

**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS  
DEPARTMENT OF LABOR  
ADMINISTRATIVE HEARING OFFICE**

In the Matter of:	)	Labor Case No. 17-003(T)
Emeelourd C. Udani,	)	
Complainant,	)	<b>ADMINISTRATIVE ORDER</b>
v.	)	
	)	
Huang Shun Corporation,	)	
Respondent.	)	
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This labor case came on for hearing on October 3, 2017, in the Hearing Office of the CNMI Department of Labor, located on Capitol Hill, Saipan. The parties testified via a Skype internet connection from the Tinian Labor Office to the Hearing Officer who was in the Administrative Hearing Office in Saipan.

Complainant Emeelourd C. Udani appeared without counsel. Respondent Huang Shun Corporation appeared through its Assistant Office Manager, Henrietta Cruz, and its legal counsel, Robert O'Connor. The Tinian Labor Office appeared through investigator Ramona P. Cabrera-Viches. Hearing Officer Jerry Cody, presiding.

**After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:**

Complainant Emeelourd C. Udani ("Employee") worked as a store cashier for Respondent Huang Shun Corporation ("Employer") in Tinian from June 20, 2016, until July 17, 2017. During her employment, on June 20, 2017, Employee filed a complaint against Employer. [A copy of the Complaint was entered into evidence as Hearing Exhibit 1.] This case followed.

**Denial of the Motion For Continuance of the Hearing:**

On the morning of the hearing, October 3, 2017, upon realizing that Employer had brought an attorney to represent the company, Employee asked that the hearing be postponed for thirty (30) days so that she could hire an attorney to represent her. The request was untimely. The Notice of Hearing, issued on July 28, 2017, states that "any request for continuance of the hearing must be made in writing to the

Hearing Office at least five days prior to the scheduled hearing date.” [Notice of Hearing; Order Referring Parties For Investigation; Other Orders, issued on 7/28/2017.] Although Employee had known of the hearing since July, she had taken no steps to hire counsel. Employee admitted that she had not thought to hire an attorney until the morning of the Hearing when she saw that Employer had hired an attorney to represent the company. [Testimony of Ms. Udani.]

Employer opposed the request on the grounds that it was untimely and prejudicial to its interests. Employer noted that, given the last-minute nature of the request, Employer’s counsel had already flown to Tinian to defend the case. Employer had prepared for hearing and gathered its witnesses. Employer contended that lost costs and attorney’s fees for the session would be about \$700.

Based on the facts, the Hearing Officer denied Employee’s request to postpone the hearing and ordered the Hearing to proceed. As in the case of all litigants who appear *pro se*, the Hearing Officer gave Complainant wide latitude in terms of procedural and/or evidentiary rules. [See Employment Rules and Regulations, codified in the Northern Mariana Administrative Code (“NMIAC”) at § 80-20.1-460(b).] <sup>1</sup>

### **FINDINGS OF FACT**

Employee worked as a store cashier for Employer at the Huang Shun Market in Tinian from June 16, 2016 until July 17, 2017. [Testimony of Ms. Cruz and Ms. Udani.] Employee was hired without a written contract and the employment was not made subject to any written contract. [Testimony of Ms. Cruz.]

At the time that Employee was hired, Employer presented her with a 4-page document, entitled “Rules and Regulations.” Employee read these rules and signed the document, indicating that she agreed to abide by the rules. [A copy of Employer’s Rules and Regulations was entered into evidence as Hearing Exhibit 2; the original of the document was entered into evidence as Hearing Exhibit 2a.]

Rule no. 5 of Employer’s Rules and Regulations stated that “cashiers are not allowed to get short or over of 2 dollars or less. Any cashiers who got short must be responsible, you cannot be short or over. This will reflect on your

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<sup>1</sup> Section 460(b), entitled “Pro Se Litigants,” states, in part: “In applying the rules of procedure in adjudicative proceedings, a hearing officer shall give added accommodation to parties appearing *pro se* to ensure than no party is prejudiced and that the ends of justice will be served. ” NMIAC at § 80-20.1-460(b).

performance.” [*Id.* at no.5.] Stated simply, Employer expected its cashiers to reconcile the amount of cash they collected at the end of each shift; discrepancies between the cash received and the cash register tape needed to be no more than two dollars, either over or under. Discrepancies of more than two dollars would reflect negatively on the cashier’s performance.<sup>2</sup>

Employee worked as a cashier at Huang Shun Market on the overnight shift (midnight to 8 a.m.) from June 2016 until late March 2017. On March 16, 2017, Employee requested and received a Certificate of Employment from Employer which stated, among other things, that “she (Employee) was proven to be with satisfactory performance, good moral character.” [A copy of the Certificate of Employment was entered into evidence as Hearing Exhibit 7,]

On March 26, 2017, Employee was attacked by a store customer while working her shift at Huang Shun Market. She spent several days recovering, including two days that were spent at the hospital in Saipan. Employee testified that around this time, the Tinian police asked Employer to move Employee’s shift from the night to the day shift. On April 2, 2017, Employee shift at Huang Shun Market was changed to the “day” shift (4 p.m. to midnight).

After Employee transferred to the day shift, she began having difficulty keeping up with the increased customer traffic at the store. [Testimony of Ms. Udani and Ms. Cruz.] Employee found the pace to be must faster, given the increased number of customer business compared to that of the overnight shift. At Hearing, Employee admitted that she had had difficulty keeping up with the increased pace at the cash register. Employee asked her Employer to give her a few “weeks or months” to improve her performance. [Testimony of Ms. Udani.]

### **Employee’s Informal Complaint lodged on May 25, 2017:**

In April and May 2017, Employee took offense at comments made by Employer’s bookkeepers, Jayleen Dimalanta and Sunny Zhang, who had commented out loud about the long lines behind Employee’s cash register and urged her to work faster. On May 25, 2017, Employee visited the Tinian Labor Office and filed an informal complaint about the harassment she was allegedly suffering from the actions of Employer’s accountants. DOL’s Ms. Cabrera contacted Employer’s Assistant

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<sup>2</sup> Employee testified that she believed that Exhibit 4 was not the document that she had signed when she was hired. Employer then produced the original Rules and Regulations [Hearing Exhibit 4(a)] that contained the original signature of Ms. Udani. The Hearing Officer finds that Employee signed this document on the date indicated – 6/15/16, as evidenced by Hearing Exhibit 4(a).

Manager, Henrietta Cruz, in an effort to diffuse the situation. Ms. Cruz then spoke to the bookkeepers, reminding them that it was not in their job description to criticize other employees and to instruct them not to lecture co-workers about how to do their jobs. [Testimony of Ms. Cabrera and Ms. Cruz.] Employee reported no further incidents of harassment after Ms. Cruz spoke to the bookkeepers.

### **Employee's Labor Complaint Filed on June 20, 2017:**

As stated above, Employee lodged an "informal" complaint against her two co-workers on May 25, 2017. On June 20, 2017, Employee returned to the Tinian Labor Office and filed a "formal and final" complaint against Employer. Again, this complaint mainly focused on the actions of Employee's two co-workers, Jayleen Dimalanta and Sunny Zhang. [A copy of the Complaint Letter ("Complaint") was entered into evidence as Hearing Exhibit 1.]

The Complaint contained certain allegations and requests for relief that were entirely ignored by Employee at Hearing. These include: an allegation that Jayleen denied Employee's request to change her schedule due to her son's illness; an allegation that Employer failed to bring Employee to the hospital after she was attacked in March 2017; a request for compensation for "shocking threats" and for "emotional damages;" and a reference to "issues...regarding CNMI Employment Equal Opportunity." Given that no evidence was presented regarding these issues and no mention was made of them by Employee at Hearing, they are deemed waived. [See Conclusions of Law, item no. 2, on page 7.]

**Amended Complaint:** After Employee was terminated on July 17, 2017, she shifted the focus of her Complaint to the contention that she had been wrongfully terminated in retaliation for her filing the Complaint with the Department of Labor. [Testimony of Ms. Udani.] During the Hearing, the Hearing Officer, *sua sponte*, issued an oral order amending the Complaint to add this charge. [See Conclusions of Law, item no. 1, on page 7.]

### **Employee's Job Performance:**

After Employee began working the day shift in April 2017, Employer's management noticed that Employee's daily sales reports contained many discrepancies and several incorrect transactions that were more than two dollar errors, in violation of Employer's Rule 5 (Hearing Ex. 2). [Test. of Ms. Cruz.]

**First Warning Letter:** On April 20, 2017, Employer issued its “First Warning Letter.” [A copy of the First Warning Letter was entered into evidence as Hearing Exhibit 3.] In the letter, Employer wrote: “We reviewed your daily sales reports for the month of April, 2017. We noticed that you had a constant cash sales discrepancy on your report.” The letter listed six daily sales discrepancies in the first 15 days of April, and reminded Employee that company cashiers were only allowed cash discrepancies of less than \$2. The letter continued: “We do not tolerate this matter. The situation showed negligence and unsatisfactory performance of yours....This is a serious matter and deserves your prompt attention. We are expecting you to improve your performance....” *Id.*

During the months of May, June and early July 2017, Employee continued to have cash sales discrepancies of more than \$2 in her daily sales reports. Employee testified that she knew Employer was dissatisfied with her job performance during this period. Employee asked her employer again and again to give her more time, months if necessary, to improve her performance on the register. [Testimony of Ms. Udani.]

**Second Warning Letter:** On July 12, 2017, management prepared a second warning letter, entitled “Warning Letter,” signed by Asst. Manager Henrietta Cruz. In the letter, Cruz noted that a review of Employee’s daily sales reports for the past two months revealed 11 days (between May 1 and July 5) in which the discrepancies or incorrect transactions were for amounts greater than two dollars. The letter noted that Employer did not see any improvement after the first warning letter. Once again, Employer stated that the matter was “serious” and noted that “this situation showed negligence and unsatisfactory performance of yours.” [A copy of the Warning Letter, dated 7/12/2017, was entered into evidence as Hearing Exhibit 4.]<sup>3</sup> The Warning Letter was delivered to Employee on about July 15, 2017. [Testimony of Ms. Udani.]

On July 15, 2017, Employee’s daily sales report again showed a discrepancy of more than two dollars (over by \$5.15). [A copy of this daily sales report was entered into evidence as Hearing Exhibit 6.]

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<sup>3</sup> Both the First Warning Letter and the (second) Warning Letter attached copies of all daily sales reports that were cited in the letters. These back-up documents were entered into evidence along with the letters (see Hearing Exhibits 3 and 4).

## Termination

On about July 15, 2017, Employer's management prepared a termination letter for the review of the chief executive officer, Huang, Yuren. Mr. Huang arrived on Tinian around July 15, 2017, and reviewed the situation. According to Ms. Cruz, Mr. Huang had been inclined to give Employee one more chance to improve her performance, but an incident occurred on July 16, 2017, which caused Mr. Huang to decide to terminate Employee. [Testimony of Ms. Cruz.]

The incident involved a videotape of store operations on the evening of July 16, 2017, which showed that shortly after 10 p.m., Employee had allowed a customer to buy items that were concealed in a black plastic bag without scanning such items, as was company policy. Employer believed the customer had loaded the bag with beer, which all stores are prohibited by law from selling to the public after 10 p.m. [4 CMC § 5555; and regulations at NMIAC § 20.1-10.1-145(5).]<sup>4</sup> Employer testified that selling alcoholic beverages after 10 p.m. is a very serious matter because violating this prohibition could cause Employer to lose its license to sell beer. If that were to happen, Employer could lose many customers who buy beer along with other groceries at Employer's store. [Testimony of Ms. Cruz.]

After viewing the videotape on July 16, 2017, Mr. Huang decided to terminate Employee; Mr. Huang then signed the Termination Letter, which had previously been prepared for his signature.<sup>5</sup> [A copy of the Termination Letter was entered into evidence as Hearing Exhibit 5.] The letter was delivered to Employee at her home on July 17, 2017.

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<sup>4</sup> A digital copy of the "videotape" was produced by Employer post-hearing and entered into evidence as Hearing Exhibit 10. After viewing the tape, the Hearing Officer notes that the "tape" shows the customer approaching the register with a closed black bag and Employee ringing up something on the register without looking in the bag. Prior to that, the tape shows the customer going to the refrigerated section of the store and putting one or two cans of something in the bag; the Hearing Officer cannot see if the cans are beer or some other beverage.

<sup>5</sup> The Termination Letter made no mention of the videotaped incident. Rather, it only referred to the discrepancies in Employee's daily sales reports. [See Hearing Exhibit 5.]

## CONCLUSIONS OF LAW

### **1. Employee's Complaint was amended during the Hearing to add a claim for wrongful termination in retaliation for filing a labor complaint.**

After Employee was terminated on July 17, 2017, she shifted the focus of her Complaint to the contention that she had been wrongfully terminated in retaliation for her filing the Complaint with the Department of Labor. [Testimony of Ms. Udani.] Employee never formally requested an amendment of her Complaint to add this charge, but it was clear from her Opening Statement at Hearing that the gist of her complaint had become wrongful termination due to alleged retaliation. During the Hearing, the Hearing Officer, *sua sponte*, issued an oral order amending the Complaint to add this charge. This was done in accordance with the Hearing Officer's responsibilities to protect *pro se* litigants against being prejudiced by their lack of legal expertise and to ensure that the ends of justice are served. [Regs. at NMIAC § 80-20.1-460(b) ("The hearing officer should take all steps necessary to develop the record fully, including the record adverse to the Department." See also fn. 1.)]

### **2. The Complaint requested certain relief that falls outside the jurisdiction of the Hearing Office; those portions shall be stricken from the Complaint.**

The Complaint, filed on June 20, 2017, requests compensation for "shocking threats," and "emotional damages" as well as compensation for Employer's alleged failure to bring Employee to a hospital after she was attacked (she took herself to the hospital) and compensation for the alleged harassment that Employee suffered at the hands of her co-workers. Such relief is outside the jurisdiction of the Hearing Office. See 3 CMC § 4942(a) (granting the Administrative Hearing Office jurisdiction over "all actions involving alleged violations of the labor and wage laws of the Commonwealth"). Accordingly, these portions of the Complaint shall be stricken and shall not be considered in this Administrative Order.

### **3. Employee worked for Employer under an "at will" employment arrangement.**

Commonwealth courts have followed the principle that employment of unspecified duration is considered "at will" employment. [See *Shiprit v. STS Enterprises, Inc.*, Civ. Action No. 99-0490, Order Granting Defendant's Motion To Dismiss, issued December 13, 1999.] Employee was hired without a written contract and for an unspecified duration; thus, she was an at-will employee.

**4. As an “at will” employee, Employee could be terminated with or without cause, provided that the termination did not otherwise violate protected employee rights. Under the so-called “public policy” exception to the at-will doctrine, Employee could maintain a claim for wrongful termination based on her allegation that Employer retaliated against her for filing a labor case.**

The “at-will” employment doctrine provides that employment for an indefinite term may be terminated by either the employer or employee at any time or for no reason, without legal liability. *Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9<sup>th</sup> Cir. 1989). However, there are three general exceptions to this rule: (1) where employer’s conduct undermined an important public policy; (2) where discharge would breach an implied-in-fact promise of employment for a specific duration; or (3) where discharge would breach an implied-in-law covenant of good faith and fair dealing in employment contracts. *Shiprit, supra* [citing *Huey v. Honeywell, Inc.* 82 F.3d 327, 330-331 (9<sup>th</sup> Cir. 1996)].

The applicable exception in this case is the so-called “public policy” exception to the at-will doctrine. Employee alleged that the actual reason for her termination was as retaliation for her filing a labor complaint against Employer one month before her termination. If this charge were proven, it could support a finding of wrongful termination, given that there is a strong public policy in the CNMI against employers retaliating against their employees for filing a labor complaint. This principle is codified in a labor regulation which states that “[a]n employer shall not retaliate against an employee for filing a complaint. Such retaliation is a separate cause of action against the employer.” [Employment Rules and Regulations at NMIAC § 80-20.1-455(1).]

**5. Employee failed to prove by a preponderance of the evidence that her termination was done in retaliation for her filing of a labor complaint against her employer about one month before her termination.**

Employee failed to meet her burden of proving by a preponderance of the evidence that she had been terminated in retaliation for filing a labor complaint against Employer. In fact, Employee presented no evidence at Hearing to prove her assertions regarding retaliation.

Employee’s main contention was that Employer complained about her poor performance on the cash register as a mere pretext for the “actual” reason which was to retaliate against her for “seeking assistance from Labor.” [Testimony of Ms. Udani.] Yet, this contention is belied by the fact that Employer began



complaining about Employee's poor performance on the cash register three months *before* Employee filed her labor complaint (and two months before her "informal" complaint). Moreover, as she admitted during the Hearing, Employee's labor complaint attacked the conduct of her co-workers, the bookkeepers, rather than company management. Nothing in the record suggests that Employer's management - Asst. Manager Cruz or Mr. Huang - were angry or resentful about Employee's charges, or that they felt the need to protect the bookkeepers. On the contrary, Ms. Cruz testified that she had reprimanded the bookkeepers for the comments they made against Employee.

Furthermore, Employee cited no facts to support her suspicion that management sought to retaliate against her for her filing of the labor complaint. Employee testified that nobody from management mentioned the case to her. This was contradicted somewhat by Ms. Cruz who testified that she had told Employee, it's "your right to file a complaint if you want to." Ms. Cruz testified credibly that the company's decision to issue the second warning letter, and Mr. Huang's decision to terminate, were in no way connected to the fact that Employee had filed a labor case. [Testimony of Ms. Cruz.]

Finally, as discussed below, Employer presented credible evidence to show that its decision to terminate Employee was based on valid business reasons. Absent some credible evidence that Employer acted with a retaliatory motive, the retaliation claim remains merely an unsubstantiated suspicion on the part of Employee.

**6. Employer established by a preponderance of the evidence that it had cause to terminate Employee for valid business reasons and that its decision to terminate was based on those legitimate reasons.**

As an at-will employee, Employer did not need "cause" to terminate Employee. Nevertheless, Employer presented credible evidence that its decision to terminate Employee was based on valid business reasons.

Employer complained about Employee's numerous cash discrepancies that she reported while operating the cash register; these discrepancies were in amounts above what was allowed under company Rules and Regulations. [Hearing Exhibit 2.] These mistakes were numerous enough to cause Employer's management to be concerned about Employee working the cash register at the market. Employer brought this issue to Employee's attention and warned her in April 2017, months before her termination, that unless she improved, such performance would not be tolerated. [See First Warning Letter at Exhibit 3.]

After receiving the warning, Employee continued to perform below the standards set by Employer: 11 days of inaccurate daily sales reports were reported over the next three months. The issue of Employee's poor performance arose again in mid-July 2017, in connection with a general employee review conducted by the chief executive officer, Mr. Huang. Employer then issued a second warning letter (Hearing Exhibit 4) noting the Employee's continued mistakes on her daily sales reports. [Testimony of Ms. Cruz.]

The final conduct that led to termination occurred on July 16, 2017, when Employee allowed a customer to purchase an unknown beverage after 10 p.m., without requiring the customer to show the item he was buying and without scanning the item on the register, as was company policy. Whether the videotape shows a beer being bagged or not is almost beside the point. Given the known law against selling alcoholic beverages after 10 p.m., the cashier should not have allowed a customer to hide the beverage he was purchasing, especially after 10 p.m. Employee's conduct put Employer at risk for being cited for a violation and losing its license to sell alcoholic beverages. This proved to be the final negative mark against Employee's performance. After viewing the video, Mr. Huang made the decision to terminate Employee.

The Hearing Officer finds that the evidence establishes that Employer had cause to terminate Employee. It was reasonable for Employer to expect Employee's performance on the cash register to improve after *many months* on the job. It was also reasonable for Employer to conclude, when the cash discrepancies continued, that Employee was simply not going to improve. Furthermore, Employee's failure to scan all products, especially those purchased after 10 p.m., caused Employer to have a legitimate concern that Employee was jeopardizing Employer's license to sell beer. For these reasons, Employer had cause to terminate Employee. Thus, even if Employee's employment had been subject to a "termination only for cause" requirement, Employer would not have been found at fault for this termination.<sup>6</sup>

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<sup>6</sup> Employer produced an example of the type of written contract that Employer uses in employing CW-1 status workers. The contract contains a section regarding "Termination For Cause" and one cause listed is "neglect" or "careless performance." [A copy of the contract was entered into evidence at Hearing Exhibit 9.] Employer argued that Employee's inaccurate daily sales reports demonstrated poor or careless performance; therefore, even if Employee had been employed under these types of written contracts, she could have been terminated for cause. The Hearing Officer agrees.

**7. Based on the above conclusions, judgment should be entered in favor of the Respondent Employer in this case.**

For the foregoing reasons, the Hearing Officer finds that Employer did not violate any labor laws or statutes by terminating Employee in July 2017. Accordingly, Employee shall take nothing from the Complaint and judgment shall be entered in favor of Employer – Huang Shun Corporation.

**8. Employer shall be awarded the reasonable costs it incurred in defending this case, provided that such costs are itemized in an Affidavit and approved by the Hearing Officer.**

At the conclusion of the Hearing, Employer's counsel made an oral request for reimbursement of Respondent's reasonable "costs" incurred in defending this action, excluding attorney fees. As the prevailing party, Respondent could request attorney fees but chose not to do so. The Hearing Officer finds Respondent's request to be justified. Therefore, Respondent shall be awarded its reasonable costs incurred in defending this case, provided that those costs are substantiated in an itemized Affidavit to be submitted to the Hearing Officer for approval. [3 CMC §§ 4947(d)(8) and (d)(11); and Regs. at §§ 80-20.1-485(c)(13) and (c)(14).]

**The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED:**

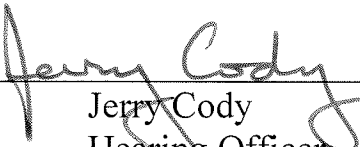
1. **Motion to Postpone Hearing was Denied:** For the reasons stated in the discussion on pages 1-2, Complainant's request to postpone the hearing on October 3, 2017, was denied as untimely and prejudicial. 3 CMC § 4947(d)(11).
2. **Judgment:** Based on the findings and conclusions detailed above, judgment is hereby entered in favor of Respondent Huang Shun Corporation with respect to the Complaint filed on June 20, 2017, and amended at Hearing. 3 CMC § 4947(b).
3. **Award of Costs:** Respondent Huang Shun Corporation shall be awarded the costs it reasonably incurred in defending itself in this action (excluding attorney fees). 3 CMC § 4947(d)(8) and (d)(11). Respondent is ORDERED to submit an Affidavit of Costs to the Hearing Office within ten (10) days after the date of issuance of this Order, if it wishes to pursue its request for costs.

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[L.C. No. 17-003(T)]

4. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: October 25, 2017

  
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Jerry Cody  
Hearing Officer