would terminate Mooney and find someone else to train to work in GH4.

14. On October 1, 1998, Mooney's friend warned her about the alleged dangers of bromine, a chemical that she used at work.

15. On October 2, 1998, Mooney talked to Bertelmann about her concerns with using bromine at work. Mooney told

Bertelmann that she would take a sample of the chemical to the Hawaii Occupational Safety and Health ("HIOSH") office for testing. Mooney told Bertelmann not to tell Kasman or Fell about her plans.

16. On October 2, 1998, Bertelmann told Kasman about Mooney's concerns regarding the use of bromine at work.

17. On the morning of October 5, 1998, Kasman held a safety meeting at work. Kasman advised the employees it was brought to her attention that one of them had some concerns about bromine. Kasman assured them that the chemical was safe to use, but that she would be sending for the latest MSDS or materials safety and data sheet from the manufacturer just to be safe. In the mean time, Kasman told the employees not to use bromine for now until receipt of the MSDS and further information.

18. Immediately after the meeting, Kasman and Fell left for a one week business trip to the Mainland.

19. On October 11, 1998, upon their return, Kasman and Fell talked to Hedberg about taking over GH4.

20. On October 12, 1998, Kasman and Fell terminated Mooney.

21. After her termination, Mooney filed a complaint with the Director's division of HIOSH, alleging that she was discriminated against for raising a safety concern.

22. On November 4, 1998, Dandini formally advised HSN that she would not be returning to work.

23. There is no dispute that Mooney was an employee and had exercised a protected activity under Chapter 386, when she raised safety concerns with her supervisor on October 2, 1998.

24. The only dispute is whether or not she was terminated for exercising a protected activity under HRS §396-8(e).

25. We find, based on the credible testimonies of Fell, Kasman, and the other employees, the written statements of coworkers, and other evidence in the record, that HSN had legitimate reasons to terminate Mooney due to her poor job performance and attitude problems, that a decision to terminate her was made prior to her exercising a protected activity, and that she was terminated on October 12, 1998, for poor job performance and not for exercising her right under Chapter 396 to raise safety concerns with her supervisor.

#### CONCLUSIONS OF LAW

1. Section 396-8(e) reads in pertinent part:

No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter.

Based on the foregoing findings, we conclude that HSN did not unlawfully terminate Mooney, in violation of HRS §396-8(e).

2. Having concluded that there was no violation of HRS §396-8(e), we do not reach the issues of backpay and penalty.

ORDER

The decision of the Director, dated January 12, 1999, is reversed, in accordance with the foregoing.

Dated: Honolulu, Hawaii, MAY 3 1 2001.

EXCUSED

RANDALL Y. IWASE, Chairman

*Carol K. Yamamoto*  
CAROL K. YAMAMOTO, Member

*Vicente F. Aquino*  
VICENTE F. AQUINO, Member

Ellen Mooney  
Complainant

David Fell  
for Respondent

Herbert B.K. Lau, Esq.  
for the Director, Department of  
Labor and Industrial Relations

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*UAB*