

CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

WILLIAM D. HOSHIJO,	)	Docket No.09-001-H-SH
Executive Director, on	)	
behalf of the complaint	)	FINAL DECISION AND ORDER
filed by ELAINE M. BOWES	)	
	)	
vs.	)	
	)	
MICHAEL KAKAR	)	
	)	
Respondent.	)	
_____	)	

CIVIL RIGHTS COMMISSION  
HONOLULU, HAWAII

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FINAL DECISION AND ORDER

This case involves claims of quid pro quo and hostile environment sexual harassment in a real estate transaction. The Hearings Examiner filed her Findings of Fact, Conclusions of Law and Recommended Order on May 24, 2010 ("Hearings Examiner's Decision"). The Executive Director timely filed its exceptions and statement in support on June 8, 2010. The Respondent did not file any exceptions or statement in support. Neither party requested oral argument and none was held.

I. FINDINGS OF FACT

The Commission adopts and incorporates the Hearings Examiner's Findings of Fact in their entirety. The Commission also adopts and incorporates in its entirety the procedural

history of the case attached as Appendix A to the Hearings Examiner's Decision.

## II. CONCLUSIONS OF LAW

### A. Jurisdiction and Due Process

The Commission adopts and incorporates Conclusion of Law A, that there is jurisdiction under Chapter 515 over Respondent Michael Kakar. The Commission also adopts and incorporates Conclusion of Law B, which concludes that Respondent Kakar was afforded due process to participate in the hearing in this case. The Commission notes that Respondent Kakar received both the Notice of Hearing and the Hearings Examiner's Decision by certified mail.

### B. Sexual Harassment in a Real Estate Transaction

H.R.S. §515-3 provides that it is a discriminatory practice for an owner or any other person engaging in a real estate transaction to discriminate against a person in the terms, conditions or privileges of a real estate transaction because of sex. Under H.A.R. §§12-46-305(2) and (9) it is a discriminatory practice for an owner in a real estate transaction to discriminate in the terms, conditions, or privileges of a real estate transaction or in the furnishing of services in connection therewith because of a person's protected basis, or to engage in

harassment. Pursuant to H.R.S. §515-17 and H.A.R. §12-46-311, it is a discriminatory practice to attempt to commit, directly or indirectly, a discriminatory practice.

H.R.S. Chapter 515, the implementing administrative rules and Hawai'i case law do not define the types of sexual harassment that are prohibited. However, federal courts have looked to employment discrimination law, have concluded that both quid pro quo and hostile environment sexual harassment are actionable under the federal Fair Housing Act, and have adopted employment law standards and tests to determine whether sexual harassment has occurred in the fair housing context. See, e.g., Hall v. Meadowood Limited Partnership, 7 Fed. Appx. 687, WL 311320 (9<sup>th</sup> Cir. 2001); Dicenso v. Cisneros, 96 F.3d 1004, 1008 (7<sup>th</sup> Cir. 1996); Glover, v. Jones, 522 F. Supp.2d. 496, 503-504 (W.D. NY 2007). The Commission will do likewise and apply Hawai'i employment law on sexual harassment to the facts of this case.

i. quid pro quo sexual harassment

Under H.A.R. § 12-46-109(a), quid pro quo sexual harassment in employment occurs when: (1) submission to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct or visual forms of harassment is made either explicitly

or implicitly a term or condition of an individual's employment; or (2) submission or rejection of that conduct by an individual is used as the basis for employment decisions affecting that individual.

Applying that standard to the housing context, quid pro quo sexual harassment occurs when: (1) submission to unwelcome sexual conduct is made either explicitly or implicitly a term or condition of a real estate transaction; or (2) submission or rejection of that conduct is used as the basis for a real estate transaction decision affecting an individual. See also Quigley v. Winter, 598 F.3d 938, 947-948 (8<sup>th</sup> Cir. 2010) (quoting Honce v. Vigil, 1 F.3d 1085, 1089-1090 (10<sup>th</sup> Cir. 1993)) (quid pro quo harassment occurs when housing benefits are explicitly or implicitly conditioned on sexual favors); Ewers v. Columbia Heights Realty, LLC, 44 A.D.3d 608, 609, 844 N.Y.S.2d 45 (2007) (quid pro quo sexual harassment arises when the terms and conditions of a rental, including continued occupancy, rent and the furnishing of services such as repairs, are conditioned upon compliance with the landlord's sexual demands).

In the present case the preponderance of the evidence shows that Respondent conditioned the rental of his unit at a price Complainant could afford by requesting sexual favors from

Complainant. The Commission therefore adopts Conclusion of Law C.ii. of the Hearings Examiner's Decision and concludes that Respondent engaged in quid pro quo sexual harassment.

ii. hostile environment sexual harassment

In the employment context, to establish a hostile environment sexual harassment ("HESH") claim, the claimant must show that: 1) he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct or visual forms of harassment of a sexual nature; 2) the conduct was unwelcome; 3) the conduct was severe or pervasive; 4) the conduct had the purpose or effect of either (a) unreasonably interfering with the complainant's work performance, or (b) creating an intimidating, hostile or offensive work environment; 5) the claimant actually perceived the conduct as having such purpose or effect; and 6) the claimant's perception was objectively reasonable to a person of the claimant's gender in the same position as the claimant. Arquero v. Hilton Hawaiian Village LLC, 104 Hawai'i 423, 428 (2004).

Applying this standard to the fair housing context, hostile environment sexual harassment would occur if: 1) complainant was subjected to sexual advances, requests for sexual favors, or

other verbal or physical conduct or visual forms of harassment of a sexual nature; 2) the conduct was unwelcome; 3) the conduct was severe or pervasive; 4) the conduct had the purpose or effect of either (a) unreasonably interfering with the complainant's use or enjoyment of the premises, or (b) creating an intimidating, hostile or offensive environment; 5) the complainant actually perceived the conduct as having such purpose or effect; and 6) the complainant's perception was objectively reasonable to a person of the complainant's gender in the same position as the complainant. Arquero, supra; see also Quigley, supra, at 946-947; Honce, supra, at 1090; Reeves v. Carrollsburg Condominium Unit Owners Association, 1997 WL 1877201 (D.D.C. 1997); Hall, supra at 688.

In this case, the Hearings Examiner concluded that Respondent's conduct met the first two elements, but was not severe or pervasive (element #3). The Executive Director argues that Respondent's conduct was both severe and pervasive.

Some factors to be used in determining whether conduct is severe or pervasive include: the frequency of the conduct, its severity, whether it is physically threatening or humiliating, whether it is a mere offensive utterance, or whether it unreasonably interferes with a real estate transaction or a

tenant's living conditions. See Arquero, supra, at 432; see also Quigley, supra, (harassment must be sufficiently severe or pervasive as to interfere with or deprive plaintiff of her right to use or enjoy her home); Honce, supra, (HESH claim is actionable when offensive behavior unreasonably interferes with use and enjoyment of premises; harassment must be sufficiently severe or pervasive to alter the conditions of the housing arrangement).

In addition, H.A.R. § 12-46-109(b) requires the Commission to look at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.

Looking at the facts, the totality of the circumstances and the record in this case, the Commission concludes that Respondent's conduct was not severe or pervasive as required by the third element of a HESH claim. The Commission therefore adopts Conclusion of Law C.i. of the Hearings Examiner's Decision, as modified above.

### III. LIABILITY

The Commission concurs with the Hearings Examiner's Decision and concludes that Respondent Kakar engaged in quid pro quo sexual harassment against Complainant Bowes in violation of

H.R.S. §§515-3, 515-17 and H.A.R. §§12-46-305 and 12-46-311.

#### IV. REMEDIES

##### A. Compensatory Damages

Under H.R.S. §§515-13(b)(7) and 368-17(a) the Commission has the authority to award compensatory damages for any pain, suffering, embarrassment, humiliation or emotional distress Complainant suffered as a result of Respondent's harassment. Section 515-13(b)(7) states that "[u]nless greater damages are proven, damages may be assessed at \$500 for each violation".

The record shows that Respondent's quid pro quo harassment caused Complainant to feel stunned, confused, shocked and angry. (Tr. at 49-50) She also became fearful for her physical safety while she was in Respondent's home and after she departed. Complainant later experienced self doubts about taking care of herself, became depressed, started to eat and sleep more and sought professional psychological help. For these reasons, the Commission modifies the Hearings Examiner's recommended order regarding compensatory damages and increases the amount from \$500 to \$2,500.

##### B. Punitive Damages

H.R.S. §368-17(a) also authorizes the Commission to award punitive damages. Punitive damages are assessed in addition to

compensatory damages to punish a respondent for aggravated or outrageous misconduct, and to deter the respondent and others from similar conduct in the future. See Santos v. Niimi, Docket No. 92-001-E-SH (1992); Masaki v. General Motors Corp., 71 Haw. 1, 6, (1989). Since its purposes are punishment and deterrence, punitive damages are awarded when a respondent acts wantonly, oppressively or with such malice as implies of spirit of mischief or criminal indifference to civil obligations, or where there has been some willful misconduct or entire want of care which would raise the presumption of a conscious indifference to consequences. Hoshijo/Gould v. Simich et.al., Docket No. 95-12-E-SH (1996); Masaki, supra, at 6. Accordingly, the inquiry focuses primarily on the respondent's mental state and to a lesser degree on the nature of the conduct. Id. The penal character of punitive damages requires a more stringent standard of proof - clear and convincing evidence - than the preponderance of the evidence standard generally employed in administrative hearings. Id. at 15-17.

In determining the amount of punitive damages, the following factors are considered: a) the degree of malice and reprehensibility of the conduct; b) the respondent's financial situation; and c) the amount of punitive damages that will have a

deterrent effect on respondent in light of his financial situation. See Santos, supra.

In the present case there is clear and convincing evidence that Respondent's quid pro quo harassment of Complainant was intentional, deliberate and malicious, with a conscious indifference to civil obligations and consequences. Respondent telephoned Complainant and invited her to a second showing of his unit knowing that she could not afford the rental price. After showing her the unit, he repeatedly asked her into his home and bedroom, offered her wine, asked her to sit on his bed and sofa, stated that the rent was flexible, that he could lower the rent and could make it work for her, and became angry when she refused his offers. In light of these actions, the Commission believes that \$10,000 is an appropriate amount of punitive damages and modifies the Hearings Examiner's recommended order accordingly.<sup>1</sup>

#### C. Costs and Penalties

Pursuant to H.R.S. §368-5 and H.A.R. §12-46-32 the Commission upholds the costs awarded to the Executive Director for the deposition Respondent failed to attend. Pursuant to H.R.S. §368-5 the Commission also upholds the penalty of \$500 against Respondent for failing to comply with the Hearings

<sup>1</sup> Because Respondent refused to answer interrogatories and did not appear for

Examiner's discovery orders.

D. Equitable Relief

Pursuant to H.R.S. §§368-17 and 515-13, the Commission modifies the Hearings Examiner's recommended order and orders the following equitable relief:

1. Respondent immediately cease and desist from unlawful discriminatory practices in any housing accommodation owned or managed by Respondent in the State of Hawai'i.

2. Respondent immediately develop and implement a written anti-discrimination in real property transactions policy, to be approved by the Executive Director, for any housing accommodation owned or managed by Respondent in the State of Hawai'i, and is ordered to provide a copy of such policy to all applicants and tenants.

3. Respondent to bear the costs of publishing the results of this contested case, in a press statement provided by the Executive Director, in at least one newspaper published in the State of Hawai'i and having a general state-wide circulation, not less than once in the Sunday edition and once the following week.

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his deposition, no evidence was presented as to his financial situation.

Dated: Honolulu, Hawai'i,

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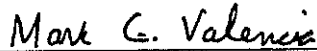
HAWAI'I CIVIL RIGHTS COMMISSION



CORAL WONG PIETSCH  
Chairperson



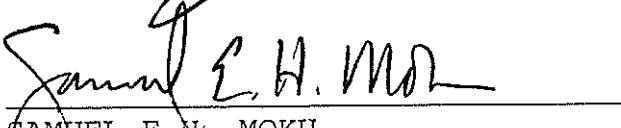
LESLIE ALAN UEOKA  
Commissioner



MARK G. VALENCIA  
Commissioner



JONATHAN L. ORTIZ  
Commissioner



SAMUEL E.H. MOKU  
Commissioner

Copies sent to:

April Wilson-South, HCRC Enforcement Attorney  
Michael Kakar, Respondent

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