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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 95-059(M)
ROLAND M. LARSON,)	DISCRIMINATION COMPLAINT
Complainant,)	HIOSH No. 93-013
)	
vs.)	
)	
PINEAPPLE HILL RESORT,)	
Respondent,)	
)	
and)	
)	
DIRECTOR, DEPARTMENT OF)	
LABOR AND INDUSTRIAL RELATIONS,)	
Appellee.)	
_____)	

FILED
DEC 4 1994
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DECISION AND ORDER

This Occupational Safety and Health case is before the Board on appeal by ROLAND M. LARSON ("Complainant") from the decision of the DIRECTOR of the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, dated December 30, 1994. In that decision, the Director determined that PINEAPPLE HILL RESORT ("Respondent") violated Hawaii Revised Statutes ("HRS") §396-8(e) by discharging Complainant from employment for exercising a right under Chapter 396. The Director awarded Complainant back wages and reinstatement.

The issues on appeal are:

(1) Whether Respondent terminated Complainant from employment in violation of HRS §396-8(e);

(2) If so, whether the Director's order that Respondent reinstate Complainant and pay him \$9,072.00 in back wages is appropriate.

For the reasons stated below, we reverse.

FINDINGS OF FACT

1. Respondent is a restaurant that employed Complainant as a part-time cook and sometime valet parking attendant. Complainant began work for Respondent in February of 1976. Prior to July of 1993, Complainant quit his job with Respondent once and was subsequently rehired. He was later terminated by Respondent and rehired again in 1989.

2. In December of 1992, Respondent came under new management and ownership by Braun Management Co., Ltd. ("Braun"), who instituted massive renovations of the restaurant and "tightened up" the restaurant's operation and employment policies. Braun also upgraded the appearance of the restaurant with new tablecloths, new china, and new silverware. Other changes included new uniforms and a new restaurant manager.

3. Complainant engaged in various pranks at work while under new management by Braun. Complainant's conduct was consistent with past behavior when Respondent was operated by the restaurant's previous owners. Respondent presented credible evidence that Complainant deliberately burned steaks when the owners of Braun came to dinner one night, sent out raw steaks to teach rookie waiters a lesson whenever they forgot to specify the doneness of the steaks ordered by the customers, hid a waiter's checkbook on at least one occasion during Braun's management, ruined employees' meals by putting rubberbands in their hamburgers, and put soy sauce in the host's cola drink. Complainant's antics disrupted the operation of the restaurant,

and annoyed and angered some of the staff members. Complainant's pranks also led to retaliatory acts by other employees and escalated to the point where two valued employees, Robin and Sarah, resigned on or about July 15, 1993.

4. We do not credit Complainant's testimony that with the exception of the soy-sauce-in-cola incident, all of the other pranks he was accused of playing while under Braun's ownership and management were either done by him prior to December 1992, before Braun's management or by someone else.

5. On March 24, 1993, Complainant complained to the Department of Labor and Industrial Relations, Division of Occupational Safety and Health, about an alleged gas leak in Respondent's kitchen area, and a crumbling floor that created a tripping hazard. The complaint was made while renovations were being carried out at the restaurant.

6. The gas smell and sagging floor complained of by Complainant were conditions that had existed for some time before Braun took over in December of 1992.

7. By letter dated April 15, 1993, the Director, via the Division of Occupational Safety and Health, informed Respondent that a complaint had been filed against it for alleged unsafe work conditions. The Director requested a written response from Respondent within twenty days.

8. On April 28, 1993, Respondent advised the Director that someone from the gas company will be investigating the

possible gas leak and that repairs to the floor were already underway.

9. What was alleged to be a gas leak turned out to be a warped burner under the steam table. Bruce Lamb, Respondent's maintenance person, fixed the burner. As for the floor, it was repaired by April of 1993 as part of Respondent's overall renovations.

10. Respondent's manager, Gae Hansen, was aware of Complainant's practical jokes at work and had written him up for some of them. However, she always hesitated to fire Complainant because of the safety complaint that he had filed.

11. Prior to July of 1993, the alleged unsafe conditions complained of by Complainant were rectified by Respondent.

12. Some time in July of 1993, Sandra Braun Ortega, one of the co-owners of Braun, decided to take Complainant off the valet shift, because Complainant was "grumpy", did not smile when greeting patrons, and projected the wrong image for the restaurant.

13. Also in July of 1993, Ms. Braun Ortega became upset when she discovered that Robin and Sarah, who had resigned on or about July 15, 1993, did so because they did not want to work with Complainant. Ms. Braun Ortega had valued them as employees and wanted them to return. But on the advice of Ms. Hansen, nothing was done about Complainant.

14. On the evening of July 30, 1993, Complainant confronted Ms. Braun Ortega about her decision to take him off the valet shift. Because Complainant approached her while she was entertaining friends at the restaurant, and during the rush dinner hour at the restaurant, Ms. Braun Ortega declined to discuss the matter with him at that time.

15. On the following evening on July 31, 1993, Complainant announced to his coworkers during business hours that he planned to sue the restaurant.

16. Ms. Hansen overheard Complainant and telephoned Ms. Braun Ortega at her home that night to inform her that Complainant, in front of other employees, was threatening to sue the restaurant. Ms. Braun Ortega and her husband, who was a co-owner of Braun, determined that they could no longer tolerate Complainant's disruptive behavior at work. They decided to terminate his employment.

17. Because of Complainant's disruptive behavior, Respondent, through Braun, fired Complainant on the evening of July 31, 1993.

18. Based on the evidence, we find that Complainant was not discharged for filing an occupational safety complaint. Complainant was discharged for his inappropriate conduct at work that disrupted the operation of the restaurant.

CONCLUSIONS OF LAW

1. Under HRS §396-8(b), an employee has the right to make complaints to the Department of Labor and Industrial

Relations about workplace hazards. In accordance with HRS §396-8(e), an employer may not discharge an employee for exercising any right under Chapter 396.

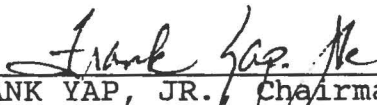
We conclude that Respondent did not violate HRS §396-8(e) when it terminated Complainant from employment. We have found that Respondent terminated Complainant for unprofessional conduct at work, and not for exercising his right to file an occupational safety and health complaint.

2. Having concluded that Respondent did not violate HRS §396-8(e), it follows that Complainant is not entitled to reinstatement or back wages.

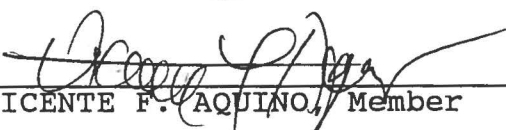
ORDER

The decision of the Director, dated December 30, 1994, is reversed, in accordance with the foregoing.

Dated: Honolulu, Hawaii, DEC 04 1997.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member

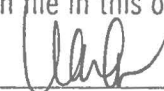

VICENTE F. AQUINO, Member

Gerald T. Johnson, Esq.,
for Complainant

Joy Yanagida, Esq.,
for Respondent

Herbert B.K. Lau, Esq.,
for Appellee

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



NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.