CIVIL RIGHTS COMMISSION

STATE OF HAWAII

LINDA C. TSEU, Executive Director, on behalf of the complaint filed by MARY ANNE COLE, v. TREEHOUSE RESTAURANT, INC. Respondent.	Docket No. 95-002-E-A-D-RET HEARINGS EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER; APPENDICES A - B.

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

I. INTRODUCTION

1. Chronology of Case

The procedural history of this case is set forth in the attached Appendix A.

2. Summary of the Parties' Contentions

The Executive Director asserts that Respondent Treehouse Restaurant, Inc. (hereinafter "Treehouse") violated H.R.S. § 378-2 by: 1) demoting Complainant Mary Anne Cole because of her age and disability; and 2) retaliating against Complainant by: a) terminating her after she filed a discrimination complaint with this Commission; b) thereafter barring Complainant from its premises; and c) thereafter providing negative references to potential employers.

Respondent Treehouse Restaurant Inc. asserts that: a) it reduced Complainant's hours and fired two other bartenders because

they had low bar sales; b) Complainant was terminated for misconduct; c) Complainant is not entitled to any relief because Respondent did not engage in any discriminatory practices; and d) alternatively, Complainant failed to mitigate her damages.

Having reviewed and considered the evidence and arguments presented at the hearing together with the entire record of these proceedings, the Hearings Examiner hereby renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT[1]

1. Respondent Treehouse Restaurant, Inc. is a Hawaii corporation which owned and operated a restaurant in the Lahaina Market Place in Lahaina, Maui. The restaurant was known as the Lahaina Treehouse.

2. Arthur "Higgins" Maddigan is the president and general manager of Respondent Treehouse. In the early 1970's Maddigan personally managed the Treehouse restaurant. Subsequently, Maddigan was not involved in the day to day operations of the restaurant. Instead, he hired and fired a large number of restaurant and bar managers and continued to make overall decisions about the restaurant's menu, image and type of clientele he wanted to attract. (Tr. 146-149, 477, 919-920, 1760-1761, 1767-1768,

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[1] To the extent that the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

2164-2166, 2182)[2]

3. Complainant Mary Anne Cole has been a bartender since 1973. She moved to Lahaina in 1978 and obtained a manager's liquor card license. Prior to working at Respondent Treehouse, Complainant worked as a bartender at various bars in the Lahaina area. (Tr. 14-16)

4. On or about September 19, 1985 Respondent hired Complainant as a bartender. (Tr. 16; Ex. 3)

5. In order to tend bar unsupervised, a bartender must obtain a manager's liquor card license. Bartenders at Respondent Treehouse usually worked alone unsupervised, except on special nights such as Halloween, Christmas and New Year's Eve, when the bar would be exceptionally busy and more than one bartender would be scheduled to work. Respondent Treehouse usually hired experienced bartenders who held manager's liquor card licenses and seldom trained its non-bartending employees to be bartenders. All but one of the bar managers (who also was the restaurant manager) at Respondent Treehouse worked shifts as bartenders. (Tr. 14-15, 888, 917, 1152-1153, 1203, 1303-1304, 2220; Ex. HE-2)

6. The work day at Respondent Treehouse was divided into two approximately seven hour shifts. The day shift ran from 10 a.m. - 4 p.m. plus an hour for set up and paper work. The evening shift ran from 4 p.m. - 10 p.m. plus one hour for paper work and

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[2] Unless otherwise indicated, "Tr." preceding a page number refers to the transcript of the contested case hearing; "Ex." followed by a number refers to the Executive Director's exhibits; "Ex." followed by a letter refers to the Respondent's exhibits; "Ex." followed by the letters "HE-___" refers to exhibits requested and obtained by the Hearings Examiner.

closing. Bartenders usually made more tips during the night shifts than during the day shifts. (Tr. 17-19, 22, 895, 908)

7. From September 1985 to February 1988 Complainant generally worked three shifts per week at Respondent Treehouse. Initially she earned $6 per hour plus tips. Some time in 1987 Respondent Treehouse promoted Complainant to be bar manager and gave her a raise to $7 per hour plus tips. (Tr. 102-103; Ex. HE-2)

8. Because Complainant worked more than 20 hours per week at Respondent Treehouse, she received medical insurance through Respondent. (Tr. 29)

9. Complainant is an insulin dependent diabetic. Complainant's medical insurance paid for her insulin and needles, which cost approximately $40 per month. Other Treehouse employees knew Complainant was diabetic because she had to take breaks to eat in order to keep up her blood sugar level. Prior to October 1991, Maddigan knew that Complainant was an insulin dependent diabetic because Complainant once told him she liked Respondent's medical plan because it paid for her insulin and needles. (Tr. 29-30, 36-38, 78, 83, 161-162, 1077)

10. On or about February 9, 1988 Complainant injured her back. Complainant claimed she injured her back while lifting a case of rum while working at Respondent Treehouse. Shortly thereafter, Complainant filed a workers' compensation claim. Complainant was diagnosed as temporarily totally disabled from work for the period February 13, 1988 through December 14, 1988 and did not work at the Treehouse for these 10 months. (Tr. 23, 107; Ex.

HE-2)

11. In October 1988 Complainant began to work part time as a sales person for Apparels of Pauline, a clothing store located in the Lahaina Market Place near the Treehouse. Complainant worked approximately 16 hours a week and was paid by check and clothes. In 1990 the owners of the store were unable to renew their lease and tried to sell the store. In 1991 the owners began to close down the store and lay off employees. By October 1, 1991 the owners cancelled their employee medical insurance. The store closed on February 17, 1992. Complainant worked at the store until its closing. (Tr. 74-76, 117, 121-122, 1902, 1907-1910, 1914, 1920-1921, 1934; Ex. II)

12. In November 1988 Complainant approached Maddigan and asked to be rehired as a bartender. After checking with Complainant's physician, Maddigan agreed to rehire Complainant as a bartender. On December 15, 1988 Complainant returned to Respondent Treehouse as a bartender and again worked three shifts per week (two evenings, one day). (Tr. 105; Ex. HE-2)

13. On December 21, 1989 Complainant settled her workers' compensation claim and received a total of $35,335.72 from Respondent's insurance company in workers' compensation benefits. (Ex. HE-2)

14. From December 15, 1988 to September 30, 1991 Complainant worked two evening shifts and one day shift per week at Respondent Treehouse. She continued to receive medical insurance through Respondent. (Tr. 24, 105-106, 116-117)

15. In September 1989 Maddigan hired Walter Clur as a comptroller in charge of personnel operations at Respondent Treehouse. (Tr. 1758-1759; Ex. 11)

16. Bill Garrett was a bartender at Respondent Treehouse from May 13, 1988 until October 1, 1991. In October 1991, Garrett was 44 years old. (Tr. 881, 897; Exs. 3, CC)

17. Peter Johnson was a bar manager at Respondent Treehouse from June 24, 1988 to August 15, 1990. Some time between February and May, 1990 Maddigan told Johnson that he wanted to hire "young girls" behind the bar. Johnson told Garrett about Maddigan's suggestion. Garret and Johnson thought the idea was ridiculous, and Johnson never implemented it. (Tr. 904-905, 930, 932-933; Ex. CC-1)

18. Patty Smith was a cook at Respondent Treehouse from approximately May 1987 to August 1989. In August 1989 Maddigan fired Smith because he felt she didn't know how to cook. In January 1992 Respondent Treehouse rehired Smith as a cook from January to February 1992. Smith and Complainant had an on-and-off friendship and sometimes fought. (Tr. 234-235, 242-243; Ex. 10)

19. Carol Clancy was a waitress at Respondent Treehouse from October 1990 to December 1992 and became its general manager until she was fired in December 1993. In October 1991 Clancy was 56 years old. Clancy and Complainant had been personal friends. Some time prior to September 30, 1991, Clancy heard that Complainant accused her [Clancy] of stealing money from the cash register. Since then, they have not been on speaking terms. (Tr. 1244, 1251-

1252, 1257, 1263, 1297, 1539-1540; Exs. 10, KK)

20. Some time prior to September 30, 1991 Smith told Clancy that Complainant's 1988 back injury did not occur while Complainant was working at Respondent Treehouse. Smith stated that Complainant actually hurt her back off hours at another restaurant while she was helping to carry her boyfriend home. Clancy told Maddigan and Clur about Smith's statements. Maddigan and Clur then believed that Complainant's workers' compensation claim was fraudulent. (Tr. 677-678, 1291, 1349-1351, 2098-2100, 2137-2140, 2246; Ex. 10)

21. Maddigan hired Tom Lowerre as a bar manager on July 24, 1991. In October 1991 Lowerre was 37 years old. (Exs. 3, CC)

22. Some time in the beginning of September 1991 Maddigan asked Linda Evans to become the bar manager at Respondent Treehouse. At that time, Evans was a bar manager at another restaurant in Lahaina. In October 1991 Evans was 38 years old. Maddigan encouraged Evans to visit the Treehouse as a patron to evaluate its management and operations. (Tr. 1764, 1955-1956; Exs. 11, CC)

23. On or about September 28, 1991 Evans and two friends entered the Treehouse near closing time. Garrett was bartending and had already closed the bar. Garrett did not know that Maddigan planned to hire Evans as the new bar manager. Evans and her friends demanded drinks. Garrett told Evans and her friends that he would only serve them two drinks each because he was closing the bar and doing paper work. Evans and her friends rudely demanded additional drinks. Garrett told Evans and her friends to leave.

(Tr. 944-945; Ex. S)

24. On or about September 29, 1991 Evans, Maddigan and Clur decided to fire Lowerre and Garrett. Evans and Maddigan wanted to fire Lowerre because: a) Maddigan felt Lowerre did not increase bar sales; b) Evans was taking over Lowerre's job as bar manager; and c) Evans wanted Lowerre's shifts. Evans decided to fire Garrett because she felt Garrett was rude to her and her friends the prior evening and because she also wanted Garrett's shifts. (Tr. 130-131, 133; Ex. 10)

25. Maddigan also wanted to fire Complainant because he believed that her workers' compensation claim was fraudulent. However, Maddigan didn't want Complainant to collect unemployment insurance because he felt she had already received a large amount of workers' compensation benefits. Maddigan decided to force Complainant to quit by reducing her shifts and terminating her medical insurance benefits. Maddigan mentioned to Evans that Complainant was diabetic and would probably quit if she lost her medical benefits. Maddigan told Evans to reduce Complainant's work schedule to two shifts per week. (Tr. 26-17, 2043, 2206; Exs. 1, M, KK)

26. On September 30, 1991 Evans went to the Treehouse and announced she was the new bar manager. Evans told Garrett he was fired but did not state any reasons for his termination. Evans falsely told Complainant and other employees that Garrett was fired for drug use. (Tr. 84, 131, 133, 889-890, 1300-1301; Exs. 10, S)

27. On September 30, 1991 Evans also posted a new bartender schedule which listed Complainant for the Tuesday and Wednesday day shifts. Evans scheduled herself and two other bartenders, (Matt Jacobson, then age 25; and Sarah Morison, then age 23) for Complainant's old evening shifts. Complainant saw the schedule on October 1, 1991 and asked Evans why her shifts had been reduced to two days and asked why she was scheduled only for day shifts. Evans stated that this was how she [Evans] wanted to schedule the bartenders and that the schedule was temporary. Complainant also received a notice which stated that her medical benefits were terminated. At that time, Complainant was 47 years old. (Tr. 25-26, 130, 159-160; Exs. 3, S,)

28. After this schedule change, Complainant suspected that Evans was going to fire her too. Complainant started to keep a log of employment actions taken by management at the Treehouse. She also began to look for other bartending jobs and solicited several letters of recommendation from former Treehouse managers and employees. (Tr. 50, 55-56, 202-205, 963, 967-972; Exs. 1, 16)

29. Complainant became bewildered and upset about her loss of work hours and medical benefits. At first she thought only Evans wanted to get rid of her. Complainant couldn't understand why Maddigan would allow Evans to cut her hours and medical benefits since she [Complainant] had been a long time loyal employee. She worried about keeping her job, cried often and couldn't sleep at night. Complainant met with Clur and told him that she needed to retain her medical benefits. During this meeting, she was very

distressed. Clur told Complainant to get medical benefits through her job at Apparels of Pauline. Complaint also discussed her need for medical insurance with Maddigan. During this discussion, Complainant was crying and in a panic about losing her insurance. Maddigan told Complainant she was eligible for COBRA or that she should get insurance through Apparels of Pauline. (Tr. 90-91, 143, 244-245, 1133-1134, 1784-1785, 2241-2243; Ex. KK)

30. On or about October 12, 1991 Complainant asked Evans if she could have more shifts in order to work enough hours to regain her medical insurance. Evans told Complainant that Maddigan wanted Complainant "out of there" because he thought Complainant had "faked" her worker's compensation claim. Evans told Complainant that Maddigan didn't want her to work more than two shifts so that she would lose her medical benefits and quit. Evans also told Complainant that Maddigan wanted Complainant to quit, instead of be fired, because she [Complainant] had collected workers' compensation benefits and he didn't want her to get any unemployment insurance. (Tr. 26-27, 31; Exs. 1, II, OO)

31. Evans began to scrutinize Complainant's work performance. On October 13, 1991 Evans gave Complainant a written reprimand for leaving the ice machine unlocked. No other employee was reprimanded for leaving the ice machine unlocked. On October 22, 1991 Evans accused and verbally reprimanded Complainant for over pouring liquor into a drink. Complainant maintained that she had not over poured. (Tr. 33, 4778-479, 1323, 1340, 1627; Ex. 1)

32. Pursuant to Evans' October 12, 1991 statements and subsequent reprimands, Complainant believed that Respondent was retaliating against her for filing her 1988 workers' compensation claim. Complainant filed a workers' compensation discrimination complaint with the Enforcement Division of the Department of Labor and Industrial Relations on October 22, 1991. In this complaint, Complainant claims that Evans told her that Maddigan wanted her "out of there because I once collected workman's comp . . . and felt I faked the claim" and that "he did not want me to be able to collected unemployment". Complainant hoped that the filing of this complaint would pressure Maddigan into restoring her shifts and medical benefits. A clerk from the Enforcement Division suggested to Complainant that she also file a disability discrimination complaint with this Commission. Respondent was served a copy of the Enforcement Division complaint on October 23, 1991. (Tr. 50-54, 165, 169-170, 180-181, 729; Ex. OO)

33. In response to the Enforcement Division complaint, Maddigan, Clur and Evans created a false bar sales report to justify Complainant's reduction in hours and the firing of Lowerre and Garrett. The report purported to cover the average sales of each of the bartenders during the months of June, July, August and September 1991. The report inaccurately states that Complainant had average sales below $160 per shift. Clur and Evans falsely claimed that Lowerre and Garrett were fired because they did not meet the $160 per shift sales quota. Clur and Evans also falsely claimed that they had planned to fire Complainant, but that

Maddigan intervened and decided to retain Complainant because of her long employment at Treehouse. (Tr. 1971, 1988-1992, 1996, 2025-2028, 2108-2109; Exs. M, AA, OO, 29, 33)

34. At the end of October 1991 Respondent Treehouse hired Sharlene Rabang as the overall manager of the Treehouse. In October 1991 Rabang was 48 years old. Prior to being hired, Rabang visited the Treehouse as a customer and saw employees steal money and be inattentive to customers. Rabang told Maddigan that she wanted to make several personnel changes. Maddigan told Rabang that he wanted to make Complainant quit because Complainant had filed a fraudulent workers' compensation claim. He also told Rabang that he didn't want Complainant fired because he feared she would file a retaliation claim. (Tr. 1048, 1053-1055, 1074-1076, 1088)

35. As the overall manager of the Treehouse, Rabang would help waitress when the restaurant was busy and would also fill in for absent employees. (Tr. 1606-1609)

36. On October 30, 1991 Morison was accused of stealing and closing the bar early and was fired. (Tr. 183-184; Ex. 1)

37. Rabang began a policy of spotting Treehouse employees to catch the employees she suspected were stealing. On November 22, 1991 Jacobson and a cook were spotted and caught giving away free drinks and meals. Rabang fired Jacobson and the cook. (Tr. 1057-1060; Exs. 1, T)

38. After Jacobson and Morison were fired, Complainant asked Evans if she could have some of their old shifts. Evans told

Complainant that Maddigan would not allow her [Evans] to give Complainant any more shifts. (Tr. 183-187, 954)

39. Rabang also arranged to have Complainant spotted because she was trying to upset Complainant and make her quit. (Tr. 1058-1059, 1139)

40. Lori Jackson-Horton was waitress and later a bartender at Respondent Treehouse from October 28, 1991 to October 1992. In October 1991, Jackson-Horton was 29 years old. Jackson-Horton was given some of Jacobson's and Morison's old shifts. (Tr. 1132; Exs. 1, CC)

41. Some time in October 1991 Jackson-Horton overheard Evans and Rabang talking about spotters being sent into the Treehouse to watch Complainant so that she would get upset and quit. Jackson-Horton told Complainant about this conversation. (Tr. 35, 192, 1139; Ex. II)

42. On January 7, 1992 Complainant was spotted and was found to be honest and in compliance with all but one of Respondent's house policies. (Tr. 1551; Ex. T)

43. Some time in January, 1992, Clancy asked Maddigan to hire Timothy Kinney as a bartender at the Treehouse. Kinney had been an alcoholic and had problems drinking when working at other bartending jobs. Maddigan decided to hire Kinney because he [Maddigan] was also a recovered alcoholic and he wanted to give Kinney a second chance. On January 10, 1992 Respondent Treehouse hired Timothy Kinney as a bartender. At that time, Kinney was 43 years old. Thereafter, 9 out of 10 bartenders hired were over age

30; two of the 10 were over age 40; and at least seven of the 10 were male. (Tr. 1789-1792; Exs. 3, 10, N, CC, CC-1; see also, Appendix B)

44. On February 19, 1992 Complainant filed an age and disability discrimination complaint with this Commission. In this complaint, Complainant states, inter alia, that "Linda Evans, Bar Manager, told me that the decrease in my hours and the demotion were because the Owner had told her that I had collected Worker's Compensation so he did not want me to collect Unemployment Insurance; that these actions would force me to quit" and that "[t]he Bar Manager mentioned my work injury as a reason I was subjected to decreased hours, demotion and unequal terms and conditions of employment." If Respondent Treehouse had restored Complainant's shifts and medical benefits, Complainant would not have filed this Civil Rights Commission complaint. Respondent was served a copy of this complaint on or about February 21, 1992. (Tr. 181-182; Complaint dated 2/19/92; Stipulated Facts Nos. 4, 5)

45. In response to Complainant's Civil Rights Commission complaint, Maddigan and Clur again falsely claimed that Lowerre and Garrett were fired because they did not meet a $160 per shift sales quota. Maddigan and Clur also claimed that Complainant did not meet the $160 per shift sales quota, but had been retained because of her long employment at Treehouse. (Tr. 1840-1841, 2024-2025; Ex. C)

46. From October 1, 1991 through March 16, 1992 Complainant freely discussed her loss of hours and medical benefits and her

Enforcement Division and Civil Rights complaints with employees and customers of Respondent Treehouse. All the employees and many customers knew that Complainant had several complaints with the Department of Labor pending against Respondent Treehouse. (Tr. 186-187, 461, 904, 1074-1075, 1125, 1133-1134, 1198, 1287, 1298-1299, 1305-1306, 1331, 1500-1501; Ex. 10)

47. During this period, Evans and Rabang became angry at Complainant for discussing her complaints, loss of hours and loss of benefits with other employees and customers. Rabang especially resented having to handle Complainant with "kid gloves" because of her pending claims against the Treehouse. However, Evans and Rabang did not terminate Complainant because Maddigan instructed them not to. (Tr. 1074-1076, 1082, 1289-1290, 1329-1331, 1508-1509, 1598-1599; Ex. KK)

48. On March 5, 1992 Complainant injured her shoulder in a boating accident unrelated to work. (Tr. 39-40; Ex. 1)

49. On March 6, 1992 Complainant went to the emergency clinic at Maui Memorial Hospital for treatment of her shoulder and received a work disability verification slip. Later that afternoon, Complainant went in to Respondent Treehouse and showed Clur the work disability verification slip. This slip was dated March 6, 1992 and stated that Complainant should be granted disability leave until March 13, 1992. Clur told Complainant to discuss the matter with Rabang. Complainant explained her injury to Rabang and stated that she didn't know when she could return to work. Rabang told Complainant that Respondent might not be able to

hold her job open. (Tr. 40-41, 507-511; Exs. 1, 5, Q, Q-1, II, KK)

50. Maddigan and Rabang became concerned that if Complainant returned to work at the Treehouse, she might further injure herself and file another workers' compensation claim. They decided to terminate Complainant. On March 9 and 10, 1992 Rabang called Complainant and informed her she was terminated because she might further injure herself. Rabang also told Complainant to come in to sign "termination papers". (Tr. 557-559, 995-996, 1150, 1499, 1800, 2190-2193, Exs. 1, KK)

51. On March 10, 1992 Complainant went to Dr. George Zakaib, her personal physician, for treatment of her shoulder. She received a sick leave verification slip stating that her ability to return to work was pending. On March 10, 1992 Complainant brought this slip into Respondent Treehouse so that she could get a temporary disability insurance (TDI) form. Rabang was not in. Complainant gave the sick leave verification slip to Clur, who gave her a TDI form. (Tr. 41-42, 516-519; Exs. 1, 6, 7, 8, TT)

52. On March 16, 1991 Complainant went into Respondent Treehouse to drop off her TDI form and to sign the "termination papers". Rabang was not present and Evans stated that she did not have such papers. Complainant gave the TDI form to Clur and asked about signing the "termination papers". Clur stated he did not have such papers. Complainant returned to the Treehouse bar area. She drank one beer and started to socialize with some customers. Complainant loudly informed the customers that she had been fired. Evans became angry at Complainant for talking about her termination

with customers. Evans told John Taylor, Complainant's boyfriend, to take Complainant home. Taylor told Complainant that since her "termination papers" weren't ready, they should leave. Complainant and Taylor left the Treehouse and drove home. On the way, Taylor told Complainant that Evans had asked him to remove her [Complainant] from the Treehouse and to take her home. Complainant casually remarked, "Well, that just really sounds typical". (Tr. 59-65, 998-1001, 1005, 1750-1753; Exs. 1, P, II, TT)

53. When Rabang returned to work on March 17, 1992 Evans told her that Complainant had been in the Treehouse the prior afternoon and had created a disturbance at the bar. Rabang would not have fired Complainant only for making such a disturbance. However, Rabang felt that such disturbance coupled with another reason would justify Complainant's termination. (Tr. 1118, 1193, 1320-1321, 1597-1598; Ex. KK)

54. Evans wrote a statement as to the March 16, 1992 incident and gave it to Rabang. The statement states that Complainant announced she was high on pain pills, that she had been drinking, that she began talking to patrons about her law suits against the Treehouse, and that "her behavior was unacceptable". (Tr. 1118, 1177; Ex. P)

55. Rabang approached Allen Jones and Craig Davis, two Treehouse cooks who were at the bar during the incident, to sign the statement. Although Davis and Jones did not observe Complainant drinking and did not hear the comments Complainant made to other customers, they signed Evans' statement because they had

just started working at the Treehouse and feared they would be fired if they refused. Rabang also approached Clancy to sign the statement. Clancy had been sitting at a table doing paper work during the incident. Clancy also not did not observe Complainant drinking and did not hear what Complainant said to the other patrons. However, Clancy signed Evans' statement because she felt the incident was not serious and thought that Complainant would only receive a written reprimand. (Tr. 405-407, 409-414, 445-446, 454, 714-718, 876, 1180, 1283, 1285, 1307-1316, 1635; Exs. 10, P)

56. On March 17, 1992 Complainant returned to Respondent Treehouse to sign the "termination papers". Rabang informed Complainant she was fired because of the March 16, 1992 incident. Rabang also told Complainant that management didn't want Complainant to return to work because she might further injure herself and file additional workers' compensation claims. (Tr. 66-67, 1119; Ex. 1; Complaint dated 6/23/92)

57. After Complainant left, Rabang filled out a payroll status change sheet stating the reasons for Complainant's termination. Rabang falsely stated that Complainant was discharged for "disorderly conduct at place of employment" and for being tardy in submitting her 3/10/92 sick leave verification slip[3]. (Tr.

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[3] Exhibit O states on three separate entries that the 3/10/92 sick leave verification slip was received on 3/16/92, which was the day before Complainant was scheduled to work. During her testimony, Rabang maintained that Complainant did not bring the sick leave verification slip in until 3/17/92 at 12:00 p.m. after Complainant's shift started and that she [Rabang] had incorrectly dated the slip and her notes. (Tr. 1108-1117) I find Rabang's testimony not credible and that Complainant actually produced the sick leave verification form to Clur on March 10, 1992 immediately after her doctor's appointment, in order to obtain a TDI form. <u>See</u>, finding of fact number 51.

1119-1120, 1620-1621; Ex. O)

58. However, Complainant was actually fired because: a) Maddigan believed that her 1988 workers' compensation claim was fraudulent; b) Maddigan did not want Complainant to receive unemployment insurance; and c) Maddigan and Rabang didn't want Complainant to return to work at the Treehouse because they feared that Complainant might further injure herself and file additional workers' compensation claims. (Tr. 995-996, 1150, 1308, 1499, 1800; Complaint dated 6/23/92)

59. Maddigan had a policy of barring all ex-Treehouse employees who had been fired from the Treehouse premises. In April 1992 Complainant and her friend, Anne Lewis, went into the Treehouse and ordered drinks and lunch. Kinney, who was bartending, served them drinks. Later Kinney apologetically informed Complainant that he could not serve her and told Complainant and Lewis to leave. Complainant became embarrassed, and she and Lewis left. (Tr. 95-99, 445, 474, 1643)

60. On April 29, 1992 Complainant applied for bartending jobs at the Westin and Marriott hotels. During June 1992 Complainant looked for other bartending positions. She: a) applied at four restaurants and two hotels; b) went to the job bank once;
c) looked at newspaper want ads about 2-3 times per week; and
d) had Taylor inquire about bartending jobs at his work place. After this one month period, Complainant did not actively seek bartending jobs and only checked want ads about 2 or 3 times a week. (Tr. 69-70, 486, 591-596, 597-598; Exs. 1, II)

61. From March 12, 1992 to June 9, 1992 Complainant received $712.50 in temporary disability insurance payments from Respondent's insurer. (Ex. TT)

62. On June 19, 1992 Complainant filed a claim for unemployment insurance. Her claim was denied and the denial was upheld on appeal.[4] (Ex. HE-3)

63. On June 24, 1992 Complainant filed a second complaint with this Commission. In this complaint, she states, inter alia, "Charlene Rabang, General Manager, informed me I was terminated because 'they' could not hold my job open for a month" and "[o]n or about 3/17/92, my supervisor told me that they did not want me to return as I may further injure myself". Complaint dated 6/23/92.

64. On June 30, 1992 Dr. Zakaib released Complainant to return to work without any restrictions. (Tr. 591; Ex. II)

65. In early July 1992 Jeanette Mohameds, the owner of the store Valley Isle Productions, Inc. dba "Oh Baby" approached Complainant and asked her to work part time as a clothing and jewelry sales person. Complainant accepted the job, started work on August 1, 1992 and is still employed there. Complainant works 20 hours a week and was paid $5.00 per hour until April 1994, when her pay was increased to $7.00 per hour. In April 1995 Complainant's pay was increased to $8.00 per hour. Complainant is

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[4] The unemployment insurance claims examiner and hearings officer found that Complainant was not qualified for unemployment insurance benefits because she had been lawfully fired for creating a disturbance at the Treehouse on March 16, 1992. I decline to adopt this conclusion because during this proceeding, Rabang testified that she would not and did not fire Complainant solely because of the March 16, 1992 incident.

paid cash and does not receive medical insurance benefits. (Tr. at 77, 82, 1858-1862; Exs. A, HE-1)

66. On March 22, 1995 Respondent Treehouse Restaurant was closed and all its employees were permanently laid off. (Tr. 2148-2149; Ex. B)

III. CONCLUSIONS OF LAW[5]

A. Jurisdiction

H.R.S. § 378-1 defines "employer" to mean

> . . . any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States.

The statute in turn defines "person" to mean one or more individuals and includes, but is not limited to, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, or the State or any of its political subdivisions.

Respondent Treehouse was a corporation with one or more employees. I therefore conclude that it is an employer under H.R.S. § 378-1 and is subject to the provisions of H.R.S. Chapter 378.

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[5] To the extent that the following conclusions of law also contain findings of fact, they shall be deemed incorporated into the findings of fact.

B. Age Discrimination

H.R.S. § 378-2 prohibits an employer from discharging or discriminating against an employee in the terms or conditions of employment because of age. The Executive Director alleges that Respondent Treehouse demoted Complainant by reducing her hours and terminating her medical insurance benefits in an attempt to force Complainant to quit because of her age. Its argument is based on both disparate treatment (direct and circumstantial evidence) and disparate impact theories.

1. direct evidence of age discrimination

Intentional discrimination under Chapter 378 may be established by direct evidence of discriminatory motive. See, In Re. Smith / MTL Inc. et. al., Docket No. 92-003-PA-R-S (November 9, 1993). Statements regarding an employee's age which are directly probative of an intent to discriminate, can serve as direct evidence of age discrimination. Lindsey v. American Case Iron Pipe Co., 772 F.2d 799, 38 EPD 35,735 at 40,302-40,303 (11th Cir. 1985) (supervisor's statement that plaintiff would not be considered for position because company was looking for a person younger than plaintiff constituted direct evidence of age discrimination); Grant v. Hazelett Strip-Casting corp., 880 F.2d 1564, 51 EPD 39,245 at 58,823 (2nd Cir. 1989) (CEO's statement "I want a young man and that's what I want and that's what I'm going to have" direct evidence of age discrimination); Beshears v. Communications Services, Inc., 930 F.2d 1348, 56 EPD 40,717 at 66,801 (8th Cir. 1991) (president's remarks during company's restructuring that

older employees "have problems adapting to changes and new policies" constituted direct evidence of discriminatory intent). However, stray remarks, statements by non-decisionmakers or statements by decisionmakers unrelated to the decisional process itself do not constitute direct evidence of discrimination. Price Waterhouse v. Hopkins. 490 U.S. 228, 109 S.Ct 1775, 104 L.Ed.2d 268, 49 EPD 38,936 at 57,103-57,104, O'Connor concurring opinion at 57,024 (1989).

Once the Executive Director presents direct evidence of discriminatory intent, the burden of proof shifts to the respondent to either: 1) rebut such evidence by proving that it is not true; 2) establish an affirmative defense; or 3) limit, but not avoid, liability by showing mixed motives for the adverse action. See, In Re. Smith / MTL Inc. et. al., supra; Beshears v. Communications Services, Inc., 56 EPD 40,717 at 66,800-66,801

The Executive Director alleges that Maddigan stated that he wanted "young girls" with "long skinny legs" and that Maddigan and Clur stated that Complainant was "too old". The Executive Director also alleges that: a) Rabang stated Respondent wanted to attract a "younger crowd"; b) Evans told Complainant she [Complainant] didn't fit the "image" of the bar; c) Evans told Complainant that she [Evans] wanted a "more hip and lively crowd"; and d) Rabang and Evans stated that Complainant was "too old". However, the preponderance of the evidence does not show that such statements were ever made or that they were made at or near the time Complainant's hours were reduced.

Garrett testified that Peter Johnson, a former bar manager, remarked that Maddigan once stated that he wanted "young girls behind the bar". Maddigan's comments to Johnson were made some time around February to May 1990, at least 1-1/2 years prior to the date Complaint's hours were reduced. (Tr. 930; Ex. CC-1) Garrett also testified that Johnson never implemented the idea. (Tr. 932-933) The evidence also shows that after Johnson's tenure, the majority of bartenders employed and working most of the shifts during this period of time were over 30 years old (Complainant, Lowerre, Garrett, Boecker, Evans and Kinney). (See, Exs. S, CC, CC-1.) In addition, Respondent subsequently hired more men than women bartenders, and more bartenders over age 30 than under age 30.[6] (Exs. CC, CC-1; see also, Appendix B) I therefore conclude that Maddigan's statement was a stray remark too far removed and unrelated to his decision to reduce Complainant's hours to constitute direct evidence of age discrimination.

Complainant testified that on October 12, 1991 Evans told her that she [Complainant] didn't fit the "image" of the bar and that Evans wanted a more "hip and lively crowd". However, I find

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6 The Executive Director argues that 8 out of 10 bartenders hired during the period after Johnson's tenure until the date Complainant filed her age discrimination complaint were under age 30. (See, Executive Director's Post-hearing Brief at 2 and its attached Exhibit 1.) However, this statistic is inaccurate because it omits the hirings of Dennis Boecker, then age 30 and Linda Evans, then age 38. (See, Exs. 3, 4, CC, CC-1, and Appendix B) And, as noted above, this statistic is irrelevant because the majority of bartenders actually employed and working most of the shifts during this period of time were over 30 years old.

Complainant's testimony regarding these remarks not credible.[7] Complainant's testimony as to Evans' statements was inconsistent. At the hearing, she first testified that Evans stated that Complainant didn't fit the "image that Higgins wanted for the bar" (Tr. 129). Later Complainant testified that Evans said that Complainant didn't fit the "image of the bar", and that Evans made no reference to Maddigan. (Tr. 145) During her July 6, 1993 interview with a Commission investigator regarding this conversation, Complainant states that Evans told her that Maddigan wanted her to quit because she was too old for the image of the Treehouse. (Ex. KK) However, during a subsequent interview held on October 27, 1993 with the same investigator regarding the same conversation, Complainant states that Evans did not say anything about age or image. (Ex. KK) At the hearing, Complainant admitted that she at first believed that Maddigan was only retaliating against her for filing her workers' compensation claim. (Tr. at 165, 729) In addition, Complainant fails to mention such remarks in documents she wrote at or near this period of time. In her October 12, 1991 log entry, Complainant states that "Evans admitted to me about workman comp claim" but does not note any "image" or "hip and lively crowd" remarks. (Ex. 1). She also does not mention such remarks in her complaint filed with the DLIR

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[7] Complainant's veracity was questionable during many parts of the hearing. At one point, she testified that she looked at newspaper job ads only 2-3 times a week because she didn't buy newspapers every day. (Tr. 622) However her live-in fiance testified that Complainant bought and read the newspapers every day. (Tr. 1730) <u>See also</u> discussion of Complainant's testimony regarding negative job references on pages 44-46, <u>infra</u>. In addition, at the hearing Complainant spoke or gestured to several witnesses while they were testifying, despite repeated admonishments not to. (Tr. 1064, 1645, 1863, 2155-2156)

Enforcement Section on October 22, 1991 (Ex. OO), in a subsequent statement made to that division (Tr. 535-536; Ex. HH), or in her first Complainant filed with this Commission on February 18, 1992. Finally, Complainant testified that at about the same time, Patty Smith informed her that Maddigan stated he wanted all the bartenders to be "long legged and blond". (Tr. 136-138) However, Smith testified that she did not hear such comments until January 1992 and that she didn't inform Complainant about Maddigan's statements because they would hurt Complainant's feelings. (Tr. 247-250, 653-654, 660, 664) For these reasons, I conclude that the weight of the evidence does not show that Evans made the "image" and "hip and lively crowd" statements to Complainant.

The only other person who testified that she heard statements about attracting a "younger crowd" and Complainant's age was Patty Smith. Smith testified that she heard: 1) Maddigan say the words "young" and "long legs" during a lunch conversation at the Treehouse; 2) Maddigan comment about Evans saying, "Isn't is great to have another Charlie" (in reference to a former female bar manager named Charlie who Smith alleges was young and had long legs) during another lunch at the Treehouse; 3) Clur say that Complainant was "too old to bring in the guys" during lunch at the Treehouse; 4) Rabang twice saying that Complainant was too old for the Treehouse and that she wanted a young, "Kimo's type" crowd (once during work and once during a picnic in April or May 1992); and 5) Evans state on three occasions that Complainant was just too old to work at the Treehouse (once during a work break and

twice during social visits in summer 1992). (Tr. 247-259)

However, I find Smith not credible. Smith only worked at the Treehouse from January to February 1992 and claimed she heard the Maddigan, Clur, one of the Rabang and one of the Evans statements during this one month period. However, no other witnesses, including bartenders such as Jackson-Horton and Garrett, waitresses such as Clancy, or cooks such as Jones heard such statements despite working longer, and during or near the same period of time as Smith. (Tr. 428-431, 463, 923, 1168-1169, 1274; Ex. 10) Smith also claimed that when Maddigan and Clur made some of the statements she was in the kitchen while they were sitting less than two feet away from her on the other side of a screen. (Tr. 251, 347, 351) However, all other former Treehouse employees who testified stated that the tables Maddigan and Clur sat on were at least five to eight feet away from the kitchen screen. (Tr. 468-473, 722, 1169-1170, 1173, 1189-1190; Exs. 17, WW, YY) Smith's testimony regarding Maddigan's uttering the words "young" and "long legs" was inconsistent. At one point, Smith stated she only heard the words "young" and "long legs". (Tr. 247, 364-365) Later Smith stated she heard Maddigan say "young girls behind the bar with long legs". (Tr. 366, 374-375, 380) Smith admitted that when Higgins allegedly remarked, "Isn't it nice to have another 'Charlie' around", she only thought he might be referring to Complainant. (Tr. 383-384) Smith testified that she didn't tell Complainant about these statements because they would hurt Complainant's feelings. (Tr. 653-654, 660, 664) However, Complainant testified

that Smith informed her of these statements in October 1991, before the dates Smith claims the statements were made. (Tr. 136-138) Smith inaccurately testified that prior to October 1, 1991 Complainant had been working 5 or 6 shifts a week, and had been reduced to 2 or 3 shifts. (Tr. 303-304, 309-310) Smith also inaccurately testified that over the years there were few changes in the Treehouse menus or clientele. (Tr. 317-321) However, other Treehouse employees, including Complainant, testified that the restaurant's menus and clientele often changed, usually whenever there was a change in managers. (Tr. 146-149) Furthermore, Smith testified that she was not aware that Complainant had filed Department of Labor complainants against Respondent until July 1993. (Tr. 660-661) In contrast, all the other Treehouse employees who testified at the hearing stated that Complainant freely discussed her Department of Labor complainants with employees and customers and that all of the employees knew about the complaints. (Tr. 186-187, 461, 904, 1074-1075, 1125, 1133-1134, 1198, 1287, 1298-1299, 1305-1306, 1331, 1500-1501; Ex. 10) Smith testified that she liked Maddigan and thought he was a great guy. (Tr. 273-274, 343). However, Complainant testified that Smith told her she didn't care for Maddigan. (Tr. 141) Finally, because Rabang and Evans were management, knew of Complainant's age discrimination complaint, and knew that Smith was Complainant's friend, it is highly unlikely that they would tell Smith that Complainant was fired because she [Complainant] was "too old". For these reasons, I conclude that the age statements Smith alleges

were not made.

I therefore conclude that the Executive Director has not established direct evidence of intentional age discrimination against Complainant.

2. circumstantial evidence of age discrimination

Intentional age discrimination under Chapter 378 may also be established by circumstantial evidence. See, In Re. Smith / MTL Inc. et. al., supra; Beshears v. Communications Services, Inc., supra, at 66,801.

Accordingly, in this case the Executive Director has the initial burden of establishing a prima facie case of demotion because of age by proving that:

1) Complainant performed her bartender duties in a satisfactory manner;

2) despite such satisfactory performance, Respondent reduced Complainant's hours of work; and

3) Complainant's hours of work were filled by a younger employee.

EEOC v. Franklin Square School District, 24 BNA 594, 25 EPD 31,601 at 19,480 (E.D. NY 1980); Moore v. Sears, Roebuck and Co., 464 F. Supp 357, 19 EPD 9036 at 6458 (N.D. Ga. 1979) aff'd 683 F.2d 1321, 30 EPD 33001 (11th Cir. 1982). In addition, statistical evidence showing a pattern or policy of demoting or taking adverse actions against older employees may be used to support an inference of discriminatory intent. Polstorff v. Fletcher, 452 F.Supp 17, 18 EPD 8790 at 5266-5267 (D. Ala. 1978) (statistics showing that 30% of non-veteran employees over age 55 but 3.5% of non-veteran

employees under age 55 adversely affected by a reduction in force (RIF) are evidence of age discrimination); Moore v. Sears, Roebuck and Co., 19 EPD 9036 at 6457-6458 (statistical data showing a highly disproportionate number of employees above age 55 terminated is evidence of age discrimination).

The establishment of the above prima facie case raises a presumption of discrimination because such actions, if otherwise unexplained, are more likely than not based on unlawful discrimination. In Re Smith / MTL; supra; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d. 207, 216, 25 EPD 31,544 at 19,240 (1981).

The burden then shifts to the respondent to rebut this presumption by producing evidence that the actions were taken for legitimate, nondiscriminatory reasons. If respondent carries this burden of production, the presumption raise by the prima facie case is rebutted. In Re Smith / MTL, supra; Texas Dept. of Community Affairs v. Burdine, 25 EPD 31,544 at 19,240; St. Mary's Honor Center v. Hicks, 113 S.Ct 2742, 125 L.Ed.2d 407, 61 EPD 42,322 at 75,583 (1993).

The Executive Director must then prove that Respondent's proffered reason was not the true reason for its actions by showing that: 1) the action was more likely motivated by a discriminatory reason; or 2) the respondent's explanation is untrue. In Re Smith / MTL, supra; Texas Dept. of Community Affairs v. Burdine, supra; St. Mary's Honor Center v. Hicks, supra. Evidence that the proffered reason is incredible, together with the elements of the

prima facie case, may be sufficient to support a finding of intentional discrimination. St. Mary's Honor Center v. Hicks, supra. However, although this Commission may find intentional discrimination where it determines that an employer's reasons are pretextual, it is not compelled to do so. Id., at 75,584-75,585.[8] The Executive Director still bears the ultimate burden of persuasion that unlawful discriminatory reasons motivated the employer. Id., at 75,585.

In the present case, I conclude that the Executive Director has not established, through circumstantial evidence, that Complainant was demoted because of her age. The Executive Director did meet its initial burden of establishing a prima facie case of age discrimination when it proved that: 1) Complainant was qualified for the position of bartender; 2) Respondent reduced Complainant's hours; 3) younger persons (Evans, Jacobson and Jackson-Horton) were scheduled to fill Complainant's old hours; and 4) Respondent at the same time terminated two other older employees (Lowerre, then age 37 and Garrett, then age 44).[9]

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8 For instance, in Hicks the Supreme court held that the district court could disbelieve the employer's proffered reasons for demoting and discharging a Black employee, yet still conclude that personal, rather than racial reasons motivated the employer to take such actions. 61 EPD 42,322 at 75,583.

9 The Executive Director attempted to show discriminatory intent through statistics comparing the age groupings of Treehouse public contact employees to the age groupings of the general population of Maui County. See, Tr. at 762-764, 773-790, 793; Ex. 13. However, the underlying data used by the Executive Director is incomplete. Clancy (then age 56) and Rabang (then age 48) were not included in the sampling of public contact employees. Dr. Hammer, the Executive Director's expert witness, testified that Rabang was not included in the sampling because she was a manager, and managers tend to be older persons. However, Dr. Hammer did include Lowerre and Evans in the sampling, even though these employees were also managers. Rabang, though a general manager, did work the bar and waitress shifts of absent employees and was a public contact employee. No reason was given for omitting Clancy, who at the time was a non-

managing waitress.

In addition, Dr. Hammer's analysis compares the age groupings of Respondent's public contact employees to the age groupings of the entire Maui County population. (See, Tr. 764, 765-770; Ex. 13) At minimum, a relevant comparison should be made to the age groupings of the community from which the employer draws its employees. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, 14 EPD 7579 n. 17 at 4872 (1977) (number of Black line drivers compared to population of Blacks living in areas surrounding terminals); Gibson v. Supercargoes & Checkers (ILWU), 543 F.2d 1259, 12 EPD 11,215 at 5606 (9th Cir. 1976) (number of Blacks employed as casual clerks compared to Blacks in the city of Portland); NAACP, Newark Branch v. Harrison, 940 F.2d 792, 57 EPD 40,908 at 67,858 (3rd Cir. 1990) (number of Black municipal employees compared to four counties from which town drew employees). Rabang, Maddigan and Clur testified that Respondent recruited only by word of mouth from the Lahaina area. (Tr. 1084-1085, 2086, 2123) Clur testified that all but one Treehouse employee resided in the Lahaina area. (Tr. 2101) Complainant and Taylor testified that they and other Lahaina residents only worked in the Lahaina area because the commute to or from Lahaina was long and dangerous, and because there is no public transportation on the island. (Tr. 605-606, 608-609, 976-977, 1010-1012) The record thus shows that the labor market in the Lahaina area is separate from the rest of Maui County. However, no evidence was presented to show that the age groupings of the entire population of Maui County (which includes the Kahului-Wailuku, Kula and Keanae areas as well as the islands of Molokai and Lanai) correlate to the age groupings of the population in the Lahaina area. (Tr. 835-836) Dr. Hammer herself was not familiar with Maui county and did not know whether Lahaina was a rural or urban area. (Tr. 835) Therefore, the general county population data used by the Executive Director was not shown to be appropriate in this case.

Furthermore, federal courts have indicated when special skills are required to fill particular jobs, use of work force data from the appropriate geographic area is preferable to general total population data. This is because general population data may not provide a true picture of worker availability. Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct 2736, 53 L.Ed.2d 768, 14 EPD 7633 at 5118 and n. 13 at 5122 (1977) (in race discrimination case, proper comparison was between the Black teachers in a school district's teaching staff and the number of Black teachers in the relevant labor market); EEOC v. United Virginia Bank/Seaboard National, 615 F.2d 147, 22 EPD 30,598 at 14,210-14,211 (4th Cir. 1980) (comparison between Blacks in general work force and Black bank staff not probative to establish race discrimination since bank positions required special skills); Piva v. Xerox Corp. 654 F.2d 591, 27 EPD 32,147 at 22,239 (9th Cir. 1981) (proper comparison was between women in labor force qualified to be Xerox salespersons and number of women salespersons employed by Xerox). In the present case, Complainant testified that bartenders in the state of Hawaii must obtain manager's liquor card licenses in order to work without supervision. At the Treehouse, bartenders were scheduled to work alone except on a few exceptionally busy nights. The evidence shows that except for one bartender (Jacobson) who was trained in house, all other bartenders held manager's liquor cards and had prior bartending experience before being hired by Respondent. (Tr. 888-889, 1152-1153, 1303-1304; Ex. HE-2) The Executive Director did not show that the age groupings of the entire population of Maui county correlate to the age groupings of the applicable work force (i.e. experienced bartenders with manager's liquor cards) in the Lahaina area. (Tr. 836-837)

In addition, many federal courts prefer to compare an employer's work force to applicant flow data since such data is not over broad and most likely reflects a more accurate labor market. See, Reynolds v. Sheet Metal Workers, 498 F.Supp.

Respondent attempted to rebut this prima facie case by stating that Complainant's hours were reduced because business was poor and because she, along with Lowerre and Garrett, failed to meet a $160 per shift sales quota.

The Executive Director showed that Respondent's proffered reason was not true. Clur testified that prior to September 30, 1991 and after November 30, 1991 Respondent did not conduct such surveys on bartender sales to evaluate bartender performance. (Tr. 1972, 2041) Rabang, who had been hired as overall manager in October 1991, testified that she was never informed about the bar sales survey and never saw the survey. (Tr. 1492, 1634) Finally, the bar sales report itself was carelessly conducted and inaccurate. (Tr. 1971, 1988-1992, 1996, 2108-2109) Complainant actually had sales over $160 per shift.

However, while I find Respondent's proffered reason to be untrue, I conclude that the Executive Director still failed to meet

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952, 22 EPD 30,739 at 14,816 (D.D.C. 1980) aff'd. 702 F.2d 221, 25 EPD 31,706 (D.C. Cir. 1981); NAACP v. Prince George's County, 737 F.2d 1299, 34 EPD 34,506 at 34,233 (4th Cir. 1984) (upholding district court's reliance on applicant flow statistics and rejection of work force statistics of surrounding geographical area); U.S. v. County of Fairfax, 629 F.2d 932, 23 EPD 31,117 at 16,789 (4th Cir. 1980) (applicant flow statistics more reliable than population data from the general metropolitan area when record showed that few Blacks from a nearby city sought employment with county because of distance and transportation factors). The Executive Director also failed to show that the age groupings of the entire population of Maui county correlate to the age groupings of applicants who applied for jobs at the Treehouse. (Tr. 835)

Finally, the Executive Director argues that Respondent's hiring practices from the period after Johnson's tenure until Complainant filed her age discrimination complaint is evidence of discriminatory intent. As stated in footnote 6, supra, such statistics and argument are inaccurate and irrelevant.

Therefore, I conclude that the Executive Director's statistics are not probative to support an inference of intentional age discrimination.

its burden of persuasion that age was a motivating factor[10] in the reduction of Complainant's hours and termination of medical benefits. Instead, the preponderance of the evidence shows that the real reason why Complainant was demoted was because Maddigan was angry at her for filing what he believed to be a fraudulent workers' compensation claim[11]. Smith testified that she spoke to Clancy about Complainant's workers' compensation claim. (Tr. 683-684) Clancy testified that Smith told her that Complainant had actually injured herself during off hours at Taylor's work place. Complainant testified that Evans told her that Maddigan wouldn't allow Complainant to work more hours because he believed that Complainant "faked" her workers' compensation claim. Evans also told Complainant that Maddigan wanted to make Complainant quit so he would not have to pay Complainant unemployment insurance. Complainant also states this in her: a) October 12, 1991 log entry (Ex. 1); b) Enforcement Section complaint filed on October 22, 1991 (Ex. OO); c) subsequent statement to that division made during that period of time (Ex. HH); and d) first complaint filed with this Commission on February 18, 1992. Maddigan and Clur admitted that Clancy told them about Smith's statements regarding Complainant's workers' compensation claim. (Tr. 2098-2100, 2137-

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10 "Motivating factor" means that, if this Commission were to ask the Respondent at the moment it made its decision to reduce Complainant's hours what its reasons were, and if the Respondent gave a truthful response, one of those reasons would be Complainant's age. See, Price Waterhouse v. Hopkins, 49 EPD 38,936 at 57,013.

11 Because the validity of Complainant's 1988 workers' compensation claim was not litigated during this proceeding, I do not make a determination on this issue.

2140, 2246) Clur admitted he knew about Complainant's workers' compensation claim prior to her reduction of shifts in October 1991. (Tr. 1781-1782) Up until that point, Complainant enjoyed a cordial and steady working relationship with Maddigan and Respondent.

Furthermore, the evidence shows no pattern of adverse action against older employees. While both Lowerre (then age 37) and Garrett (then age 44) were fired at the same time Complainant was demoted, Lowerre was replaced by Evans, who was older (then age 38). Clancy (waitress, then age 56) was retained. Rabang (general manager, then age 48) was hired. Two months later, Kinney (bartender, age 43) was hired. These older employees were hired months before Complainant filed her first age discrimination complaint with this Commission. Thereafter, 9 out of 10 bartenders hired were over age 30; two of the 10 were over age 40. (See, Exs. CC, CC-1; Appendix B) Clancy stated that Lowerre was fired because Evans wanted his job and hours. (Ex. 10) Evans was hired as the new bar manager and did take Lowerre's hours. The evidence also shows that Evans wanted to fire Garrett because he had been rude to her when she spotted him and because she wanted and did take Garrett's hours.

For these reasons, I conclude that the Executive Director has not established circumstantial evidence of intentional age discrimination against Complainant.

3. disparate impact claim

In order to prevail in a disparate impact case, the Executive Director need not show that a Respondent acted with a discriminatory purpose. It only must show that a facially neutral employment practice had a discriminatory impact on members of a protected group. If such showing is made, use of the practice is unlawful unless it is shown to be justified by business necessity. See, In Re Shaw / Sam Teague Ltd., Docket No. 94-001-E-P (March 3, 1995) (company's no extended leave policy has disparate impact on pregnant employees); Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786, 14 EPD 7632 at 5105 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct 849, 28 L.Ed.2d 158, 3 EPD 8137 at 6433-6434 (1971).

The disparate impact theory usually focuses on policies or practices that are part of an employer's standard operating procedure, as opposed to isolated or sporadic discriminatory acts. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, 14 EPD 7579 at 4855 (1977). However, a single employment decision that affects a class of employees may also be challenged as having a disparate impact. State, County and Municipal Employees (AFSME) Council 31 v. Ward, 978 F.2d 373, 60 EPD 41,839 at 72,912 (7th Cir. 1992) (single layoff decision may have disparate impact on Black employees); Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 42 EPD 36,711 at 45,238 (9th Cir. 1986) (single layoff decision may have disparate impact on minority employees).

To establish a prima facie case of disparate impact, the Executive Director must: a) identify a facially neutral personnel policy or practice[12]; and b) show that such policy or practice has a significant disparate effect on members of a protected class. Rose v. Wells Fargo, 902 F.2d 1417, 53 EPD 39,920 at 62,480 (9th Cir. 1990); Connecticut v. Teal, 457 U.S. 440,102 S.Ct 2525, 73 L.Ed.2d 130, 29 EPD 32,820 at 25,821 (1982); Dothard v. Rawlinson, supra, 14 EPD 7632 at 5105.

In the present case the Executive Director has not met its burden of identifying a facially neutral personnel policy or practice. The Executive Director first argues that Respondent instituted a reduction in force which had an adverse impact on older bartenders. (Post-hearing brief at 29) However, it also admits that Respondent made no change in the number of shifts worked by bartenders at the restaurant. (Post-hearing brief at 30) Therefore, there was no reduction in force. (See also, Tr. 2028) The Executive Director also argues that Respondent used a $160 per shift average sales quota to terminate and demote bartenders. However, the evidence shows that the Respondent really had no such policy. Instead, the record shows that Respondent created the bar sales survey and bar sales quota after October 1, 1991 to justify the terminations of Lowerre and Garret and Complainant's demotion. In addition, Complainant did meet the $160 per shift sales quota.

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12 However, if the elements of a respondent's decision making processes cannot be separated for analysis, the decision making process may be analyzed as one employment practice. See, 42 U.S.C. § 2000e-2(k)(1)(b)(i) as amended by the Civil Rights Act of 1991 § 105(a) In this case, the Executive Director does not claim that the decision making process cannot be separated for analysis.

Furthermore, even if Respondent had instituted a reduction in force or a policy of demoting bartenders who failed to meet a $160 per shift sales quota, the Executive Director has not shown that such policies had a significant disparate impact on older bartenders. The statistical evidence presented by the Executive Director is not complete or reliable. The sampling comparing the number of older public contact employees terminated/demoted (Lowerre, Garrett and Complainant) to the total number of public contact employees again omits Rabang and Clancy (both over age 30) from the total number of public contact employees. (Tr. 765-773; Ex. 13). The sampling comparing the number of older bar managers (Lowerre) and bartenders (Complainant and Garrett) terminated or demoted to the total number of bartenders, omits Evans, Boecker and Brad Howard (all working bar managers over age 30) from the total number of bartenders.[13] (Tr. 830-834; Ex. 13) Finally, the fact that three other older employees (Evans, then age 38; Rabang, then age 48; and Kinney then age 43) were hired immediately after Lowerre, Garrett and Complainant were terminated/demoted weighs heavily against any showing of significant disparate impact.

For these reasons, I conclude that the Executive Director has not established a prima facie case of disparate impact based on age.

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[13] Dr. Hammer, however, included these bar managers in the sampling of all public contact employees. (Tr. 766-768; Ex. 13)

C. Disability Discrimination

The Executive Director alleges that Respondent demoted and terminated Complainant's medical benefits because of her disability. In order to establish a prima facie case of disability discrimination in this case, the Executive Director must show that:

a) Complainant is a qualified person with a disability;

b) Respondent had knowledge of Complainant's disability;

c) Despite being qualified, Respondent changed the terms and conditions of Complainant's work; and

d) Respondent did not accordingly change the work terms and conditions of non-disabled employees.

The evidentiary burdens of production and proof then shift as discussed in section III.B.2. above.

I conclude that the Executive Director has not established that Respondent demoted Complainant because of her disability. The Executive Director met its initial burden of establishing a prima facie case of disability discrimination. Complainant was and is a qualified person with a disability. The record shows that Complainant is an insulin dependent diabetic.[14] Insulin dependent diabetes is an impairment which substantially limits the major life activity of day to day internal body functioning. Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619, 30 EPD 33,211 at 27,791 (9th Cir. 1982). The record also shows that Complainant was qualified to be a bartender at Respondent Treehouse. She had worked as a bartender for Respondent for over five years and had not received

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[14] The Executive Director did not allege that Complainant's back and/or shoulder injuries constituted disabilities.

any reprimands for performance. The record also shows that Maddigan and Evans knew of Complainant's disability prior to reducing Complainant's hours and terminating her medical benefits. Complainant testified that she made favorable comments to Maddigan about Respondent's medical plan because it paid for her insulin and needles. In her April 24, 1992 affidavit, Evans stated that she knew Complainant was a diabetic prior to the decision to reduce Complainant's hours. (Ex. M) Finally, the record shows that Respondent reduced Complainant's work hours, changed her shifts and terminated her medical insurance benefits and did not take such actions against non-disabled employees.

Respondent attempted to rebut this prima facie case by again asserting that Complainant's hours were reduced because business was poor and because she failed to meet a $160 per shift sales quota. As stated in section III.B.2. above, I conclude that such reasons are false.

However, as also discussed above, the weight of the evidence shows that the real reason why Respondent demoted Complainant was because Maddigan believed Complainant had made a fraudulent workers' compensation claim, not because she was diabetic. Complainant had worked for several years with Maddigan's and management's knowledge that she was diabetic. Maddigan and management did not reduce Complainant's hours or terminate her medical benefits until they heard rumors about her workers' compensation claim. They tried to force her to quit, not because she was diabetic, but because they thought she had fraudulently

obtained a large amount of workers' compensation benefits. I therefore conclude that Complainant was not demoted because of her disability.

D. Retaliation

The Executive Director alleges that Respondent Treehouse retaliated against Complainant by: a) terminating her after she filed a discrimination complaint with this Commission; b) thereafter barring Complainant from its premises; and c) thereafter providing negative references to potential employers.

H.R.S. § 378-2(2) prohibits an employer from discharging, expelling or otherwise discriminating against any individual because that individual has opposed an unlawful discriminatory practice, filed a complaint, testified, or assisted in any proceeding under H.R.S. Chapter 378. Individuals participating in a Chapter 378 proceeding are protected even if their complaints lack merit, so long as they reasonably believe that the employers' actions violate the statute. Hearth v. Metropolitan Transit Comm., 436 F.Supp 685, 15 EPD 8077 at 7274-7275 (D. Min. 1977); Sias v. City Demonstration Agency, 588 F.2d 692, 18 EPD 8773 at 5140 (9th Cir. 1978).

Retaliation may be shown by either direct or circumstantial evidence. Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 59 EPD 41,613 at 71,530-71,532 (2nd Cir. 1992). In the present case, the Executive Director did not present any direct evidence of retaliation. To establish a prima facia case of retaliation

prohibited by H.R.S. Chapter 378, the Executive Director must show that:

1) the individual opposed a discriminatory practice made unlawful by H.R.S. Chapter 378 or was a participant in a Chapter 378 proceeding;

2) the individual's activity was protected;

3) the individual was subjected to adverse treatment by the employer; and

4) there was a causal connection between the opposition or participation and the adverse treatment.

Wallis v. J.R. Simplot Co., 26 F.3d 885, 64 EPD 43,074 at 79,989 (9th Cir. 1994); Gunther v. County of Washington, 623 F.2d 1303, 20 EPD 30,204 at 12,104 (9th Cir. 1979). The evidentiary burdens of production and proof then shift as discussed in section III.B.2. above.

The Executive Director did not show by a preponderance of the evidence that Respondent Treehouse retaliated against Complainant for filing a complaint under H.R.S. Chapter 378 when it terminated her on March 17, 1992. The Executive Director did meet its initial burden of establishing a prima facie case of retaliation. Complainant filed a complaint with this Commission on February 19, 1992. Complainant's activities were protected. Although Complainant openly complained about her reduction in hours, loss of medical insurance and discussed her HCRC discrimination complaint with other employees and some customers, such activities constituted lawful opposition to what Complainant reasonably believed to be discriminatory practices, and are protected under H.R.S. § 378-2(2). See also, EEOC v. Kallir, Philips, Ross, Inc.,

401 F.Supp 66, 10 EPD 10,366 at 5542 (S.D.N.Y. 1975) (plaintiff who informed her co-workers that she filed a claim of discrimination against defendant and that they had a right to do likewise protected under Title VII). In addition, Rabang testified that she would not have fired Complainant for these activities alone. (Tr. 1074-1076, 1597-1598). Less than one month after the complaint was filed, Complainant was terminated.

Respondent attempted to rebut this prima facie case by stating that Complainant was fired for causing a disturbance at the Treehouse bar on March 16, 1992 and for submitting her second work disability verification slip late. The Executive Director showed that Respondent's proffered reasons were not true. Rabang testified that she would not have fired Complainant only for the March 16, 1992 incident. In addition, the evidence shows that Complainant timely submitted her second sick leave verification slip on March 10, 1992. (See, footnote 3, supra.)

However, while I find Respondent's proffered reason to be untrue, I conclude that the Executive Director still failed to meet its burden of persuasion that Complainant was fired in retaliation for filing her civil rights discrimination complaint. Instead, the preponderance of the evidence shows that real reason why Complainant was fired was because after she injured her shoulder, Maddigan and Rabang feared Complainant might re-injure herself at the Treehouse and file another workers' compensation claim. In her second complaint and interview notes, Complainant states that Rabang told her that she was terminated because of management's

concerns that she might re-injure herself. (Ex. KK, Complaint dated 6/23/92) Complainant also told Taylor that this was the reason for her termination. (Tr. 995-996) Rabang admitted that she held such concerns. (Tr. 1499) Maddigan stated that he felt it was impossible for a small business to retain employees who suffered serious off the job injuries. (Tr. 2190-2193; Ex. 9) Jackson-Horton, Clancy and Clur heard Rabang comment about terminating Complainant because of further injuries. (Tr. 1150, 1308, 1800) Finally, Rabang testified that although she was angry at Complainant for filing and discussing her Department of Labor complaints with employees and customers, she did not take any action to terminate Complainant until after Complainant injured her shoulder because Maddigan did not want to be sued for retaliation. (Tr. 1074-1076)

The evidence also does not show that Respondent retaliated against Complainant by barring her from the Treehouse premises. Maddigan routinely barred all fired Treehouse ex-employees from the premises, regardless of the reason for termination. Complainant was a fired ex-employee. I therefore conclude that Respondent's barring of Complainant from the premises was not in retaliation for filing an HCRC complaint.

The Executive Director also claims that Respondent retaliated against Complainant by giving negative references to potential employers. The weight of the evidence does not show that such negative references were given. Complainant testified that she had a very positive interview for a bartending position at the Westin

Hotel with Virginia Baybado, the human relations specialist. Complainant stated that the interview lasted for about one hour, that Baybado told Complainant she had the job if she could get a positive reference from the Treehouse, and that if Complainant couldn't secure such reference, she should leave the reference off her application. (Tr. 492-494, 496-497) Complainant then stated that immediately after the interview she telephoned Clur, who assured her that he would give her a positive reference, and then called Baybado and told her to call Clur. (Tr. 70-71, 495-496) Complainant testified that later that day, she and Anne Lewis checked on jobs at the Marriott Hotel. At either the Westin or Marriott, she had Lewis pose as a manager from the Marriott and call Clur to find out what kind of reference he was giving. She claims that Lewis called Clur, who confirmed that Complainant had worked at Treehouse for seven years, but "was not eligible for rehire". (Tr. 71-72, 485-490)

However, Complainant's testimony was not credible. Baybado testified that interviews for bartending positions usually do not exceed 10 minutes. (Tr. 1360, 1362) Baybado testified that she only screens and rates applicants and that restaurant managers make the final decision regarding bartender hires. (Tr. 1364-1367) Therefore, she would not have told any applicant that "the job was theirs". (Tr. 1371-1372) Baybado also testified that she would not have told anyone to omit a negative reference from their application. (Tr. 1372) Lewis testified that after the interview with Baybado, Complainant did not say anything about needing a

reference from the Treehouse, that she did not see Complainant call anyone after the interview, and that after the interview she and Complainant drove straight home. (Tr. 1680, 1685, 1706, 1711-1712) Lewis also testified that she and Complainant went to the Marriott to apply for jobs on a different day and could not recall where or when she [Lewis] allegedly made the phone call to Clur. (Tr. 1660, 1687, 1705-1706) Finally, Clur stated that his practice was to ask for the caller's name, position, phone number and to call the potential employer back before giving references by phone. He also testified that he would only disclose an employee's dates of employment and ending wage. (Tr. 2093-2094) For these reasons, I conclude that the weight of the evidence does not show that Respondent retaliated against Complainant by giving negative references.

E. LIABILITY

Respondent reduced Complainant's hours, changed her shifts, terminated her medical benefits and tried to make her quit because it believed she filed a fraudulent workers' compensation claim. Respondent also terminated Complainant after she injured her shoulder because it feared that Complainant would re-injure herself and file another workers' compensation claim. Unfortunately, such claims are not actionable under this Commission's statutes. Instead, Complainant should, and is in fact seeking relief pursuant to other employment laws.

I therefore conclude that Respondent is not liable for violating H.R.S. § 378-2.

IV. <u>RECOMMENDED ORDER</u>

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondent Treehouse Restaurant, Inc. did not violate H.R.S. § 378-2 and that it dismiss this complaint.

DATED: Honolulu, Hawaii JANUARY 5, 1994.

HAWAII CIVIL RIGHTS COMMISSION

LIVIA WANG
Hearings Examiner

APPENDIX A

On February 19, 1992 Complainant Mary Anne Cole filed a complaint with this Commission alleging age and disability discrimination. On June 24, 1992 she filed a second complainant alleging termination and failure to grant leave because of her shoulder injury and termination in retaliation for filing her first complaint.

On January 5, 1995 the Executive Director sent Respondent Treehouse Restaurant Inc. a final conciliation demand letter pursuant to Hawaii Administrative Rule (H.A.R.) § 12-46-17. Respondent received such letter on January 6, 1995.

On January 23, 1995 the complaint was docketed for hearing and a Notice Of Docketing Of Complaint was issued.

The Executive Director filed its Scheduling Conference Statement on February 1, 1995. Respondent filed its Scheduling Conference Statement on February 9, 1995. A scheduling conference was held on February 15, 1995 and the Scheduling Conference Order was issued on February 21, 1995.

On March 21, 1995 the Hearings Examiner filed a Motion To Extend Hearing Date from June 19, 1995 to August 23, 1995. On April 10, 1995 the Commission issued an order granting this motion.

On July 10, 1995 the parties filed a Stipulation To Continue Discovery Deadline to July 28, 1995. On July 21, 1995 an Amended Scheduling Conference Order was issued.

On July 21, 1995 Respondent filed a Motion To Continue Hearing. On July 25, 1995 a telephone conference on this motion was held and a Second Amended Scheduling Conference Order was issued.

On July 25, 1995 notices of hearing and pre-hearing conference were issued.

On August 1, 1995 the Executive Director filed a Motion To Continue Hearing. Attached to this motion was a confidential settlement agreement from another docketed case. On August 2, 1995 this Hearings Examiner issued a Protective Order expunging the settlement agreement from the pleadings, directing counsel for Respondent not to read the agreement and directing counsel for Respondent to return the settlement agreement to the Hearings Examiner.

On August 2, 1995 a telephone conference was held on the Executive Director's Motion To Continue Hearing. On August 3, 1995 an order denying the Executive Director's motion was issued.

On August 3, 1995 the Hearings Examiner filed an affidavit regarding Respondent's return of the confidential settlement agreement unopened and its destruction.

On August 3, 1995 Respondent filed a Motion To Compel Answers To Interrogatories.

On August 4, 1995 the parties filed their pre-hearing conference statements. Respondent also filed a Motion For Partial Summary Judgment. The Executive Director also filed a Motion To

Compel Answers To Interrogatories and Production of Documents and for Sanctions for Destruction of Records. On August 7, 1995 the Executive Director filed a Memorandum in Opposition To Respondent's Motion To Compel. On August 8, 1995 Respondent filed a Motion To Strike Executive Director's Motion to Compel. On August 8, 1995 the Executive Director attempted to file a memorandum in opposition to Respondent's Motion For Partial Summary Judgment after the response deadline. This memorandum was not accepted for filing.

Hearings on these three motions were held on August 8, 1995 at the Hawaii Civil Rights Commission conference room, 888 Mililani Street, 2nd floor, Honolulu, Hawaii. In attendance were: Deputy Director G. Todd Withy, Esq. on behalf of the Executive Director, Executive Director Linda C. Tseu and Frederick R. Troncone, Esq. on behalf of Respondent.

At the hearing on Respondent's Motion For Partial Summary Judgment, the Executive Director filed an Affidavit of G. Todd Withy in opposition to the motion. The affidavit was not made on personal knowledge of the facts and did not comply with HRCP Rule 56(e), which requires a non-moving party to set forth facts, based on personal knowledge, that show a genuine issue for hearing. Pursuant to HRCP Rule 56(f) the Hearings Examiner granted the Executive Director additional time to file affidavits in opposition to Respondent's Motion for Partial Summary Judgment.

On August 8, 1995 a pre-hearing conference was held and on August 10, 1995 a Pre-hearing Conference Order was issued. On August 9, 1995 orders granting in part Respondent's motion to

compel, granting in part Executive Director's motion to compel and denying Respondent's motion to strike were issued.

On August 10, 1995 the Hearings Examiner issued a Protective Order over the Executive Director's Exhibit 2, which contains Respondent's income tax returns for the years 1990, 1991 and 1992.

On August 11, 1995 the Executive Director filed supplemental affidavits in opposition to Respondent's Motion for Partial Summary Judgment. Later that day, an order denying Respondent's Motion for Partial Summary Judgment was issued.

On August 11, 1995 Respondents also filed a Motion To Strike Executive Director's Expert's Report and to Exclude Expert Witness Testimony. This motion was treated as a motion in limine and on August 14, 1995 it was orally denied.

Pursuant to H.R.S. Chapters 91 and 368, the contested case hearing on this matter was held on August 14-16, 1995 at the second floor board room, Maui Coast Hotel, 2259 South Kihei Road, Kihei, Maui, Hawaii; August 17 at the conference room of the law office of Robert Rowland, 33 Lono Ave., suite 470, Kahului, Maui, Hawaii; August 25 at the Hawaii Civil Rights Commission conference room, 888 Mililani Street, 2nd floor, Honolulu, Hawaii; August 28-30 at conference room 117, Maui Islander Hotel, 660 Waihee Street, Lahaina, Maui, Hawaii and September 11, 1995 at the Hawaii Civil Rights Commission conference room. The Executive Director was represented by Deputy Director G. Todd Withy, Esq. Complainant Cole was present during portions of the hearing. Respondent was represented by Frederick R. Troncone, Esq. After the presentation

of the Executive Director's case, Respondent moved for involuntary dismissal. After considering the arguments presented, the Hearings Examiner orally denied Respondent's motion.

On September 27, 1995, supplemental exhibits were admitted into evidence and an order closing hearing was issued.

On October 27, 1995 the parties filed post-hearing briefs.

On November 8, 1995 the Hearings Examiner filed a Motion To Extend Time To File Proposed Decision from November 26, 1995 to January 19, 1996 to allow for the completion of the hearing tape transcripts. On November 16, 1995 the Commission issued an order granting this motion.

APPENDIX B

(complied from Exhibits 3, 4, CC, CC-1)

bartenders / bar managers hired between 8/15/90 and 12/23/93

name	job title	hire date	age at hire
Patrick Silveira	bartender	1/16/91	25
Dennis Boecker	bar mgr.	2/9/91	30
Mary Jane Church	bar mgr.	4/23/91	26
Marita Corr	bartender	5/3/91	24
Matt Jacobson	bartender	5/22/91	25
Thomas Lowerre	bar mgr.	7/24/91	37
Vicky Panto	bartender	9/91	28
Linda Evans	bar mgr.	9/30/91	38
Sarah Morison	bartender	10/8/91	23
Lori Jackson-Horton	bartender	10/28/91	29
Norman Ross	bartender	11/29/91	23
Timothy Kinney	bartender	1/10/92	43
Terrance Jensen	bartender	5/4/92	37
Randy Plumley	bartender	10/20/92	29
Chris Randolph	bartender	11/12/92	31
John Gibson	bartender	12/21/92	36
Brad Howard	bartender	1/27/93	33
Tricia Albering	bartender	2/93	38
Gary Hyder	bar mgr.	5/26/93	42
Robert Hayden	bar mgr.	10/29/93	38
Rodney Saldin	bartender	11/16/93	39
James Sullivan	bartender	12/23/93	42