CIVIL RIGHTS COMMISSION

STATE OF HAWAII

LINDA C. TSEU, Executive Director, on behalf of the complaint filed by MARY ANNE COLE, v. TREEHOUSE RESTAURANT, INC. Respondent.	)	Docket No. 95-002-E-A-D-RET FINAL DECISION AND ORDER

'96 MAY -2 P2:34

FINAL DECISION AND ORDER

The Hearings Examiner's Proposed Findings of Fact, Conclusions of Law, and Recommended Decision were filed on January 5, 1996. The Executive Director filed Written Exceptions on January 29, 1996, and requested oral argument. Treehouse, Inc. ("Treehouse"), Respondent, filed a Statement in Support on February 12, 1996.

Oral argument was held on February 26, 1996, 2:00 p.m. before Commissioners Amefil Agbayani, Richard Port, Jack Law, Faye Kennedy, and William Hoshijo. G. Todd Withy, Esq., and Karl K. Sakamoto, Esq., appeared on behalf of the Executive Director[1]. Frederick R. Troncone, Esq., appeared on behalf of Treehouse. Also present were Linda C. Tseu, Executive Director, and Mary Anne Cole ("Cole"), Complainant.

[1]The Commission through its Executive Director is required to provide counsel on behalf of the complaint. H.R.S. § 368-14(a). At administrative hearings where the complainant has not intervened as a party, the party bringing the action is the Executive Director, on behalf of the complaint.

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

CHIEF COUNSEL

I. BRIEF OF AMICUS

On February 26, 1996, the Commission found good cause to accept the Brief of Amicus filed by the National Employment Lawyers Association-Hawaii Chapter ("NELA") because of 1) its interest in a legal issue to be decided (whether the Commission should adopt the decision in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2752 (1993)?); and 2) the assistance that the brief may provide the Commission in making its decision. NELA is an organization of attorneys representing employees in discrimination cases. The parties were given ten (10) days to file written responses to the Brief of Amicus. Both responses were filed on March 7, 1996, and are made a part of the record herein. Also made a part of the record is the Executive Director's revised Table of Contents provided at oral argument.

II. PUBLIC POLICY OF THE STATE OF HAWAI'I AGAINST DISCRIMINATION

The Hawai'i Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

(Emphasis added.) The United States Constitution does not have a comparable provision against discrimination in the exercise of one's civil rights.

The Hawai'i constitutional mandate is further amplified by H.R.S. § 368-1, the Civil Rights Commission statute, which provides, in part:

> The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy.

(Emphasis added.) The Commission has jurisdiction to enforce the employment discrimination law, Part I of H.R.S. Chapter 378, which prohibits employment discrimination because of age and disability, H.R.S. § 378-2(1)(A), and retaliation against a person who files a discrimination complaint. H.R.S. § 378-2(2).

The Hawai'i Supreme Court has recognized the strong public policy of our State against racial discrimination embodied in the Constitution and numerous other statutes, including the employment discrimination law. Hyatt Corp. v. Honolulu Liquor Commission, 69 Haw. 238 (1987). In Ross v. Stouffer Hotel Company (Hawai'i) Ltd., Inc., 76 Haw. 454, 464 (1994), the Court recognized that the employment discrimination law, "modif[ied] the employment at-will doctrine to further an important public policy." (Emphasis added.) Thus, the Hawai'i Constitution, statutes, and case law clearly establish that discrimination in employment is against public policy.

III. PROOF OF DISPARATE TREATMENT BY CIRCUMSTANTIAL EVIDENCE

A. COMPLAINANT'S BURDEN OF PROVING A PRIMA FACIE CASE

The Commission has followed the prima facie case standards in McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct 1817 (1973), and its progeny for establishing disparate treatment discrimination based upon circumstantial evidence. McDonnell Douglas recognized

that often there is no direct evidence of discriminatory intent, such as a decision maker's statement that a certain action is being taken because of an individual's protected basis, and that circumstantial evidence can be used to prove discriminatory intent. United States Postal Service Bd. of Governors v. Aikins, 460 U.S. 711, 716 (1981) ("There will seldom be 'eyewitness' testimony to the employer's mental processes.") "In order to facilitate the orderly consideration of relevant evidence, [McDonnell Douglas] devised a series of shifting evidentiary burdens that are 'intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.'" Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 986, 108 S.Ct. 2777 (1988) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n 8, 101 S.Ct. 1089 (1981) and brackets added.)

McDonnell Douglas places the initial burden of proof upon a complainant to establish a presumption of discriminatory intent by proving a prima facie case through circumstantial evidence. The elements of a prima facie case will vary based upon the type of adverse action taken. McDonnell Douglas, 411 U.S. at 802, n 13. For example, the elements of a prima facie case for a demotion because of age are: 1) complainant performed the job duties in a satisfactory manner; 2) despite satisfactory performance, employer reduced complainant's work hours; and 3) complainant's hours were filled by a younger employee. Moore v. Sears, Roebuck and Co., 464 F.Supp. 357 (N.D. Ga. 1979), aff'd 683 F.2d. 1321 (11th Cir. 1982); EEOC v. Franklin Square Union Free School District, 25 E.P.D. ¶

31,601 (E.D. N.Y. 1980). A prima facie case must be established by a preponderance of the evidence.

Cole filed a complaint which alleged that her hours were reduced and her medical benefits terminated because of her age and disability. At the time of the reduction in hours, Cole was 47 years old. She had worked for five years as a bartender at Treehouse. The evidence showed that Cole had been performing her job duties satisfactorily and that substantially younger persons (Linda Evans (38 years), Matt Jacobson (25 years), and Lori Jackson-Horton (29 years)) had been scheduled to fill her old hours. Recommended Decision at 31. Cole is a diabetic, who requires daily insulin shots. The evidence also showed that Treehouse knew that she was a diabetic and that non-disabled employees did not have their hours reduced and medical benefits terminated. Cole alleged that as a result of filing the complaint, she was terminated in retaliation for such filing.

The Hearings Examiner concluded that prima facie cases were established for age, disability, and retaliation discrimination. Recommended Decision at 31, 39-40, and 42-43. The Commission adopts the prima facie case standards for age, disability, and retaliation discrimination used by the Hearings Examiner. Treehouse concedes that a prima facie case was made out for each protected basis. Oral Argument Transcript at 46. Thus, the Commission adopts the Hearing Examiner's Conclusions of Law that prima facie cases were established for age, disability, and retaliation discrimination.

B. RESPONDENT'S BURDEN AFTER PROOF OF A PRIMA FACIE CASE

Proof of a prima facie case implies discrimination because "we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (citation omitted); Burdine, 450 U.S. at 254. After a prima facie case is established, respondent must articulate legitimate non-discriminatory reasons for its actions. McDonnell Douglas, 411 U.S. at 802. In order to do so, a respondent must introduce evidence of the reasons for its actions. If respondent does not introduce any evidence of its legitimate non-discriminatory reasons, complainant is entitled to judgment that the action was discriminatory. Burdine, 450 U.S. at 254.

In this case, Treehouse introduced evidence of several reasons to justify the reduction in hours and termination. These reasons included low bar sales to justify the reduction in hours, and causing a disturbance at work and failing to timely provide a doctor's slip to justify the termination. The Hearings Examiner concluded that all of the proffered reasons were pretextual or false. The survey of bar sales was created and used on that one occasion; the manager, Sharlene Rebang, was never informed about nor saw the survey; and the survey was inaccurate--Cole's bar sales actually exceeded the minimum amount set. Finding 33; Recommended Decision at 33. Rebang disavowed the disturbance as being grounds for termination; and the doctor's slip was actually submitted on time. Findings 51 and 53; Recommended Decision at 43. Thus, all

of Treehouse's proffered reasons were pretextual. The Commission determines there was no error in the findings that the proffered reasons were pretextual and adopt such findings.

C. APPLICABILITY OF HICKS CASE

Despite finding that the proffered reasons were pretextual, the Hearings Examiner went further and found that the reasons for the adverse actions were non-discriminatory. The Hearing Examiner relied upon St. Mary's Honor Center v. Hicks, supra, where the United States Supreme Court held that even if pretext is proven there must be a finding that the adverse actions were taken for discriminatory reasons. Hicks held that while proof of pretext alone may be sufficient to support a finding of discriminatory intent, an ultimate determination of discriminatory intent must still be made. 113 S.Ct. at 2749, 2752.

The Hearings Examiner found that Cole's hours were reduced to end her medical benefits and force her to quit because of a belief that she had earlier filed a fraudulent workers' compensation claim for a back injury. The Examiner also found that Treehouse had terminated Cole, not in retaliation for filing the discrimination complaint, but because of the workers' comp claim[2], wanting to disqualify her from receiving unemployment benefits, and a concern that she might reinjure a shoulder[3]. Thus, the Examiner concluded

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[2]Although retaliation for filing a workers' comp claim is prohibited by H.R.S. § 378-32, such action is not prohibited under the employment discrimination law. H.R.S. §§ 378-1 through 6.

[3]Termination of an employee because of fear of reinjury would not be in retaliation for filing a discrimination complaint but may constitute disability discrimination. A person with a pre-existing

that Treehouse did not discriminate when it acted because of these other reasons.

A narrowly-divided Supreme Court decided Hicks based upon Rule 301 of the Federal Rules of Evidence (Fed.R.E.). Under this rule, a presumption does not shift the burden of proof from complainant to respondent. Instead, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift the burden of proof." Rule 301, Fed.R.E. Thus, the burden of proof remains with complainant under the Fed.R.E.

By contrast, the Hawaii Rules of Evidence (Haw.R.E.) contain two different rules on presumptions. Rule 303, Haw.R.E., mirrors Rule 301, Fed.R.E., and does not shift the burden of proof. Treehouse contends that the Commission should apply Rule 303, Haw.R.E. However, the Executive Director contends that Rule 304, Haw.R.E., for which there is no federal counterpart, should be applied. It provides:

> (a) General rule. A presumption established to implement a public policy other than, or in addition to, facilitating the determination of the particular action in which the presumption is applied imposes on the party against whom it is directed the burden of proof.
> (b) Effect. The effect of a presumption imposing the burden of proof is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced sufficient to convince the trier of fact of the non-existence of the presumed fact. Except as otherwise provided by law or by these rules,

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injury may be disabled as a result of being "regarded as having a mental or physical impairment which substantially limits a major life activity." H.R.S. § 378-1. A termination may be discriminatory if it resulted from the employee's perceived disability.

> proof by a preponderance of the evidence is necessary and sufficient to rebut a presumption established under this rule.

(Emphasis added.)

Given the State's strong public policy against discrimination, the Commission concludes that Rule 304, Haw.R.E., applies[4]. After proof of a prima facie case, the burden of proof shifts to respondent to prove that it acted for its proffered legitimate non-discriminatory reasons[5]. If respondent's burden is not carried, it must be concluded that respondent acted with discriminatory intent. In Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225 (N.D. 1993), the North Dakota Supreme Court relied upon its rule, similar to Rule 304, Haw.R.E., that a presumption shifts the burden of proof in deciding not to follow Hicks. Two other states have also declined to follow Hicks for other reasons. See, Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 646 N.E.2d

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[4]H.R.S. § 91-10(5) provides:

> "In contested cases: [e]xcept as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of evidence shall be a preponderance of the evidence.

(Emphasis added.) H.R.S. Chapter 626, which contains Rule 304, Haw.R.E., constitutes the exception provided by law.

[5]Treehouse's brief cites to two California cases and contends that Hicks should be followed because the Haw.R.E. are based upon the California Rules of Evidence. However, neither case dealt with the applicability of California's evidentiary rules on presumptions or the public policy in this case. Also, one of the cited cases, Moisi v. College of Sequoias, 19 Cal.App.4th 564, 25 Cal.Rptr.2d 165 (Ct. of App., 5th Dist. 1993), was depublished by the California Supreme Court on January 27, 1994, and cannot be cited or relied upon by a court or any party. Rule 977, Cal. Rules of Court.

111 (1995); Hasnudeen v. Onan Corp., 531 N.W.2d 891 (Minn.App. 1995).

D. POLICY REASONS FOR NOT FOLLOWING HICKS

Shifting the burden of proof is a fair way to carry out the McDonnell Douglas goal of sharpening the focus on "the elusive factual question of intentional discrimination." Watson, 487 U.S. at 986 (citing Burdine, 450 U.S. at 255, n 8.) A business does not act in a totally arbitrary manner, Furnco, 438 U.S. at 577; and it is reasonable to require a business to prove that its actions were taken for its proffered legitimate non-discriminatory reasons. Respondent should have such evidence in its business records or the testimony of decision makers. If such evidence is introduced and deemed credible, respondent's burden is carried, the presumption is rebutted, and the conclusion must follow that it acted for its proffered legitimate non-discriminatory reasons.

Respondent is not limited in the number of reasons it may rely upon, but, it should not be exonerated by reasons not proffered or reasons disavowed. There should be no incentive for respondent to withhold any of its reasons; nor should respondent be allowed to deny a reason yet derive a benefit if the trier of fact believes that it is the real reason for the adverse action. It is unfair to require complainant to disprove the proffered reasons as well as "all possible nondiscriminatory reasons that a factfinder might find lurking in the record." Hicks, 113 S.Ct. at 2762 (Souter, J., dissenting). Complainant is entitled to have a full and fair opportunity to squarely address the proffered reasons to prove

pretext[6].

Both parties will benefit from this limitation on the issues. During discovery, if respondent states its legitimate non-discriminatory reasons, complainant does not have to inquire into disavowed or non-proffered reasons or ask respondent's witnesses additional questions to establish irrevocably that there are no other possible reasons for its actions. Id. at 2758 (Souter, J., dissenting) ("It is unfair and utterly impractical to saddle victims of discrimination with the burden of . . . eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision.") At the hearing, the focus should be upon the proffered reasons for purposes of adjudicatory economy. Id. at 2763 (Souter, J., dissenting) ("The majority's scheme, therefore, will promote longer trials and more pre-trial discovery, threatening increased expense and delay in Title VII litigation for both plaintiffs and defendants, and increased burdens on the judiciary.") The irony of the instant case is that both parties have taken exception to the finding that the allegedly fraudulent workers' comp claim was the reason for the adverse actions[7].

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[6]In Hicks, the immediate supervisor had specifically denied that there were any personal difficulties, however, six months after trial, the court found that personal animosity actually motivated the termination. There was no "opportunity, much less a full and fair one, [for Hicks] to demonstrate that the . personal animosity of his immediate supervisor, was unworthy of credence." 113 S.Ct. at 2766 (Souter, J., dissenting).

[7]Treehouse maintains that its actions were taken for its proffered reasons despite the pretext finding and continues to deny that workers' comp played any part in the decision. The Executive Director contends that the record shows that workers' comp could not have played a part because the earliest Treehouse could have

Shifting the burden of proof is also consistent with existing practice and common sense. Normally, respondent will not only articulate its legitimate non-discriminatory reasons but attempt to prove that such reasons actually motivated it. Mastie v. Great Lakes Steel Corp., 424 F.Supp. 1299, 1308 (E.D. Mich. 1976) ("[T]he practical distinction between the burden of going forward with the evidence and the burden of proof to establish a nondiscriminatory reason for the action taken is, in many instances, a distinction without substance.") At the same time, complainant will attempt to prove that the reasons are pretextual. It can be said that both parties have opposite but complimentary burdens of proof. In effect, complainant also has the burden of proving pretext because pretext and legitimate non-discriminatory reasons are opposite sides of the same coin. Proof of one precludes proof of the other. Thus, if complainant proves more likely than not that all of the proffered reasons are pretextual, respondent has not shown that the action was taken for a legitimate non-discriminatory reason, and the conclusion must follow the action was discriminatory[8]. However,

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found out about it was in January 1992, several months after the reduction in hours, and Arthur Maddigan, Treehouse's president, specifically denied any knowledge of it until after Cole had been terminated.

[8]Prior to Hicks, several circuit courts including the Ninth Circuit found discrimination upon proof of pretext. See, e.g., Williams v. Edward Apffels Coffee Co., 792 F.2d 1482, 1486 (9th Cir. 1986); MacDissi v. Valmont Industries, 856 F.2d 1054 (8th Cir. 1988); Tye v. Board of Education, 811 F.2d 315 (6th Cir.), cert. denied 484 U.S. 924 (1987); Thornburg v. Columbus & G. R.R., 760 F.2d 633 (5th Cir. 1985); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir) (en banc), cert. dismissed 483 U.S. 1052 (1987); Siegel v. Alpha Wire Corp., 894 F.2d 50 (3rd Cir); cert. denied 110 S.Ct. 2588 (1990).

if respondent proves more likely than not that one of its proffered legitimate non-discriminatory reasons actually motivated its action, complainant has failed to prove the reason is pretextual, and the conclusion must follow the action was taken for non-discriminatory reasons.

In this case, because of the finding of pretext, Treehouse did not carry its burden of proof. Thus, the Commission does not adopt the findings that Treehouse acted because of the non-proffered reasons and finds instead that Treehouse discriminated against Cole because of her age and disability and in retaliation for filing a discrimination complaint in violation of H.R.S. § 378-2.

To summarize, in cases where there is a prima facie case of discrimination shown through circumstantial evidence, Rule 304, Haw.R.E., applies. Initially, complainant has the burden of proving a prima facie case by a preponderance of the evidence. Upon proof of a prima facie case, there is a presumption that the adverse action was taken for discriminatory reasons. The burden of proof shifts to respondent to establish that it acted because of its proffered legitimate non-discriminatory reasons. If respondent carries its burden of proof by a preponderance of the evidence, the presumption is rebutted, and there must be a finding of no discrimination. If respondent does not carry its burden because complainant shows that the proffered reasons are pretextual, the presumption that the action taken for discriminatory reasons has not been rebutted, and a finding must be made that respondent has discriminated against complainant.

IV. OTHER EVIDENCE OF DISCRIMINATORY INTENT

A. DIRECT EVIDENCE OF DISABILITY DISCRIMINATION

The Hearings Examiner found that Treehouse had reduced Cole's hours to end her medical insurance so that she would quit in order to retaliate for the allegedly fraudulent workers' comp claim. Findings 25 and 30. This was based upon the testimony of Maddigan and the Treehouse comptroller that Maddigan had directed that Cole's work shifts be reduced, and Cole's testimony that the bar manager, Linda Evans, had told her that Maddigan didn't want her to work more than two shifts so that she would lose her medical benefits and quit. The Commission adopts Findings 25 and 30 that Treehouse reduced Cole's hours to end her medical benefits so that she would quit but does not adopt the portions related to the workers' comp claim.

The provision of medical benefits for employees working more than 20 hours per week is required by law, H.R.S. Chapter 393, and is a term, condition, or privilege of employment. An employer cannot discriminate against an employee in the terms, conditions, and privileges of employment because of a protected basis. H.R.S. § 378-2(A). When the loss of medical benefits is because of complainant's protected basis, respondent has acted with discriminatory intent. That the discriminatory act may have been part of a larger scheme to retaliate for the workers' comp claim does not excuse the discriminatory practice.

Treehouse knew that Cole was a diabetic who needed insulin on a daily basis. Diabetes is a disability because it is a physical

impairment which substantially limits a major life activity. H.R.S. § 378-1. The loss of medical benefits was designed to impact upon Cole's disability. The Commission finds especially probative Treehouse's refusal to give Cole another shift while it was continuing to hiring other bartenders. See, Part IV, B, infra. Given her experience and long tenure, it could have easily given Cole another shift in light of her need for medical benefits. Treehouse's desire to force Cole to quit by ending her medical benefits constitutes discrimination because of disability in the terms, conditions, and privileges of employment. Thus, the Commission finds there is also direct evidence that Treehouse discriminated against Cole because of her disability.

When there is direct evidence of discriminatory intent, the burden of proof shifts to respondent to either 1) rebut the evidence by proving that it is untrue; 2) establish an affirmative defense; or 3) limit, but not avoid, liability by proving that it would have taken the same action for legitimate non-discriminatory reasons, i.e. business necessity. See, In re Smith/MTL Inc., Commission Docket No. 92-003-PA-R-S (November 9, 1993). Findings 25 and 30 establish that the direct evidence was not rebutted; and there was no affirmative defense established. The claimed business necessity was low bar sales, however, the Commission has accepted Finding 33 that the bar sales did not justify the reduction in hours because Cole's sales actually exceeded the level. Thus, Treehouse discriminated against Cole because of her disability. This provides an alternative basis for concluding that Treehouse

violated H.R.S. § 378-2(1)(A).

B. EVIDENCE PROBATIVE OF AGE DISCRIMINATION

Pretext may be shown by evidence of how Cole was treated in comparison to other similarly-situated employees of a different protected basis. See, McDonnell Douglas, 411 U.S. at 804. The Executive Director contends that three bartenders, including Cole, (all over 37 years) were adversely affected by the bar sales levels, while a younger bartender (26 years) was not adversely affected despite having a low sales level. The favored bartender was "substantially younger" than Cole. See, O'Connor v. Consolidated Coin Caterers Corp., --- U.S. ---, 1996 WL 14564 (1996) (favorable treatment of a substantially younger employee is a "far more reliable indicator of age discrimination.") The Commission finds that the favorable treatment of the similarly-situated, substantially younger bartender is an additional basis to conclude that Treehouse's justification for its treatment of Cole was pretextual.

Another way to establish pretext is to examine an employer's general policy and practice with respect to minority employment, including statistical evidence about the composition of the labor force, because it may be "reflective of restrictive or exclusionary practices." McDonnell Douglas, 411 U.S. at 805, n 19. The range of ages of bartenders hired while Cole was employed constitute statistical evidence probative of age discrimination. In this case, the hiring pattern shows that Treehouse had a 3-6 ratio of younger (under 30 years of age) bartenders and older (30 years of

age and above) bartenders up until the time a particular manager, Peter Johnson, was terminated. Johnson had decided not to implement Maddigan's directive to hire younger female bartenders. Finding 17. However after Johnson's termination, those hired were mostly younger bartenders--8 out of 12. Then after Cole filed her age discrimination complaint, the hiring pattern changed and Treehouse began to hire mostly older bartenders.

The Executive Director contends that hiring older bartenders was in response to the age complaint and does not excuse Treehouse from its earlier practice of discriminating against older bartenders. The Commission agrees. See, Furnco, 438 U.S. at 579; Teamsters v. United States, 431 U.S. 324, 341-42 (1977). Although Treehouse began hiring older bartenders after the age complaint was filed, the prior pattern of hiring younger bartenders reflected a change in practice after Johnson left. A pattern of hiring based upon age is probative of age discrimination and provides a basis to infer that Treehouse had an animus against older bartenders when it reduced Cole's hours. See, MacDissi v. Valmont Industries, Inc., 856 F.2d at 1058 (firing of two oldest employees in nine member department is "circumstantial evidence which tends to support a specific claim of disparate treatment.") This constitutes additional support for the finding of pretext.

VIII. OTHER FINDINGS AND CONCLUSIONS OF LAW

With the exception of the findings related to the workers' comp claim and the other non-proffered reasons for the adverse

actions, the Commission hereby adopts the remaining Findings of Fact in the Recommended Decision. The Commission concludes that it has jurisdiction over the complaints and that Treehouse violated H.R.S. § 378-2 by discriminating against Cole because of her age and disability and by retaliating against her for filing a discrimination complaint. As discussed above, these violations were proven under the disparate treatment theory of discrimination by circumstantial evidence. The age discrimination violation was also proven by direct evidence. Finally, the Commission adopts the Conclusion in the Recommended Decision that there was no disparate impact discrimination.

IX. REMEDIES FOR TREEHOUSE'S DISCRIMINATORY PRACTICES

The Hearings Examiner made extensive findings about the effect of Treehouse's actions upon Cole. Cole lost wages and medical benefits because of the reduction in hours and termination. She also suffered from a great deal of emotional distress and gained much weight as a result of the discriminatory actions.

A. BACKPAY

The Commission hereby awards Cole back pay and benefits from the time of her demotion to the closure of Treehouse less her other earnings[9]. The Commission finds that Cole is entitled to backpay of $1,260.00 per month for 41 months (October 1991 to March 1995 when Treehouse closed) or $51,660.00 less her earnings at Treehouse

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[9]No deduction is being made for Cole's earnings at Apparels of Pauline because she was already working there and had no increase in hours after her Treehouse hours were reduced.

(with the reduced hours) of $2,960.00 ($592.00 per month[10] for 5 months), and less her earnings at Valley Isle Promotions, dba "Oh Baby", of $14,720.00 (for the period from July 1992 to March 1995) for a net back pay amount of $33,980.00. Cole's monthly expense for insulin was $40.00 per month for 41 months or $1,840.00. The total amount of back pay and benefits awarded is $35,820.00.

B. COMPENSATORY DAMAGES

The Commission can award compensatory damages to victims of discrimination. H.R.S. § 368-17. An award of compensatory damages carries out the constitutional provision supporting the exercise of one's civil rights and against discrimination in the exercise thereof, Haw. Const. Art. I, Sect. 5, and the public policy of the State against discrimination in employment. H.R.S. § 368-1.

The record contains ample evidence that Cole suffered from emotional distress resulting from the discrimination in the exercise of her civil rights. Losing her job made her anxious, depressed, and feel humiliated. She had nightmares and sleeplessness and gained considerable weight as a result. She was deeply concerned about the loss of medical benefits because of her on-going medical needs. The Commission hereby awards Cole a total of $20,000.00 for the violation of her civil rights.

C. PUNITIVE DAMAGES

There is also direct evidence that Treehouse reduced Cole's

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[10]In Table II of the Executive Director's Written Exceptions Cole's average weekly earnings is stated as $168.00 based upon $78.00 in wages and $70.00 in tips. Based upon these amounts, however, her average weekly earnings was $148.00, and her average monthly earnings was $592.00.

hours to end her medical benefits so that she would quit. Treehouse's refusal to give her another shift despite her tearful requests while at the same time hiring younger, less experienced, bartenders clearly reflects a willful, wanton, and reckless disregard of Cole's status as a disabled person. Treehouse was not in any financial difficulty whereby it had to reduce employees' hours so that it could not provide Cole with another shift as she once had. There was no business necessity justification for its callous and cavalier treatment of her. The Commission finds that there is clear and convincing evidence that Treehouse acted willfully, wantonly, and recklessly when it reduced her hours because of her disability and concludes that Cole is entitled to receive punitive damages of $10,000.00.

D. AFFIRMATIVE RELIEF

The Commission orders the following affirmative relief:

1) Treehouse is ordered to cease and desist from discrimination in age, disability, and retaliation;

2) Treehouse will implement an appropriate non-discrimination policy with specific instructions as to whom complaints can be made; and

3) Treehouse will provide Cole with a neutral letter of reference and not make any statements, verbally or in writing, to anyone requesting references regarding her complaints against it.

DATED: Honolulu, Hawaii MAY 2 1996

AMEFIL AGBAYANI, Commissioner

WILLIAM HOSHIJO, Commissioner

FAYE KENNEDY, Commissioner

JACK LAW, Commissioner

RICHARD PORT, 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 days after service of the certified copy of the final decision and order of the agency.