

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

'07 JUN 22 P3:05

WILLIAM D. HOSHIJO,)
 Executive Director, on behalf)
 of the complaint filed by DEL)
 M. SCOTTO)
)
 vs.)
)
 JANENE CARACAUS,)
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 Respondent.)
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DOCKET NO. 06-001-H-D

2007 JUN 22 3:05 PM

FINAL DECISION AND ORDER

The Hearings Examiner filed Findings of Fact, Conclusions of Law and Recommended Order on March 13, 2007 ("Hearings Examiner's Decision"). The Executive Director and Respondent Janene Caracaus ("Caracaus") filed timely Written Exceptions. The Executive Director requested oral argument.

The Hawaii Civil Rights Commission ("Commission") heard oral argument on May 25, 2007. Participating were Acting Chair Lisa Wong and Commissioners Sara Banks, Leslie Alan Ueoka, and Mark G. Valencia. Frank Kim, Esq., and David Forman, Esq., represented the Executive Director. Janean McBrearty represented Caracaus. Acting Chair Wong, Ms. McBrearty, Caracaus and Complainant Del M. Scotto ("Scotto") were unable to attend the hearing in person and participated via telephone conference bridge. Sara Banks, as the senior commissioner

I hereby certify that this is a true and correct copy of the original file of the HAWAII CIVIL RIGHTS COMMISSION.



 GENERAL CLERK

attending the hearing, presided.

Chairperson Coral Wong Pietsch was not present due to her work with the Iraqi Reconstruction Authority and will not participate in the case.¹

I. HEARINGS EXAMINER'S DECISION

The Hearings Examiner made the following salient findings of fact and conclusions of law. Scotto rented a room in a house at 150 Chong Street in Hilo owned by Caracaus in February 2005. During Scotto's tenancy, Caracaus did not reside in the house because of her work as a traveling nurse in Los Angeles (from February to July 2005) and Honolulu (from July to November 2005). From July to November 2005, Caracaus would visit the house from 1 or 2 times a month and stay in one of the bedrooms.²

In early October 2005 during a visit, Scotto showed Caracaus the results of a PSA test and said that he thought he had

¹In light of Chair Pietsch's decision not to participate in the case, Caracaus' Motion to Recuse her is moot. Because Caracaus' Motion was based in part on Chair Pietsch's military service, prior to commencing oral argument the Commission advised Caracaus and McBrearty that Commissioner Valencia had served in the military and that the Commission would entertain an oral motion to recuse him, should she desire to do so. McBrearty advised that Caracaus' Motion was based on their understanding that Chair Pietsch is an active member of the military and, therefore, she had no objection to Commissioner Valencia sitting on the case.

²Beginning in November 2005, Caracaus did not visit the house because she began attending medical school in Mexico.

prostate cancer. Caracaus, a registered nurse, also believed that Scotto had prostate cancer. Caracaus told Scotto that he would get weaker and needed someone to care for him. She suggested that he move back to California to be closer to his family or that he hire a home health nurse to care for him. Scotto told Caracaus that he did not want to move back to California and could not afford to hire a nurse.

During visits in July through October 2005, Caracaus observed Scotto using marijuana while drinking alcohol and taking prescription medications for a back injury from a motorcycle accident. Scotto told Caracaus that he had a medical marijuana permit from California.³ Scotto did not get a Hawaii permit to use medical marijuana until November 30, 2005. Caracaus was concerned that Scotto was abusing prescription and illegal drugs, which affected his ability to care for himself. She felt that she could lose her nursing license if authorities discovered illegal drug use on the premises.

On October 16, 2005, Caracaus wrote a letter to Scotto terminating his tenancy:

I have done a lot of thinking about your recent tests and considering the fact that you will be needing further treatment, I think it best that you return to California or somewhere where there will be someone to

³The California permit would not authorize Scotto to use marijuana in Hawai'i.

help you through whatever treatment you decide on.

Of course, this is your decision but effective December 1, I will have to rent the apartment to another family. I appreciate all you have done for me and I like you very much, but there is still quite a bit of work needing to be done and I should not expect you to be able to tackle this monumental job.

You must take my word for it that you will get weaker and you will then be in a situation where you cannot do anything. I have seen many cases of cancer in my experience as a nurse.

The letter was left in Scotto's room where he found it.

Based on the Findings of Fact, the Hearings Examiner made the following Conclusions of Law:

The Commission has jurisdiction over this case. Caracaus does not qualify for the exception in HRS § 515-4(a)(2), which provides: "Section 515-3 does not apply ... [t]o the rental of a room or up to four rooms in a housing accommodation by an individual if the individual resides therein." Caracaus was a traveling nurse during Scotto's tenancy. Although Caracaus would visit the house for 1-2 days per month during July to November 2005, she did not live in the house.

Caracaus terminated Scotto's tenancy because of his "disability" as defined in HRS § 515-2:

[H]aving 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 use that

threatens the property or safety of others.

Scotto had cancer. He was tired, fatigued and slept most of the day. Scotto was disabled because his cancer substantially limited his ability to stand, walk, take care of himself and work.

It is an unlawful discriminatory practice for a landlord to evict a person because of disability. HRS § 515-3⁴ provides in relevant part:

It is a discriminatory practice for an owner or any other person engaging in a real estate transaction ... because of disability ...

- (1) To refuse to engage in a real estate transaction with a person;
- (2) To discriminate against a person in the terms conditions, or privileges of a real estate transaction

Caracaus knew of Scotto's cancer when she sent him the eviction notice. The eviction notice shows that Caracaus was terminating Scotto's tenancy because of his cancer and concerns that he would not be able to care for himself. This constitutes direct evidence of disability discrimination.

Caracaus also believed that Scotto was abusing prescription drugs and using illegal drugs. The Hearings Examiner found that Caracaus "credibly testified that she felt Complainant's illegal drug use would hinder him from taking care of himself, and that

⁴HAR § 12-46-305 is essentially the same as HRS § 515-3.

she did not want to lose her nursing license because of illegal drug use in her house." This constitutes a legitimate, nondiscriminatory reason for the eviction.

The Hearings Examiner found that there are both discriminatory and nondiscriminatory reasons for the eviction. Under HAR § 12-46-317(2), if a protected basis is any part of the reason for the adverse action, a discriminatory practice has occurred. The Hearings Examiner concluded that Caracaus is liable for violating HRS § 515-3 and HAR § 12-46-305.

The Hearings Examiner did not award any damages and ordered equitable and injunctive relief requiring Caracaus to: 1) cease and desist from discriminating against all other tenants and persons on any protected basis, including disability; 2) adopt a written nondiscrimination policy within 90 days of the final decision; and 3) post such policy in a conspicuous place at 150 Chong Street and at any rental unit owned and operated by her in the State of Hawaii.

II. EXCEPTIONS OF THE PARTIES

In the exceptions and oral argument, the Executive Director argued that Caracaus did not evict Scotto for legitimate nondiscriminatory reasons, damages should be awarded to Scotto for Caracaus' disability discrimination, and Caracaus should be required to publish legal notice of her violation of the law.

The Commission accepts the determination that Caracaus' reasons for evicting Scotto included concern for his use of illegal drugs because the Hearings Examiner had opportunity determine Caracaus' credibility on the matter. The Commission also agrees that Hearings Examiner's Recommended Order granting the injunctive and declaratory relief is appropriate and proper under the facts of this case.

In the exceptions and oral argument, Caraucus argues that Scotto was not disabled because his cancer was not terminal. Although the diagnosis that his prostate cancer was terminal did not come until after the eviction, a person does not have to have terminal cancer in order to be considered disabled under the law. Cancer is a physical impairment which can substantially limit one or more major life activities. The Hearings Examiner found that Scotto was disabled because he was substantially limited in his ability to stand, walk, take care of himself, and work. The Commission accepts the determination that Scotto was disabled.⁵

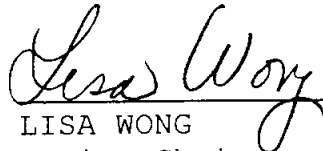
IV. ORDER

Accordingly, after reviewing the written exceptions, the

⁵Caracaus' termination letter also shows that she regarded Scotto as having an impairment which substantially limited one or more major life activites. HRS § 515-2. Based upon his diagnosis of cancer, Caracaus felt that Scotto needed help in caring for himself, which is a major life activity.

oral argument and the entire record herein, the Commission hereby adopts the Hearing's Examiner's Findings of Fact and Conclusions of Law and Recommended Order.

DATED: Honolulu, Hawaii, June 22, 2007.



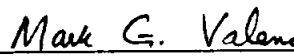
LISA WONG
Acting Chairperson



SARA BANKS
Commissioner



LESLIE ALAN UEOKA
Commissioner



MARK G. VALENCIA
Commissioner

Notice: Under H.R.S. § 368-16(a), a complainant and respondent shall have a right of appeal from a final order of the Commission in the circuit court for the circuit in which the alleged violation occurred or where the person against whom the complaint is filed, resides, or has the person's principal place of business.

Under H.R.S. § 91-14(b), proceedings for review shall be instituted in the circuit court within thirty days of service of a certified copy of the final decision and order of the agency.

CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

WILLIAM D. HOSHIJO,
Executive Director, on
behalf of the complaint
filed by DEL M. SCOTTO,

vs.

JANENE CARACAUS,

Respondent.

) Docket No.06-001-H-D
)
) HEARINGS EXAMINER'S
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW
) AND RECOMMENDED ORDER;
) EXHIBIT "1"; APPENDIX "A"

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 Del M. Scotto rented a room from Respondent Janene Caracaus and during his tenancy, he was diagnosed with prostate cancer and was a person with a disability; 2) Complainant informed Respondent of

his prostate cancer; and 3) Respondent Caracaus terminated Complainant's tenancy because of this disability in violation of H.R.S. § 515-3 and H.A.R. § 12-46-305.

Respondent Caracaus contends that: 1) Complainant Scotto did not have a disability; and 2) she terminated his tenancy for other legitimate, non-discriminatory reasons.

Having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of these proceedings, this Hearings Examiner finds and concludes that Respondent had both discriminatory and legitimate, nondiscriminatory reasons for terminating Complainant's tenancy and recommends that the Executive Director be limited to declaratory and equitable relief.

II. FINDINGS OF FACT¹

1. Complainant Scotto is a 57 year old male who moved from California to Hawaii in the fall of 2004. Prior to moving to Hawaii, Complainant had been in a motorcycle accident and injured his back. In California, he was prescribed methadone, morphine and medical marijuana to treat his back pain from that accident. (Tr. at 323-325; Ex. 4)

1 To the extent that the following findings of fact also contain conclusions

2. In January or early February 2005 Complainant saw an ad in a newspaper for a room to rent in a house located at 150 Chong Street in Hilo, Hawaii. This house is owned by Respondent Caracaus, who is a registered nurse. (Tr. at 7, 73; Ex. 10, Ex. A at 6)

3. At that time, the house at 150 Chong Street was divided into several units. The main unit, which was raised, consisted of a finished living room, kitchen, 4 bedrooms and 2 bathrooms. This unit was rented by the Tagoilelagi family from June 2005 to the present. Underneath the main unit were two unfinished units - a large studio which had been converted from a garage, and a two bedroom unit with an attached unfinished bathroom. In addition, there was a separate unit behind the house. The downstairs area also contained a common bathroom, a common living room and a common kitchen, which were shared by the tenants living in the downstairs and separate back units. During Complainant's tenancy, the units were rented by various tenants. (Tr. at 37-38, 106-107; Ex. 10, Ex. 14 at 8, 41-44, Ex. A at 7-12)

4. During Complainant's tenancy, several of Respondent's tenants had mental or physical impairments, were disabled and/or

of law, they shall be deemed incorporated into the conclusions of law.

received disability benefits. Soma Henderson, who rented the garage unit, had brain damage from a childhood drowning incident, external cognition problems, language center disorder, selective amnesia and post traumatic stress disorder; Ann Tagoilelagi had a back injury; Tagoilelagi's husband, Joe Tagoilelagi, had a severe head injury. Several of these tenants also smoked in the Chong Street house when Respondent was not present. (Tr. at 19-20, 58-60, 170-173, 189-191, 204-205, 257-258; Ex. B at 107-108)

5. From February to July 2005 Respondent Caracaus was a traveling nurse in Los Angeles and did not travel back to her Chong Street house. From July to November 2005 Respondent was a traveling nurse at Queens Hospital in Honolulu, Hawaii and visited her Chong Street house once or twice a month. From November 2005 Respondent went back to the mainland and began attending medical school in Mexico. Accordingly, from February to December 2005 Respondent did not live at her Chong Street house. (Tr. at 10-11, 34, 84; Ex. 1)

6. After calling about the room for rent at Chong Street, Henderson, who was acting as a property manager in Respondent's absence², showed Complainant the downstairs bedroom. Henderson

² After Henderson moved out of the Chong Street house in June 2005, Respondent

did not inform Complainant of any house rules regarding smoking cigarettes in the house. Complainant made a verbal agreement with Henderson to rent the room for \$450/month beginning in mid-February 2005. At that time, there was a water leak in the ceiling of the room and Complainant offered to fix it. Complainant also noticed that the bathroom attached to the other bedroom was not functional, and that in the common rooms some pipes leaked and some wires were exposed. Complainant offered to fix these too. Henderson instructed Complainant to contact Respondent about doing these repairs. After contacting Respondent, Respondent agreed to reduce Complainant's rent in exchange for these repairs. (Tr. at 7-8, 27, 36-37, 62, 169-170, 173-177, 194, 257-259, 262-263; Exs. 10, 11, Ex. A at 6-7, 15-16, 18-24)

7. In March 2005 Complainant began to feel fatigued, tired and was having problems urinating. He went to see Dr. Macario Rivera at the Hilo Veteran's Association clinic for these symptoms. Dr. Rivera checked Complainant's prostate specific antigen blood (PSA) levels, which were elevated, and suspected that Complainant had prostate cancer. Dr. Rivera then

asked Complainant to be the property manager in exchange for a reduction in rent. Complainant was the property manager for the Chong Street house from July to October 2005. (Tr. at 60-61, 125, 170; Exs. 10, 11, Ex. A at 28)

sent Complainant for further tests at Tripler Medical Center in Honolulu, which were conducted in August 2005. A biopsy was also conducted in October, 2005 which confirmed that Complainant had prostate cancer. (Tr. at 220-222, 264-265, 325-326; Exs. 4, 5, 6, Ex. B at 75-79)

8. From March to December 2005 Complainant felt tired, had no energy, lost weight, slept most of the day, and felt a more intense pain in his back and hips. He had difficulty standing, walking and urinating. Complainant also became depressed after receiving his diagnosis of prostate cancer. He could no longer work and sold his store in Honomu. To treat these symptoms, Dr. Rivera prescribed 160 mg. of methadone and morphine. (Tr. at 121-123, 178-179, 184-185, 222-225, 228-231, 248-251, 263-265, 274-277, 280-281, 283-284, 325-326, 341, 354; Exs. 5, 7, 9, Ex. 14 at 31-33, Ex. A at 32-34, 42-43, Ex. B at 117-118, 120-125)

9. During Respondent's visits to her Chong Street house during July through October 2005, Respondent stayed in the downstairs bedroom with the attached bathroom. While at the house, Respondent observed Complainant taking methadone and drinking alcohol. She also saw marijuana cigarette butts in the common living room area and suspected that Complainant was

smoking marijuana in the house. Ann Tagoilelagi informed Respondent that she smelled marijuana smoke in Complainant's sheets when she once washed them and often smelled marijuana from the downstairs units. Respondent asked Complainant if he smoked marijuana in the house. Complainant admitted that he did, but stated he had a medical permit to do so. Respondent asked Complainant to show her his permit, but Complainant never did. Respondent thought that even if Complainant had a valid marijuana medical use permit, his marijuana use might still be illegal under federal law. Respondent believed that Complainant was abusing prescription and illegal drugs, that this was also affecting his ability to take care of himself, and felt she could lose her nursing license if the authorities discovered illegal drug use at her house. (Tr. at 39-42, 54, 63-65, 374-375, 378-380)

10. At that time, Complainant had a valid California medical permit to use marijuana and incorrectly believed that permit enabled him to legally use marijuana in Hawaii. Complainant did not obtain a valid Hawaii medical permit to use marijuana until November 30, 2005. Prior to obtaining a Hawaii marijuana medical use permit, Complainant grew and smoked marijuana at 150 Chong Street. (Tr. at 128-129, 183, 199-200,

313, 317-321, 351-352; Ex. 8)

11. Some time in October 2005 Complainant showed Respondent the results of his PSA tests and told her he thought he had prostate cancer. Since Respondent was a nurse, Complainant asked what she thought of the test results and if she had any advice. Respondent looked over the test results and assumed that Complainant had prostate cancer. Respondent told Complainant he would get weaker and would need someone to help take care of him. She suggested that he move back to California where he had family to take care of him, or that he hire a home health nurse to take care of him in Hawaii. This was because Respondent had experience taking care of cancer patients as a nurse, and had taken care of her father when he was terminally ill. Complainant told Respondent that he did not want to move back to California and could not afford to hire a nurse. (Tr. at 15-19, 62, 70-71, 75-76, 92-93, 266, 272-274, 335-338, 364-369; Exs. 1, 10, Ex. 14 at 31, Ex. A at 29, 31, Ex. B at 81-83)

12. In mid October, 2005 Complainant decided to go on a week long inter-island cruise to take a break and to contemplate his relationship to his god and his future. (Tr. at 179, 277, 328-329; Ex. 10, Ex. A at 42)

13. While Complainant was on this cruise, Respondent decided to terminate Complainant's tenancy because: a) she felt that Complainant would get too weak from his cancer and drug use, would not be able to take care of himself and keep his room clean, and would become a burden on other tenants; b) she felt that Complainant would be too weak to complete the repairs and finishing work on the downstairs rooms; and c) she believed that Complainant was abusing prescription drugs and using illegal drugs in the house and she could lose her nursing license. (Tr. at 39-44, 52-54, 75-78, 120-121, 373-375, 380; Exs. 1, 13)

14. On October 16, 2005 Respondent wrote a letter to Complainant stating in relevant part:

I have done a lot of thinking about your recent tests and considering the fact that you will be needing further treatment, I think it best that you return to California or somewhere where there will be someone to help you through whatever treatment you decide on.

Of course, this is your decision but effective December 1, I will have to rent the apartment to another family. I appreciate all you have done for me and I like you very much, but there is still quite a bit of work needing to be done and I should not expect you to be able to tackle this monumental job.

You must take my word for it that you will get weaker and you will then be in a situation where you cannot do anything. I have seen many cases of cancer in my experience as a nurse.

Respondent wrote this letter and left it on Complainant's desk because she did not want to inform Complainant of her decision in

person. (Tr. at 13, 15, 77-78, 120; Ex. 1, Ex. 14 at 88)

15. During his inter-island cruise, Complainant's boat stopped in Hilo and Henderson picked him up and took him to the Chong Street house to drop off some things. Complainant saw Respondent's October 16, 2005 letter on his desk. Upon reading the letter, Complainant became very upset and stressed about being evicted and having to find another place to live. He felt that Respondent was being unfair and cruel in terminating his tenancy, especially after he had just been diagnosed with cancer. (Tr. at 136-137, 179-180, 196, 278-279; Ex. 14 at 89-90, Ex. A at 34-35, Ex. B at 88, 91)

16. By the end of November 2005, Complainant found a cottage to rent at Hawaiian Acres and moved there with some of his belongings. A few days after moving to Hawaiian Acres, Complainant fell and broke his hip and was hospitalized for the next four months. Thereafter, Complainant had Steve Stagg, a contractor who did some work for Respondent, move the rest of Complainant's belongings into a storage locker that Stagg was already renting. Later, Stagg informed Complainant that he [Stagg] failed to pay the storage fee and that the storage company confiscated all of Complainant's belongings. Complainant has not able to retrieve the rest of his belongings, which had a value of

between \$7,000 and \$8,000. (Tr. at 290-297, 301-303, 310-311; Ex. A at 35-36, 63-65, Ex. B at 94-95, 103-105, 113-114)

III. CONCLUSIONS OF LAW³

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 . . .

(1) To refuse to engage in a real estate transaction with a person;

(2) To discriminate against a person in the terms, conditions, or privileges of a real estate transaction . . .

H.A.R. § 12-46-305 states in relevant part:

It is a discriminatory practice for an owner . . . because of a person's protected basis:

(1) To refuse to engage in a real estate transaction, evict or terminate a tenancy . . .

A. JURISDICTION

Pursuant to the above, this Commission has jurisdiction over owners or any other persons engaging in real estate transactions.

Respondent argues that this Commission does not have jurisdiction over her because she falls under the exception contained in H.R.S. § 515-4(a)(2) which states:

Section 515-3 does not apply:

. . .
(2) To the rental of a room or up to four rooms in a housing

³ 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 by an individual if the individual resides therein.

This same exemption is found in H.A.R. § 12-46-313(a)(2). Respondent claims that she was residing at her Chong Street house during Complainant's tenancy because it is her permanent address, she stored her and her daughter's belongings in one of the downstairs bedrooms, and she stayed in that room when she was in Hilo.

The legislative history of H.R.S. § 515-4(a)(2) characterizes this exemption as the "tight living exemption". (Emphasis added.) See, House Standing Committee Report 874, 1967 House Journal at 819; Senate Standing Committee Report 298, 1967 Senate Journal at 982. In addition, the legislative history of H.A.R. § 12-46-313(a)(2) states that the provision means the "rental of a room in a housing accommodation by an individual who rents the room to another, if the individual **lives** in the housing accommodation". (Emphasis added.) See, Public Hearing Notice published in the Hawaii Tribune-Herald on August 6, 1993 and accompanying Affidavit of Publication, attached at Exhibit 1. Accordingly, the exemption applies to a lessor who **lives** in the house.

In the present case, the evidence shows that Respondent Caracaus did not live at 150 Chong Street during Complainant Scotto's tenancy from February to December 1, 2005. From February

