CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO, Executive Director, on behalf of the complaint filed by JERRY and MOANA P. RAMOS, vs. BERETANIA HALE, LTD. and MARY MAU LE CAVELIER, Respondents.	)))))))))))))	Docket No. 99-001-H-D HEARINGS EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER; APPENDIX "A".

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

I. INTRODUCTION

A. Chronology of Case

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

B. Summary of the Parties' Contentions

The Executive Director alleges that: 1) Complainant Moana P. Ramos (hereinafter "Mrs. Ramos") was a person with a disability who rented an apartment from Respondent Mary Mau Le Cavelier (hereinafter "Mrs. Le Cavelier") which did not have a parking stall; 2) Mrs. Ramos informed Mrs. Le Cavelier and Respondent Beretania Hale Ltd. (hereinafter "BHL") that she was disabled and requested a parking stall near her apartment; 3) Respondents violated H.R.S. § 515-3 and H.A.R. § 12-46-306 when they refused to

provide Mrs. Ramos with a parking stall to accommodate her disability and harassed Mrs. Ramos and her husband, Complainant Jerry Ramos (hereinafter "Mr. Ramos"); 4) alternatively, Respondents violated H.R.S. § 515-3 and H.A.R. § 12-46-306 when they failed to engage in an interactive process to determine whether they could accommodate Mrs. Ramos' disability; and 5) Complainants were forced to move from their apartment because they could not obtain parking and because of Respondents' harassment.

Respondents BHL and Mrs. Le Cavelier contend that: 1) Mrs. Ramos does not have a disability; 2) even if Mrs. Ramos had a disability, they had no notice of her disability or that she was requesting a parking stall because of her disability; 3) Mrs. Ramos' request for a parking stall was not reasonable because: a) Respondent BHL had no control over any parking spaces; and b) Respondent Le Cavelier had only one parking stall which was already rented out to another tenant; and 4) Complainants moved from their apartment for other reasons.

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 BHL is a Hawaii corporation formed in November 1959 to lease and manage the land and apartment building known as Beretania Hale. Beretania Hale is located at 1727 Beretania Street in Honolulu, Hawaii and contains 25 units and 17 paved parking stalls. The building is three stories high and does not have elevators. (Tr. at 22-23, 445; Exs. 9, 27, 68)

2. The portion of Beretania Street fronting the building is a four lane thoroughfare which runs one way Ewa. From 6:30 a.m. to 8:30 a.m., Mondays through Fridays, no parking is allowed in the far left (makai) lane. At all other times parking is allowed in this lane and traffic is generally limited to the three mauka lanes. (Exs. 27, LL)

3. By November 1982 BHL had leased all of its interests in the units and parking stalls at Beretania Hale to individual sublessees (hereinafter referred to as "owners").

The relevant title history of the units and parking stalls is as follows. In July 1959 George Inn and Theodore Di Tullio leased the two lots at 1727 Beretania Street from Annie Chun, the land owner, for 55 years. Inn and Di Tullio formed a partnership known as Cathay Investment Company and built the apartment building on the lots as well as 12 parking stalls and a swimming pool. In November 1959 Inn and Di Tullio formed Respondent BHL and subleased the land, building, parking stalls and other improvements to this

[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.

corporation. Because there were fewer parking stalls than units, BHL assigned parking stalls to certain units and began selling proprietary leases to the units and stalls. Purchasers also received shares of stock in BHL. By 1963 BHL sold only 10 units. Seven of the 10 units sold had parking stalls.

In July 1963 Inn and Di Tullio sold their remaining interests in BHL (15 units, 5 of which had parking stalls and their shares of stock) to a hui composed of Francis Tom, Violet Mau and Jack and Maydelle Cione. The hui later acquired one more unit and parking stall (16 units and 6 parking stalls total). Subsequently, the hui members drew lots to divide up the ownership of 15 of the one- and two-bedroom units. Violet Mau received 5 units, two of which had parking stalls; Francis Tom received 5 units, three of which had parking stalls; and the Ciones received 5 units, one of which had a parking stall. The ownership of the studio unit, which did not have a parking stall, remained with the hui. In 1989 Violet Mau sold one unit with a parking stall to Laura Austin Pierce. (Tr. at 426-428, 507-508, 549, 660-662, 665-676, 693-700; Exs. 12, 13, 14, 15, 16, 17, 18, 19, 20, 29, 68, Q)

4. From about 1966 until the mid 1980's BHL employed Rose Lew as a resident manager. Lew was a friend of Tom's and lived in unit 1B, which Tom owned. BHL agreed to compensate Lew by paying her rent to Tom. As a resident manager, Lew took care of the common areas. Lew also reminded residents to move their cars from Beretania Street during tow-away hours and helped some residents move their cars from the street into empty stalls or the driveway

of Beretania Hale. In addition to being resident manager of the common areas, Lew also managed Tom's units and parking stalls, and sometimes rented out Tom's parking stalls to other owners' tenants. Lew, however, did not manage or rent out any other owner's units or parking stalls. Tom, who later acquired 10 units, also performed maintenance and repair work for BHL. (Tr. at 159-161, 369-370, 429, 546-547, 563-566, 659-660, 693, 700-701, 720, 768; Exs. 27, 29, 75)

5. Some time around 1979, BHL decided to fill in the swimming pool and create five more parking stalls in that area (hereinafter the "swimming pool stalls"). Tom advanced the monies for this work. Some time before 1982, BHL stopped paying Lew's rent and could not repay Tom for certain repairs and the work on the swimming pool stalls. At a BHL owners meeting held in 1982, the owners subleased the swimming pool stalls to Tom as compensation for these expenses. The owners also continued Lew's employment as a resident manager at a cost of $10.00 per month per unit. The owners, however, never paid this amount. Lew nevertheless continued to manage the common areas gratis and continued to manage Tom's units and parking stalls. (Tr. at 701-703, 738-739; Exs. 29, 75)

6. Respondent Mrs. Le Cavelier is the daughter of Violet Mau. Mrs. Le Cavelier helped her mother and father, Henry Mau, manage the 5 units and one parking stall they owned at Beretania Hale. In 1993, Mrs. Le Cavelier rented out unit 1E and the Maus' only parking stall to Terry Rodrigues. (Tr. at 426, 428-429, 469;

Ex. 28)

7. From about 1994 to 1999 unit 1A was rented by Robert Kong, a friend of Tom's. Kong used this studio unit as an office and storage space for his fundraising candy business. Initially Kong rented a parking stall from Tom. Because Kong was constantly loading and unloading boxes of candy from unit 1A to his van, he asked Tom for permission to park his van in the grassy area immediately fronting the building and adjacent to unit 1A. This grassy area was a common area managed by BHL. The grassy area was also part of the apartment's 10 foot front yard set back, and pursuant to the City and County of Honolulu Land Use Ordinance[2], it is illegal to park there. Nevertheless, Tom gave Kong permission to park in that area during the day.[3] (Tr. at 708-710, 735; Exs. 29, 71, Exs. A and B attached to Respondents' Final Argument)

8. Complainant Jerry Ramos is a maintenance worker at Hawaiian Waikiki Beach Hotel. He is married to Complainant Moana P. Ramos. Mr. Ramos at one time worked with the Maus' son, Steven, and for over 20 years the Maus employed Mr. Ramos as a part time handyman to do repairs on their units at Beretania Hale and other apartments. (Tr. at 13, 26-29, 430; Exs. 28, EE)

9. Complainant Moana P. Ramos is a housewife. Since the early 1990's, Mrs. Ramos has had diabetes mellitus, coronary artery disease and is also obese. Due to these conditions, Mrs. Ramos

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[2] Land Use Ordinance § 3.30(e) (1995)

[3] Twice a week the Beretania Hale residents left their rubbish cans in this area from late afternoon to the next morning for pick up. (Tr. at 710-712)

also has hypertension, hyperlipidemia and lumbar disc disease. Prior to April 1996 Mrs. Ramos sporadically had back pains, chest pains, shortness of breath and difficulty walking. (Tr. at 48, 249-250, 641-646; Exs. 33, FF)

10. From 1984 to June 1995 Mr. and Mrs. Ramos and their daughter Kimberly rented a house on Kunawai Street in the Liliha area[4]. In May 1995 the owners of the Kunawai Street house did not renew the Ramoses' lease, and they had to vacate that house by the end of July 1995. During a telephone conversation with Beverly Smith, the manager of the Maus' units at Liholiho Manor, Mrs. Ramos mentioned that she was looking for a place to rent. Smith called Mrs. Le Cavelier and asked if the Maus had any units available. Mrs. Le Cavelier instructed Smith to have the Ramoses look at unit 2A at Beretania Hale and to contact her (Le Cavelier) if they liked it. (Tr. at 24-25, 373, 431; Exs. EE, FF)

11. Some time around June 1995, Mr. and Mrs. Ramos went to look at unit 2A. Mrs. Ramos didn't like the apartment because she preferred to live in a house, the apartment was on the second floor, and she didn't want to climb two flights of stairs to get to it. Mr. Ramos decided to take the apartment anyway because the rent was reasonable, they had to move immediately and he only planned to live there temporarily. (Tr. at 60-61, 123-129, 137-138, 386-387; Exs. EE, FF)

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[4] Paul Mau, another one of the Maus' children, helped the Ramoses find this house. (Tr. at 28)

12. That evening Mr. and Mrs. Ramos met with Mrs. Le Cavelier in the parking lot of Liholiho Manner. Mr. Ramos told Mrs. Le Cavelier that his family had two cars and asked if there was any parking. Mrs. Le Cavelier told Mr. Ramos that unit 2A did not have parking. She stated that if her other tenant who had parking moved out, the Ramoses "would be first in line to get that parking". Mrs. Le Cavelier also suggested that the Ramoses contact Lew about renting a parking space. Later, Mrs. Le Cavelier informed Lew that the Ramoses wanted a parking space. (Tr. at 151, 436-438; Exs. 9, 28, EE, FF)

13. At the time the Ramoses lived at Beretania Hale, the BHL officers and board members were: Laura Austin Pierce, Stephanie Ebanks and Lorraine Alexander. During this period, BHL did not have rules or procedures whereby owners or tenants could contact each other to rent unused parking stalls. After Pierce sold her unit and moved to the mainland in August 1996, she and the other officers resigned from the BHL board. Since then, BHL has not had any officers or directors. (Tr. at 556-558, 689-691; Exs. 9, 30)

14. The Ramoses moved into unit 2A incrementally during July 1995. Mrs. Le Cavelier sent the Ramoses a standard rental agreement, requiring a deposit of $650 and monthly rental payments of $650 due at the first of each month. Mr. Ramos called Mrs. Le Cavelier and asked if he could pay the rent in installments on the first and fifteenth of each month. He also asked if he could pay the deposit in installments of $25 each half month. Mrs. Le Cavelier agreed to these adjustments. Because Mr. Ramos made some

repairs to apartment 2A and because he was a long time family friend, Mrs. Le Cavelier also waived the July 1995 rent. (Tr. at 148-149, 438-439, 443-444, 460; Ex. EE)

15. After the Ramoses moved into Beretania Hale, Mrs. Ramos became friendly with Lew. Mrs. Ramos often discussed her health problems with Lew and mentioned that she wanted a parking space. Mrs. Ramos, however, did not state that she needed a parking space because of her health problems. Some time in July 1995 Lew told Mrs. Ramos that the Ramoses could rent parking stall #4 for $50 a month starting in August 1995. This stall was owned by Tom (and was not one of the swimming pool stalls). Lew told Mrs. Ramos that stall #4 had been rented by the tenant in unit 1A (Kong), who was now parking illegally in the grassy area in front of that unit; if that tenant needed the stall back, the Ramoses would have to relinquish it. Lew also told Mrs. Ramos that other people would park in stall #4 for short periods if it were vacant. (Tr. at 56, 71-73, 118, 121, 312, 567-570, 573-574; Ex. FF)

16. The Ramoses agreed to rent stall #4 under these conditions and made monthly payments by check to Lew. The Ramoses subsequently sold one of their vehicles. Mr. Ramos usually drove their remaining vehicle (a van) to work. However, at times Mrs. Ramos used the van to go to doctor appointments, run errands or visit relatives and friends. On these occasions Mrs. Ramos would drive Mr. Ramos and Kimberly to work in the mornings, return home, go out, and then pick up Mr. Ramos and Kimberly in the afternoon. (Tr. at 74-75, 312; Exs. 27, FF)

17. During the next 9 months, on about 5 occasions Lew gave other residents or visitors permission to park in the Ramoses' stall when it was vacant. Once after sending her family to work, Mrs. Ramos returned and had to wait three hours before a tenant moved her car. On about 3 or 4 occasions Mrs. Ramos had to honk to get Lew or Lew's daughter to move their cars out of the stall, which they did immediately. On one occasion another tenant mistakenly parked in stall #4 and Mr. Ramos had to park on the street for the afternoon. Mrs. Ramos became upset about these incidents and asked Lew not to let other people park in the stall. (Tr. at 76-81, 83-84, 162-163, 201, 313, 395, 577-580; Ex. FF)

18. In April 1996 Mrs. Ramos had surgery to correct a pinched nerve in her neck. After this surgery Mrs. Ramos' condition significantly worsened. She had constant shortness of breath, chest pains and fell often. (Tr. at 54-56, 58-59; Exs. 2, 4, 32, 33, FF)

19. On a Sunday afternoon in mid-April 1996 Lew was showing one of Tom's units to a prospective tenant. Although Mr. and Mrs. Ramos were home, Mr. Ramos had parked on the street[5]. Without Lew's knowledge, the prospective tenant parked in stall #4. Mrs. Ramos saw this and became upset. She walked on to the lanai of her apartment and yelled at the prospective tenant to move his car out of her space. Lew explained that she was showing an apartment to

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[5] Kimberly's boyfriend, Fernan Caspillo, often visited the Ramoses. When Mr. Ramos took the van to work or parked on the street, Caspillo would park in their stall and moved his car when Mr. Ramos returned or needed to park. (Tr. at 377-379, 500)

this man and he would leave shortly. Mrs. Ramos insisted the man move his car immediately. After this exchange, the prospective tenant decided not to rent the apartment and left. (Tr. at 84-86, 163-164, 237-239; Exs. 27, FF)

20. Lew became upset. She felt that Mrs. Ramos was complaining too much and that her outburst caused Tom to loose a good tenant. Lew went upstairs to talk to Mrs. Ramos. Mrs. Ramos demanded to have access to the stall "24 hours a day" and that no one else be allowed to park there. Lew countered that the Ramoses rented the stall with the understanding that others could park temporarily if the stall was vacant. A heated argument ensued and Lew decided to take back the parking stall. Lew ordered Mrs. Ramos to vacate the space by the end of May. (Tr. at 86, 239-240, 395, 580-583, 761-764; Exs. 27, FF)

21. Mrs. Ramos became upset about the incident and loss of the parking stall. That evening, she called Mrs. Le Cavelier and told her that Lew had taken away the parking space. Mrs. Le Cavelier stated that she couldn't do anything about Lew's decision. She suggested the Ramoses talk to Tom, since he was Lew's employer. Mrs. Le Cavelier did not suggest the use of her family's parking stall, because she believed that Rodrigues would not give up the stall to the Ramoses.[6] If Mrs. Le Cavelier had asked, Rodrigues

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[6] Prior to April 1996 Rodrigues complained about a leak in her apartment and asked Mrs. Le Cavelier to fix it. Mrs. Le Cavelier proposed that Rodrigues instead move to another unit. Rodrigues told Mrs. Le Cavalier she would not move if it meant loosing her parking stall. In addition, Rodrigues' boyfriend moved in with her, had a brand new truck and Rodrigues had unsuccessfully sought an additional parking stall from Mrs. Le Cavelier for his use. (Tr. at 467-469, 743-746, 754)

would have refused.[7] Mrs. Le Cavelier also suggested that Mr. Ramos call her if the Ramoses wanted to discuss the matter further. (Tr. at 87-88, 241-243, 463-469; Ex. 28)

22. The next day, Mrs. Ramos attempted to talk to Tom about the incident. Lew saw Mrs. Ramos approach Tom and intervened. The two began to argue again. Tom told Lew, "this isn't worth it, just take the stall back". Mrs. Ramos told Tom he had to give her 30 days' notice. Tom said, "fine, you can have the stall until the end of May for free but you must vacate by May 31st". Lew then wrote a follow up memorandum and mailed this to the Ramoses. (Tr. at 89-90, 588-589, 624-625, 704-707, 724-725; Exs. 1, 29)

23. Mrs. Ramos then contacted several government agencies, including the Hawaii Civil Rights Commission. An HCRC investigator advised Mrs. Ramos to write to Lew and Tom, inform them of her disability and request a parking accommodation. On May 6, 1996 Mrs. Ramos wrote to Lew and Tom, stating that she had "recently been faced with a disability" and would not vacate the parking stall. Lew wrote to the Ramoses on May 16, 1996, reiterating her demand to vacate the parking space. Mrs. Ramos wrote back on May 17, 1996 stating inter alia, that she "became disabled the end of April" and that she was entitled to the parking. On May 23 and 26 1996 Mrs. Ramos attempted to mail her June payment for the parking stall. Lew refused to accept these letters. (Tr. at 105, 296-297, 590, 623-624; Exs. 2, 3, 4, 5, 6, 27)

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[7] Rodrigues wanted the parking stall because she had a young child and because her car was fairly new and expensive and she didn't want to park it on the street. (Tr. at 745-746)

24. Some time in May 1996 Lew informed Mrs. Le Cavelier that Mrs. Ramos claimed she had a disability and required a parking space. Mrs. Le Cavelier did not discuss this matter with the Ramoses because she thought it was a conflict between the Ramoses and Lew/Tom, and because neither Mr. or Mrs. Ramos had called her back. (Tr. at 513-514, 538, 625; Exs. 9, 28)

25. Lew also informed Laura Austin Pierce about the parking incident with Mrs. Ramos and Mrs. Ramos' disability claim and request for parking. To avoid future conflicts, on June 1, 1996 Pierce issued a memorandum to the Beretania Hale owners and tenants instructing them not to use or allow guests to park in stalls other than their own and not to park in the driveway area. Pierce also instructed Lew to post a "no parking" sign in the grassy area fronting Beretania Hale where Kong parked.

Pierce did not ask Lew or Tom if they would reconsider renting a parking stall to the Ramoses or if Tom would be willing to lease a stall back to BHL for the Ramoses' use. If she had asked them, they would have refused. Lew was angry that Mrs. Ramos would not allow others to temporarily park in the stall when it was vacant and did not want to deal with Mrs. Ramos' complaints. Tom was angry that Mrs. Ramos fought with Lew and did not want Lew to be further aggravated by Mrs. Ramos.[8] Tom also wanted to retain ownership over as many parking stalls as he could because it was easier and more profitable for him to rent units that had parking

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[8] At that time Lew also had health problems and was ordered by her doctors to avoid stressful situations. (Tr. at 583, 586, 705-706)

stalls.

Pierce also did not ask any other owners if they would rent a parking stall to the Ramoses. If Pierce had asked, no other owner would have rented their parking stall to the Ramoses. The remaining owners had one stall each and either used their stall or rented it to their tenants. (Tr. at 308, 480-482, 558-559, 684, 691, 725-726; Exs. 8, 27, 28, 29)

26. During this period of time, the Ramoses were also late with some of their rental payments to Mrs. Le Cavelier. Mrs. Le Cavelier was concerned about the Ramoses' late payments, but didn't want to loose them as tenants.[9] To help the Ramoses, she waived their rent for the latter half of May 1996 (since Mr. Ramos had done some plumbing work on the unit) and for the month of June 1996. However, to avoid future late payments, Mrs. Le Cavelier asked the Ramoses to pay their entire rent at the first of the month and the remaining balance ($265) of their deposit.[10] (Tr. at 472-479; Exs. 7, 28, EE)

27. After losing the parking stall, the Ramoses decided to move out of Beretania Hale. However, during this time the Ramoses

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[9] At that time, two of the Maus' units were not rented and another tenant was behind in rent. In addition, Henry Mau was gravely ill in the hospital; Mrs. Le Cavelier was caring for him and didn't have time to look for new tenants. (Tr. at 297-298, 462-463, 541-542)

[10] Henry Mau's bookkeeping company had previously collected the Ramoses' rental payments for their Kunawai Street house. At Kunawai Street, the Ramoses paid their $600 rent on the first of each month and Mrs. Le Cavelier, who was an accountant at her father's bookkeeping company, was aware of this. The Ramoses' bank records also show that they had sufficient funds to pay their rent at Beretania Hale at the first of each month. In addition, after moving from Beretania Hale, the Ramoses subsequently paid their $950 deposit up front and $950 rent at the first of each month at Piliwai Street. (Tr. at 27-28, 142-143, 511; Ex. FF)

planned to move anyway because Mr. Ramos felt the apartment was too hot and noisy and Mrs. Ramos didn't like living in an apartment. In addition, Mrs. Ramos was going to have a catherization in July and would not be able to walk up and down the stairs while recovering from that procedure. Furthermore, Kimberly was expecting a baby in November, Caspillo wanted to move in with them, Kimberly and Caspillo wanted the baby to have his own room, and the apartment was too small for a family of five. Kimberly also wanted to move to Kalihi because she wanted to live closer to her church. In late June 1996 the Ramoses found a four bedroom home on Piliwai Street in Kalihi with no stairs and close on street parking. By letter dated June 28, 1996 Mr. Ramos informed Mrs. Le Cavelier that they would vacate unit 2A at the end of July 1996. The Ramoses began living at the Piliwai Street house during the second week of July and finished moving all their belongings at the end of that month. (Tr. at 132-134, 137-138, 181-189, 388, 391-393, 492-495, 501-502; Exs. EE, FF)

III. CONCLUSIONS OF LAW[11]

H.R.S. § 515-3 states in relevant part:

> It is a discriminatory practice for an owner or any other person engaging in a real estate transaction . . . because of disability . . .
> (11) To refuse to make reasonable accommodations in rules, policies, practices or services when the accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a housing

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

accommodation . . .

H.A.R. § 12-46-306(a)(3) specifies that use and enjoyment of a housing accommodation includes the use and enjoyment of public and common use areas.

A. JURISDICTION

Pursuant to the above, this Commission has jurisdiction over owners or any other persons engaging in real estate transactions. H.A.R. § 12-46-302 defines "person" to include an individual or corporation. The section also defines "real estate transaction to mean:

> . . . the . . . rental, lease . . . management, or use of real property, including, but not limited to, any actions related to real property after the . . . rental, or lease . . .

1. Respondent BHL

Respondent BHL is the corporation which holds the lease to and manages the common areas at Beretania Hale, including the grassy area fronting the building. It is therefore an "owner" and a "person engaging in a real estate transaction" and is subject to the provisions of H.R.S. Chapter 515.

2. Respondent Le Cavelier

Mrs. Cavelier managed her parent's five units and one parking stall at Beretania Hale and rented unit 2A to Mr. and Mrs. Ramos. She was therefore a "person engaging in a real estate transaction" and is subject to the provisions of H.R.S. Chapter 515.

B. DISABILITY DISCRIMINATION

The Executive Director contends that Respondents violated H.R.S. § 515-3(11) when they refused to provide Mrs. Ramos with a parking accommodation. Alternatively, the Executive Director argues that Respondents violated § 515-3(11) when they failed to engage in an interactive process to determine whether they could accommodate Mrs. Ramos' disability.

H.R.S. Chapter 515 was amended in 1992 to conform to Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments of 1988. In 1993 this Commission promulgated H.A.R. 12-46 subchapter 20 for the same purpose. See, H.A.R. § 12-46-301. Therefore, federal caselaw and HUD administrative decisions are instructive in formulating the elements of a housing disability accommodation claim. In addition, courts and this Commission may look to employment disability accommodation cases for guidance. See, Gambel v. City of Escondido, 104 F.3d 300, 304 (9th Cir. 1997); Larkin v. Michigan Dept. of Social Services, 89 F.3d 285, 289 (6th Cir. 1996); Pfaff v. U.S. Dept. of HUD;, 88 F.3d 739, 745 n. 1 (9th Cir. 1996).

1. Whether Respondents refused to provide an accommodation

The elements of a prima facie case for failure to make a reasonable accommodation are:

a) complainant has a disability or is a person associated with a disabled person;

b) respondent knew of the disability or could have been

reasonably expected to know of it;

c) accommodation of the disability may be necessary to afford complainant an equal opportunity to use and enjoy the dwelling; and

d) respondent refused to make the requested accommodation.

HUD v. Dedham Housing Authority, No. HUDALJ 1-90-0424-1 (November 15, 1991). Claims based on this theory do not require a showing of discriminatory intent. Trovato v. City of Manchester, N.H., 992 F.Supp 493, 479 (D.N.H. 1997). Once the Executive Director makes out the above prima facie case, a respondent may nonetheless prevail if he or she can demonstrate that the accommodation would create an undue hardship. Dedham, supra.

As discussed below, given the facts of this case, I conclude that the Executive Director has met its burden of establishing a prima facie case. However, I conclude that Respondents have also demonstrated that the requested parking accommodation would have created undue hardship and was not reasonable.

a) whether and when Mrs. Ramos had a disability

H.R.S. § 515-2 defines "disability" to mean

> . . . having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment. The term does not include current illegal use of or addiction to a controlled substance or alcohol or drug abuse that threatens the property or safety of others.

Respondents argue that Mrs. Ramos was not disabled. At the hearing, Respondents presented several witnesses who testified that

Mrs. Ramos did not appear to have any problems walking and did not use a walker until after the parking incident with Lew. The existence of a disability, however, does not depend on Mrs. Ramos' appearance, it depends upon her physical condition. Jankowski Lee & Associates v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996) quoting Shapiro v. Cadman Towers, Inc., 844 F.Supp. 116, 121 (E.D.N.Y. 1994) aff'd 51 F.3d 328 (2nd Cir. 1995) "[d]iscrimination against the handicapped often begins with the thought that she looks just like me - that she's normal - when in fact the handicapped person is in some significant respect different. Prejudice . . . includes not just mistreating another because of the difference of her outward appearance but also assuming others are the same because of their appearance, when they are not".

Mrs. Ramos' doctors credibly testified that prior to 1995, she had diabetes mellitus, coronary artery disease and was obese. These conditions caused her to have hypertension, hyperlipidemia and lumbar disc disease.

However, the evidence shows that Mrs. Ramos did not became substantially limited in her ability to breath and walk until after her neck operation in April 1996. Mrs. Ramos' medical records show that prior to that date, her chest pains, shortness of breath and back pains were sporadic and occurred only a few times a year. (Ex. 33) After the April 1996 operation, these symptoms became constant. (Ex. 33) Mrs. Ramos testified that after that operation, she had more difficulty moving around and would often fall. (Tr. at 55) Caroldeen Tinay, Mrs. Ramos' close friend,

testified that Mrs. Ramos did not have such symptoms prior to living at Beretania Hale, and that they appeared and became worse later. (Tr. at 197) Significantly, the record also shows that Mrs. Ramos herself believed she first became disabled in of April 1996. In her May 6, 1996 letter to Lew and Tom, she states: "I have recently been faced with a disability and need to get about with a walker. . ." (Ex. 2) In her May 17, 1996 letter to Lew and Tom, she again states: "I explained that unfortunately I became disabled the end of April and need to get about with a walker. . ." (Ex. 4) Finally, in her pre-complaint questionnaire Mrs. Ramos wrote: "I became disabled middle of Apr 96". (Ex. 7 of Ex. FF)

For these reasons I conclude that Mrs. Ramos became substantially limited in the major life activity of walking and was a person with a disability as of April 1996.

b) whether Respondents knew of Mrs. Ramos' disability

Mrs. Le Cavelier

The record shows that Mrs. Ramos wrote to Lew/Tom and informed them of her disability and requested a parking accommodation on May 6, 1996. Mrs. Le Cavelier admitted she knew of Mrs. Ramos' disability when Lew informed her of Mrs. Ramos' claim and request for parking some time in May 1996.

Respondent BHL

The record shows that Mrs. Ramos did not inform BHL, its board of directors or any of its officers about her disability or need for parking because of her disability. (Tr. at 663-664) However,

the record shows that in May 1996 Lew informed Pierce, then BHL President, that Mrs. Ramos was claiming she had a disability and was requesting parking as an accommodation. Therefore, Respondent BHL first knew of Mrs. Ramos' disability and request for parking in May 1996.

c) whether accommodation of the disability may be necessary to afford Mrs. Ramos an equal opportunity to use and enjoy the dwelling

An accommodation "may be necessary to afford equal opportunity to use and enjoy a housing accommodation" when complainants can show that but for the accommodation they will not be able to enjoy the premises to the same degree as a similarly situated non-disabled person. Trovato, supra at 497, HUD v. Jankowski, No. HUDALJ 05-93-0517-1 (June 30, 1995).

The record shows that in May 1996, a parking stall on the premises of Beretania Hale was necessary to afford Mrs. Ramos an equal opportunity to use and enjoy her apartment. Mrs. Ramos often used her van to go to doctor appointments and to visit friends and relatives. She would drive her husband and daughter to work, return home and then go out. Parking was not available on Beretania Street until after 8:30 a.m. on weekdays and sometimes there was no parking on the street immediately fronting Beretania Hale. Mrs. Ramos had constant back pains, shortness of breath and could not walk more than a short distance during this time. In addition, traffic on Beretania Street was usually busy, and it was dangerous and difficult for Mrs. Ramos to walk to the passenger side of her van (where the back door is located) to unload her

walker and packages. (Tr. at 66-67, 194-196)

d) whether Mrs. Le Cavelier and BHL refused to make the requested accommodation

Once informed of the possibility that a tenant may need an accommodation, it is the landlord or manager's responsibility to explore that need and suggest accommodations. HUD v. Jankowski, supra. Accommodation of individuals with disabilities is an informal interactive process involving cooperation by both tenant and landlord/manager in identifying the causes of the difficulty the tenant is having and exploring possible accommodations. Id. Since landlords and managers possess greater knowledge about their facility's ability to provide an accommodation, they bear the responsibility of suggesting reasonable accommodations to tenants; not vice versa. Id. Mere suspicion that an individual may not actually be disabled is not sufficient to deny an accommodation without further inquiry. Id.; Shapiro, supra, at 121.

Mrs. Le Cavelier

After Lew notified Mrs. Le Cavelier of Mrs. Ramos' disability and request for parking, Mrs. Le Cavelier did not follow up on the matter with the Ramoses.

Respondent BHL

After Lew notified Pierce of Mrs. Ramos' disability and request for parking, Pierce did not follow up on the matter with the Ramoses.

e) whether the requested parking accommodation was reasonable or would cause undue hardship

Whether a requested accommodation is "reasonable" is a question of fact, determined by a close examination of the particular circumstances. Jankowski, 91 F.3d at 896. An accommodation is "reasonable" if it does not impose an undue hardship or burden upon landlords or managers and would not undermine the basic purpose which the requirement at issue seeks to achieve. Shapiro, supra, at 125. Although landlords or managers should not be required to assume undue financial burdens, they may be required to incur reasonable costs. HUD v. Jankowski, supra.

Mrs. Le Cavelier

Mrs. Le Cavelier contends that the Ramoses' request for parking is unreasonable and would cause an undue hardship because the Maus only owned one parking stall which had already been rented out. The evidence shows that at the time, the Maus owned five units and only one parking stall which was rented to Rodrigues.[12]

The sublease of the Maus' only parking stall, however, does not automatically constitute an undue hardship. A landlord or manager in such a situation must also make a good faith effort to obtain the lessee's permission to use the area or negotiate a change in the lease. See, EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with

[12] Therefore, unlike the example given in H.A.R. § 12-46-306, the Maus owned fewer parking spaces than units.

Disabilities Act (March 1, 1999) Question 46.[13] In the present case, Mrs. Le Cavelier did not ask Rodrigues whether she would be willing to give up the parking stall to the Ramoses. However, the evidence shows that if Rodrigues had been asked, she would have refused. (See, FOF No. 21) Thus Mrs. Le Cavelier would have had to break her rental agreement with Rodrigues in order to accommodate the Ramoses.

I therefore conclude that the parking accommodation would have caused an undue hardship to Mrs. Le Cavelier.

Respondent BHL

BHL contends that it had no ownership or control over any parking spaces at Beretania Hale and could not provide one to the Ramoses. The Executive Director argues that BHL retained the leasehold to all the parking stalls. The weight of the evidence, however, shows that by 1982 BHL had leased out all of its interests in the parking stalls.

The record shows that in the 1960's BHL assigned its interests in the 12 original parking stalls to certain units and began to sublease these units and stalls to specific owners. A deed makes reference to the ratification of such action by the BHL board in 1964. (See, Ex. 19) Subsequent leases for certain units include

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[13] Pursuant to these guidelines, an employer cannot claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else. The employer must make good faith efforts to obtain the owner's permission to make the changes. If the owner refuses to allow the employer to make the modifications, the employer may then claim undue hardship.

the lease of specific stalls. (Exs. N, O, P, Q) In addition, Kenneth Mau, accountant for BHL, testified that BHL assessed maintenance fees and property taxes based on the size of owners' units and whether or not their leases included parking stalls.[14] (Tr. at 660-661, 676)

The evidence also shows that BHL subleased the 5 swimming pool stalls, which had been built on a common area, to Tom. The minutes of the November 30, 1982 BHL owners meeting state that the owners granted Tom the authority to "operate and maintain without interferences, interruption or complaints from Co-op owners" the swimming pool stalls from January 1, 1983 until the expiration of the land lease in 2014. (Ex. 75) In effect, the owners transferred possession of a parcel of real estate for a specific purpose and definite term and granted a lease.[15] See, Kapiolani Park Preservation Society v. City & County, 69 Haw. 569, 578-579 (1988) (agreement to allow corporation to operate restaurant for 15 years in specific area of city park was a lease); McCandless v. John Ii Estate, 11 Haw. 777, 778-789 (1899) (if the instrument in question passes the right to use land for a definite term and a specific

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[14] Because the 12 parking stalls were leased to certain unit owners, this case is unlike the Jankowski and Dedham cases, cited by the Executive Director, in which the building owners controlled the parking areas as common areas. This case is also unlike Shapiro and Gittleman v. Woodhaven Condominium Assoc. 1997 WL 468259 (D.N.J. 1997), in which the condominium owners owned and controlled the parking area as tenants in common.

[15] Alternatively, the owners granted Tom a license, which was not revocable at will because Tom gave valuable consideration (waived payment BHL owned him for repairs and parking improvements and Lew's rent) for it. See, 25 AmJur 2nd, Estates and Licenses § 143 (1996); 53 CJS Licenses § 97 (1987) (the giving of valuable consideration for a license ordinarily renders it irrevocable).

purpose, it creates an interest in the land and does not create a license). The owners also disclaimed liability for any claims or damages incurred through the operation of the swimming pool stalls.[16] (Ex. 75)

Although Pierce (or the BHL board of directors) should have, but did not ask Lew and/or Tom if they would reconsider renting a stall to the Ramoses, Lew and/or Tom would have refused. (See, FOF No. 25) Mrs. Ramos herself wrote several times to Lew and Tom, informed them of her disability and requested a parking stall. They would not reconsider.[17]

The evidence also shows that BHL did not have rules or a system by which owners or tenants could approach the corporation and ask other owners to rent or sell their unused stalls.[18] Regardless, the remaining Beretania Hale owners and tenants would have also not rented or given up their stalls to the Ramoses. (See, FOF No. 25) Thus, BHL would have had to break its lease agreements with Tom and/or other owners in order to accommodate the Ramoses. This would have caused an undue hardship to BHL.

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[16] Therefore, in contrast to the "first come/first served" rule used to allocate parking spaces in Shapiro and which could be changed by vote of the association members, in the present case possession and use of the swimming pool stalls was conveyed by BHL to Tom by lease, and could not be changed without the consent of Tom.

[17] Because Lew and Tom were not named as respondents in this case, I do not determine whether they were required to provide a parking accommodation to Mrs. Ramos.

[18] Testimony at the hearing showed that Pierce's August 14, 1996 response to the complaint stating that Rose Lew, as resident manager, had the discretion to rent other owners' unused stalls was incorrect. When Lew rented stall #4 to the Ramoses or other stalls to other tenants, she was only acting on behalf of Tom, not BHL. (Tr. at 531-536, 627-629)

The Executive Director also contends that BHL retained the leasehold and managed the grassy area fronting the apartment building and could have allowed the Ramoses to park there. The evidence, however, shows that it was illegal to park in that area. Beretania Hale is located in an area zoned AMX-2 (medium density apartment mixed use district). _See_, Ex. A attached to Respondents' Final Argument. Pursuant to Department of Land Utilization, City and County of Honolulu regulations, buildings in AMX-2 districts are required to have a 10 foot front yard set back. _See_, Ex. B attached to Respondents' Final Argument. Parking is not allowed in this area. _Id._, _see also_ Ex. 71. Therefore, BHL could not allow the Ramoses to park in this area.

Because Beretania Hale did not own, manage or control the parking stalls, would not have been able to renegotiate its sublease of stalls with Tom and/or other owners, and could not allow the Ramoses to park in the grassy area, I conclude that the Ramoses' requested parking accommodation would have imposed an undue hardship and could not have been reasonably made.

2. _Failure to engage in interactive process_

The Executive Director argues that even if Respondents could not provide the requested parking accommodation, they are _per se_ liable under H.R.S. § 515-3(11) because they failed to engage in an interactive process to explore Mrs. Ramos' request for parking.

In employment discrimination cases, federal courts are split as to whether an independent cause of action exists for failing to

engage in an interactive process. The Third, Fifth, Seventh and Eighth Circuits have held that a cause of action exists. See, Mengine v. Runyon, 114 F.3d 415, 419 (3rd Cir. 1997) (employer is required to participate in an interactive process under the Rehabilitation Act); Taylor v. Phoenixville School District, 184 F.3d 296, 312, 315 (3rd Cir. 1999) (both parties have duty to act in good faith and assist in the search for appropriate reasonable accommodations); Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996) (request for accommodation obligates an employer to participate in the process of determining one); Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285-1286 (7th Cir. 1996) (employer has a good faith obligation to help an employee determine a reasonable accommodation); Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 951 (8th cir. 1999) (follows Third Circuit's analysis in Taylor).

Other circuits have concluded that no such obligation exists and that an employer cannot be held independently liable under the ADA for simply failing to engage in an interactive process. See, Barnett v. U.S.Air, Inc., ___ F.3d ___, 1999 WL 976709 (9th Cir. 1999) (ADA and its regulations do not create independent liability for employer who fails to engage in discussions to find a reasonable accommodation); White v. York Int'l Corp., 45 F.3d 357, 363 (10th Cir. 1995) (employee must first be qualified before employer is obligated to engage in interactive process); Willis v. Conopco, 108 F.3d 282, 285 (11th Cir. 1997) (employee cannot bring a cause of action for employer's failure to participate or

investigate).

I conclude that H.R.S. § 515-3(11) and H.A.R. § 12-46-306 require respondents to participate in such interactive process and create a cause of action if they fail to do so. The statute and rule state that it is a discriminatory practice to "refuse to make reasonable accommodations . . ." Failure to engage in an interactive process is in effect a refusal to make an accommodation. In addition, this Commission's employment disability rules require an employer to initiate an interactive process with a disabled person after a request for accommodation is made. See, H.A.R. § 12-46-187(b)[19].

There are also important policy reasons for such requirement. The interactive process promotes accommodation. Each party usually holds information the other does not have or cannot easily obtain (i.e., landlords/managers will not always know what kind of limitations a disabled tenant has and the tenant may not be aware of the range of accommodations possible) and requiring both parties to interact will facilitate the identification of a suitable accommodation. In addition, the interactive process is a form of mediation that encourages settlement of accommodation issues and may help the parties avoid litigation.

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[19] H.A.R. § 12-46-187(b) states:

> To determine the appropriate reasonable accommodation;, it shall be necessary for an employer or other covered entity to initiate an interactive process, after a request for an accommodation;, with the qualified person with a disability in need of the accommodation. This process shall identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

However, I also conclude that there is no per se liability under H.R.S. § 515-3(11) if a respondent fails to engage in an interactive process. As the Third and Eighth Circuits have noted, discrimination laws are not intended to punish defendants for behaving callously if, in fact, no accommodation for the plaintiff's disability could have reasonably been made. Mengine, supra at 420; Taylor v. Phoenixville School District, supra, at 317; Fjellestad, supra at 952; Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 727-728 (8th Cir. 1999) (bank not liable for failing to engage in interactive process when plaintiff could not show that any accommodation would have allowed him to keep his job).

Thus, to prevail on a theory that respondent failed to engage in an interactive process, the Executive Director must demonstrate that:

a) respondent knew about the complainant's disability;

b) complainant requested accommodations or assistance for his or her disability;

c) respondent did not make a good faith effort to assist the complainant in seeking accommodations; and

d) complainant could have been reasonably accommodated but for the respondent's lack of good faith.

Taylor v. Phoenixville School District, supra, at 319-320; Fjellestad, supra.

As discussed in section III.B.1.b above, the Executive Director has shown that Lew notified Mrs. Le Cavelier and BHL of Mrs. Ramos' disability and request for parking accommodation in May

1996, and neither discussed or followed up on the matter with Mrs. Ramos. However, the evidence also shows that both Respondents could not provide Mrs. Ramos with a parking accommodation without undue hardship. (See discussion in section III.B.1.e above.) I therefore conclude that Respondents are not liable for failing to participate in an interactive process with Mrs. Ramos.

3. Whether Respondents harassed Mr. and Mrs. Ramos

The Executive Director contends that Respondents harassed Mr. and Mrs. Ramos after Mrs. Ramos requested a parking accommodation when: a) Pierce issued the June 1, 1996 memorandum instructing tenants not to park in the driveway area or other tenants' stalls; b) Pierce directed Lew to post a "no parking" sign in the grassy area; and c) Mrs. Le Cavelier asked the Ramoses pay the balance of their deposit and their rent at the first of each month.

The weight of the evidence, however, shows that these actions were not taken to harass the Ramoses. Pierce issued the memorandum to avoid future conflicts over parking and had the "no parking" sign posted to stop illegal parking in the grassy area. (See, FOF No. 25.) Mrs. Le Cavelier asked the Ramoses to pay the balance of their deposit and their rent at the first the month to prevent future late payments and to simplify her bookkeeping. (See, FOF No. 26). She waived the Ramoses' rent for June 1996 so they could accumulate the money to do this. Respondents therefore did not harass the Ramoses.

C. <u>LIABILITY</u>

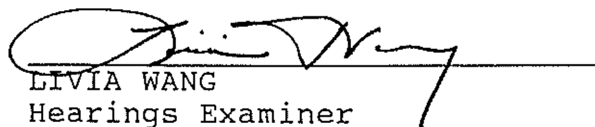
Mrs. Ramos is a person with a disability who requested a parking accommodation. Respondents knew of Mrs. Ramos' disability and request and did not engage in an interactive process to determine whether an accommodation could be made. However, Respondents could not grant Mrs. Ramos' request without breaking pre-existing leases, which would impose undue hardships. I therefore conclude that Respondents are not liable for violating H.R.S. § 515-3 and H.A.R. § 12-46-306(a)(3).

IV. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude that Respondents Beretania Hale, Ltd. and Mary Mau Le Cavelier did not violate H.R.S. § 515-3 and H.A.R. § 12-46-306 and that it dismiss this complaint.

Dated: Honolulu, Hawaii, December 13, 1999.

HAWAII CIVIL RIGHTS COMMISSION



LIVIA WANG
Hearings Examiner

Copies sent to:

Paul F.N. Lucas, Esq. HCRC Enforcement Attorney
Robert L.S. Nip, Esq. Attorney for Respondents

APPENDIX A

On August 2, 1996 Complainants Jerry and Moana Ramos filed a complaint against Beretania Hale Association of Apartment Owners (hereinafter "BH AOAO") and Mary Mau Le Cavelier alleging disability discrimination. On December 29, 1998 the Executive Director sent Respondents a final conciliation demand letter pursuant to H.A.R. § 12-46-17.

On January 19, 1999 the complaint was docketed for administrative hearing and a notice of docketing of complaint was issued. On January 27, 1999 the Executive Director filed its scheduling conference statement. On February 1, 1999 Respondents filed their scheduling conference statement. A scheduling conference was held on February 16, 1999 and a scheduling conference order was issued on February 18, 1999.

On June 18, 1999 notices of hearing and pre-hearing conference were issued.

On June 23, 1999 Respondents filed a motion to dismiss case against all respondents and against Respondent Le Cavelier. A notice of hearing on these motions was issued on June 24, 1999. On June 25, 1999 Respondents filed a second motion to dismiss case against all respondents. On June 29 and 30, 1999 the Executive Director filed memoranda in opposition to these motions. A hearing on these motions was held on July 6, 1999 at the Hawaii Civil Rights Commission conference room, 830 Punchbowl St. room 411 before this Hearings Examiner. Participating were: Enforcement Attorney Paul F.N. Lucas on behalf of the Executive Director, and

Robert L.S. Nip, Esq. on behalf of Respondents. Also present were Complainant Moana P. Ramos, Respondent Mary Mau Le Cavelier, and Kenneth Mau, representative for Beretania Hale, Ltd. (hereinafter "BHL"). Orders denying these motions were issued on July 7, 1999.

On June 24, 1999 the Executive Director filed a motion to amend caption to add Beretania Hale, Ltd. as a party respondent. A notice of hearing on this motion was issued that day. On June 30, 1999 Respondents filed a memorandum in opposition to this motion. A hearing on this motion was held on July 6, 1999 at the Hawaii Civil Rights Commission conference room, 830 Punchbowl St. room 411 with the parties mentioned above. At the hearing, Mr. Nip clarified that a BH AOAO does not exist. The motion was then treated as one to amend the complaint to substitute BHL as a party respondent, and was granted. An order granting the motion was issued on July 7, 1999.

On June 28, 1999 the Executive Director filed a motion for partial summary judgment. A notice of hearing on this motion was issued on June 29, 1999. A hearing on this motion was held on July 6, 1999 at the Hawaii Civil Rights Commission conference room, 830 Punchbowl St. room 411 with the parties mentioned above. An order granting the motion in part and denying it in part was issued on July 7, 1999.

The parties filed their pre-hearing conference statements on June 30, 1999. On July 6, 1999 a pre-hearing conference was held.

On July 9, 1999 this Hearings Examiner filed a motion to extend hearing date. On that day the Commission granted that

motion.

On July 16, 1999 Respondents filed a document naming additional witnesses. On July 27, 1999 the Executive Director filed a memorandum in opposition to Respondents' naming of additional witnesses. On July 28, 1999 this Hearings Examiner issued an order allowing Respondents to name additional witnesses and allowing the Executive Director to depose such witnesses. On August 19, 1999 Respondents filed a motion to name other additional witnesses. On August 23, 1999 the Executive Director filed a memorandum in opposition to this motion, and on August 26, 1999 Respondents filed a reply memorandum. On August 30, 1999 this Hearings Examiner issued an order allowing Respondents to name additional witnesses and allowing the Executive Director to depose such witnesses.

On September 16, 1999 the Executive Director filed a motion to amend its exhibit list. On September 17, 1999 this Hearings Examiner granted that motion.

The contested case hearing on this matter was held on September 20, 21 and October 12, 13, 1999 at the Hawaii Civil Rights Commission conference room, 830 Punchbowl Street, room 411, Honolulu, Hawaii pursuant to H.R.S. Chapters 91 and 368. The Executive Director was represented by Enforcement Attorney Paul F.N. Lucas, and Complainant Moana P. Ramos was present during portions of the hearing. Respondents were represented by Robert L.S. Nip, Esq. Respondent Mary Mau Le Cavelier and Kenneth Mau, representative for BHL were also present.

The parties were granted leave to file post-hearing briefs. On October 19, 1999 the Executive Director filed a motion to enlarge its brief. On October 22, 1999 Respondents filed a memorandum in opposition to the motion. An order granting the motion in part and denying it in part was issued on October 15, 1999. On October 28, 1999 Respondents filed their final argument. On October 29, 1999 the Executive Director filed its post hearing brief.