

I. FINDINGS OF FACT

Based upon the exceptions, oral argument, and review of the entire record, the Commission makes the following change: Finding of Fact 18 is hereby modified to eliminate the word "mistaken" in the second sentence. The reasons for this change are explained below. Based upon the Executive Director's representation at oral argument that there is no challenge to the factual and credibility findings, Oral Argument Transcript at 2, the Commission adopts and incorporates the Hearings Examiner's Proposed Findings of Fact, as amended herein, in their entirety and incorporates them into the Final Decision.

II. CONCLUSIONS OF LAW

It is an unlawful discriminatory practice to make an adverse employment decision because of an individual's protected basis¹, such as ancestry or marital status. H.R.S. § 378-2. When information about an applicant's protected basis is not readily apparent at a job interview, an employer making an inquiry into the protected basis puts the applicant in an awkward position. Despite any reservations, the applicant may feel compelled to answer because a refusal may reflect adversely upon qualities important to an employer, such as candor and being a team player. However, the inquiry allows an employer to obtain information about the applicant's protected basis and possibly use it in making an

¹Unless the employer can establish that the protected basis is a bona fide occupational qualification for the particular job. H.R.S. § 378-3(2).

employment decision. Such inquiries are inherently suspect due to the potential to facilitate unlawful discriminatory practices when there is no demonstrable need for the information².

Unless there is a bona fide occupational qualification or other statutory exemption, an employer has no legitimate reason to inquire about an individual's protected basis. H.R.S. § 378-2(1)(C) provides that:

It shall be an unlawful discriminatory practice:

(1) Because of . . . ancestry [or] marital status . . .

(C) For any employer . . . to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination . . .

Commission rules specifically prohibit an employer from making a pre-employment inquiry into whether an applicant is married, the names and ages of spouse and children, or spouse's place of employment. H.A.R. §§ 12-46-123(b)(2), (3), and (4). Commission rules also prohibit pre-employment questions that would "tend to disclose a person's ancestry" and lists as examples questions about birthplace, nationality, and parentage. H.A.R. §§ 12-46-177(b)(4), and (6).

The Findings of Fact establish that Respondent asked numerous questions about Complainant's marital status and ancestry. Recommended Decision at 5-7. Respondent asked about Complainant's parentage, such as why his family (parents and siblings) moved to California from Lebanon and if they still lived there. Id. at 5,

²The Hearings Examiner noted how Respondent could have determined whether Mr. Hemaidan would be a stable and responsible employee by asking questions that did not inquire into his marital status. Recommended Decision at 11, n. 6.

¶10. The Executive Director took exception to the Hearings Examiner's failure to specifically conclude that Respondent asked unlawful parentage-oriented questions. The Commission believes that the parentage-oriented questions were recognized as part of the unlawful inquiry based upon the findings that Respondent asked why the family moved to California and whether they still lived there and the conclusion that H.R.S. § 378-2(1)(C) and H.A.R. §§ 12-46-171 and 177(b) were violated by such questions.

On page 18 of the Recommended Decision, Complainant's assumption that the inquiries would be used to screen him from the job and his belief that he was not hired because of his ancestry and marital status are characterized as "mistaken." The Commission concludes that the assumption and belief were not mistaken at the time. After being asked a series of questions about his marital status and ancestry, it was reasonable for Complainant to believe that such information was important to Respondent and would play a part in the hiring decision³. Although Respondent also had other reasons for asking such questions, Complainant was not aware of them and his assumption and belief that they would be used to discriminate were reasonable at the time. Based upon the exceptions, oral argument, and review of the entire record, the Commission deletes any references to or discussion in the

³Indeed, Respondent considered that being married was a favorable factor for a prospective employee. Recommended Decision at 8, ¶19. Although, the person actually hired was not married, her experience and qualifications outweighed the adverse factor of her marital status, being single. Id. In any event, Respondent did consider an applicant's marital status as a one of several factors in determining who to hire.

Conclusions of Law about Complainant being "mistaken" in his assumption and belief.

The Hearings Examiner concluded that in addition to emotional distress resulting from the inquiries⁴ being made, the major part of Complainant's emotional distress was based upon four other factors: his mistaken assumption about being screened out, mistaken belief about why he was not hired, being unemployed for 10 months⁵, and believing he would not be able to secure a good job in Hawaii because of his ancestry⁶. Recommended Decision at 18. Any emotional distress from these four factors was not considered in the damages award. With respect to the last two factors, the Commission agrees that any emotional distress from these factors was not reasonably caused by the unlawful inquiries and is not compensable. However, Complainant's assumption and belief

⁴The Hearing Examiner found that the weight of the evidence showed that immediately after the interview Complainant believed that the inquiries would be used to deny him the job and that after getting the rejection letter believed that he did not get the job because of his martial status and ancestry. The evidence also showed that these perceptions caused Complainant to become very upset, irritated, short tempered, and distant from his family. Recommended Decision at 17.

⁵The finding that Complainant had emotional distress from being unemployed for 10 months was based upon the Hearings Examiner's review of conflicting evidence. Although Complainant maintained that all of his emotional distress resulted solely from the unlawful inquiries, the Hearings Examiner correctly determined that being unemployed for 10 months caused Complainant to suffer emotional distress which existed at the time of the unlawful inquiry. At oral argument, it was conceded that Complainant suffered stress from being unemployed for so long. Oral Argument Transcript at 9-10.

⁶Complainant's belief that he would not be able to find a job in Hawaii because of his ancestry was reasonably caused by being unemployed for 10 months and did not arise from the unlawful inquiry.

reasonably resulted from the unlawful inquiry and were substantial factors in causing him some emotional distress. Knodle v. Waikiki Gateway Hotel, Inc., 69 Haw. 376, 742 P.2d 377 (1987). Thus, Complainant is entitled to compensation for such distress.

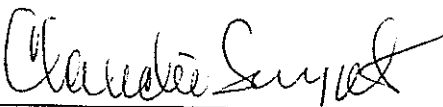
Because Complainant's emotional distress was caused by the unlawful inquiry and as well as other factors, damages must be apportioned. Montalvo v. Lapez, 77 Hawai'i 282 (1994). Because the emotional distress resulting from the assumption and belief were not considered in assessing Complainant's damages, the Commission hereby apportions damages and increases the compensatory damages awarded to Complainant from \$7,000.00 to \$10,000.00⁷. The remaining portions of the Conclusions of Law are hereby adopted in the Final Decision.

III. FINAL ORDER

The Commission hereby adopts the Hearings Examiner's Recommended Order, as modified, by increasing the compensatory damages to \$10,000.00.

DATED: Honolulu, Hawaii

OCT 14 1997



CLAUDIO SUYAT, Chair

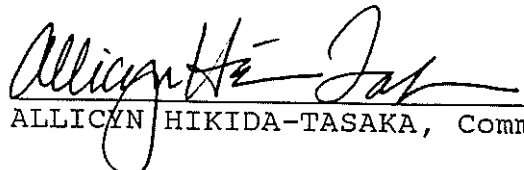


JACK LAW, Commissioner


⁷The Commission wishes to stress that the award is not a fixed penalty for making an unlawful inquiry into two protected bases but is compensation for Complainant's emotional distress resulting from the inquiry.



FAYE KENNEDY, Commissioner



ALLICYN HIKIDA-TASAKA, Commissioner



HARRY YEE, Commissioner

NOTICE: Pursuant to H.R.S. §§ 91-14 and 368-16, an aggrieved party may institute proceedings for judicial review in the circuit court within thirty (30) days after service of the certified copy of the final decision and order of the agency.