

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY,
EXECUTIVE DIRECTOR, *ex rel.*
TOMORROW KOSAL,

Complainant,

v.

PAUL KOPF,
D/B/A GOLDSTREAM STORE,
A/K/A GOLDSTREAM GENERAL STORE
Respondent.

ASCHR No. J-10-272
OAH No. 11-0024-HRC

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, now ORDER that the Administrative Law Judge's Recommended Decision of August 10, 2011 recommending that Respondent be found to have engaged in unlawful retaliation against Tomorrow Kosal in violation of AS 18.80.220(a)(4) and recommending that certain relief be granted, is hereby ADOPTED by the Commission in its entirety.

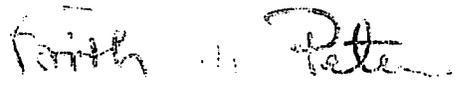
IT IS SO ORDERED.

Judicial review is available to the parties pursuant to AS 18.80.135 and AS 44.62.560-570. An appeal must be filed with the superior court within 30 days from the date this Final Order is mailed or otherwise distributed to the parties.

DATED: February 29, 2012


Lester C. Lunceford, Commissioner

DATED: February 29, 2012


Faith Peters, Commissioner

DATED: February 29, 2012


Karen Rhoades, Commissioner

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
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CERTIFICATE OF SERVICE

I certify that on February 29, 2012, a true and correct copy of this Final Order was mailed or delivered to the following parties:

✓ Stephen Koteff, Human Rights Advocate (hand-delivery)
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, AK 99501

Paul Kopf d/b/a Goldstream Store
2591 Goldstream Road
Fairbanks, AK 99709

and to:

Administrative Law Judge Jeffrey Friedman
Office of Administrative Hearings
State of Alaska
550 W. 7th Avenue, Suite 1600
Anchorage, AK 99501

By: Margaret A. Taylor
Margaret A. Taylor
Commission Secretary

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
APPOINTMENT BY THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS**

Paula M. Haley, Executive Director, Alaska)
State Commission for Human Rights *ex rel.*)
TOMORROW KOSAL,)
)
Complainant,)
)
v.)
)
PAUL KOPF,)
d/b/a Goldstream Store,)
a/k/a Goldstream General Store,)
)
Respondent.)

OAH No. 11-0024-HRC
ASCHR No. J-10-272

RECOMMENDED DECISION

I. INTRODUCTION

The State Commission on Human Rights (ASCHR) filed an Accusation against Paul Kopf, alleging that he retaliated against a former employee in violation of AS 18.80.220(a)(4). Specifically, the Accusation alleged that he banned Tomorrow Kosal from his store in retaliation for having testified in a prior ASCHR proceeding.

ASCHR appointed the Office of Administrative Hearings (OAH) to conduct a hearing in this matter. Mr. Kopf contested the charges against him. A case planning conference was held to set a hearing date and schedule other prehearing matters, and Mr. Kopf attended the conference by telephone. On the date of the scheduled hearing, Mr. Kopf did not appear, and was not available by telephone. The Executive Director subsequently filed a Motion for Default, and requested a default judgment against Mr. Kopf.

A default occurred when Mr. Kopf failed to appear at the hearing. Based on this failure, and his failure to participate in prehearing matters for a substantial period of time prior to the hearing, it is not appropriate to set aside that default. The evidence in the record shows that a motivating factor in Mr. Kopf's decision to ban Ms. Kosal from his store was her prior deposition and hearing testimony. Accordingly, he has violated AS 18.80.220(a)(4) and appropriate remedies should be imposed.

II. FACTS

A. Mr. Kopf's Dealings with Ms. Kosal

The following relevant facts can be determined from the record in this matter. First, there is no dispute that there was a prior Commission hearing involving Mr. Kopf and a different employee, entitled *Paula Haley, ex rel Lynn Dowler v. Paul Kopf*.¹ There is also no dispute that Ms. Kosal testified in that prior hearing.² Finally, there is no dispute that Mr. Kopf banned Ms. Kosal from his store after she testified.³

In a statement filed on February 14, 2011, Mr. Kopf stated he has been attacked by Lynn Dowler “who organized my employees to work together to destroy me financially so that the previous owner would be forced to foreclose and return control of the store back to Lynn Dowler.” In his opposition to the Motion for Default, Mr. Kopf states: “Lynn Dowler and Tomorrow Kosal are literally engaged in a conspired and executed program to cause me total financial ruin.”

In his opposition to the Motion for Default, Mr. Kopf states: “To make matters worse, the HRC clearly observed that Tomorrow Kosal the new complainant was proven at the hearing to outright lie on 3 major accounts that prove she TOO is NON CREDIBLE.” Mr. Kopf’s attorney stated that one reason Ms. Kosal was banned from the store was “because she testified falsely, contrary to objective facts proven by other evidence”⁴

B. The Prior Hearing

Because much of Mr. Kopf’s argument in the present case is predicated on his strongly held belief that the *Dowler* case was wrongly decided, the relevant holdings from that decision are included here.

The evidence demonstrates that Lynn Dowler was subjected to a hostile work environment that altered the terms of her employment. It is true that Ms. Dowler was not being coerced into agreeing with or conforming to Mr. Kopf’s religious beliefs. She was, however, required to listen to those religious beliefs almost every day – beliefs that differed from her own. Ms. Dowler testified that the conversations interfered with her work and made her uncomfortable, and several witnesses corroborated that testimony. Both Amber Dowler and Collin Hogan testified that Lynn Dowler looked frustrated and uncomfortable when Mr. Kopf was talking to her about his religion, and Amber Dowler testified that her

¹ ASCHR No. J-09-138, OAH No. 10-0264-HRC (ASCHR 2011).

² Affidavit of Tomorrow Kosal, ¶ 11.

³ Affidavit of Tomorrow Kosal, ¶ 12; July 22, 2011 pleading from Mr. Kopf.

⁴ Motion for Default, Exhibit 3.

mother had complained to her about this. It is also significant that the person making the religious statements was Mr. Kopf, the owner of this small business. Ms. Dowler could not avoid working with Mr. Kopf, and he controlled all aspects of the employment relationship.

Goldstream Store is a small business, and its owner, Mr. Kopf, lived in the apartment above the store. He would come downstairs daily, often to the backroom where Ms. Dowler was working. He would trap her in the room such that she felt she could not escape listening to him. When she did try to avoid him, he would follow her, continuing to talk about religion. At least a few of Mr. Kopf's comments were disparaging to Catholics. A reasonable person would find this to be sufficiently hostile or abusive to alter the terms and conditions of employment. In addition, Ms. Dowler testified that she subjectively perceived this conduct as abusive, and there is no reason to doubt her testimony on that question.^[5]

The hostile work environment found in the *Dowler* matter stemmed from two sources. First, Mr. Kopf frequently forced Ms. Dowler to listen to his discussion of religion. Second, that at least a few of Mr. Kopf's comments disparaged Catholics. In defending the present case, Mr. Kopf focuses on the second reason, and disputes the accuracy of that finding, but does not mention the first basis for finding a hostile work environment.

In addition, the *Dowler* decision found that Ms. Dowler had been constructively discharged. Contrary to the implication of some of Mr. Kopf's arguments, there was no finding that he intended her to quit. Instead, the finding was that Ms. Dowler felt compelled to quit without regard to whether that was Mr. Kopf's intent.

C. Proceedings in this Case

After the conclusion of the *Dowler* hearing, the Accusation in this case was referred to the Office of Administrative Hearings for a hearing.⁶ On January 27, 2011, a Notice of Case Planning Conference was issued. OAH received a letter from Mr. Kopf on February 14, 2011. That letter expressed concerns about the *Dowler* decision and the hearing process, and requested that a different administrative law judge be assigned to hear the present case. Mr. Kopf's request for a different judge was denied without prejudice.⁷ The notice denying his request informed him of the manner to properly request a different judge, but Mr. Kopf did not re-file his request with an affidavit as required by AS 44.64.070.

⁵ *Dowler*, OAH No. 10-0264-HRC, page 10 (footnotes omitted).

⁶ Referral dated January 6, 2011.

⁷ Notice Regarding Request for Reassignment of Judge dated February 15, 2011.

The case planning conference occurred on February 17, 2011. Mr. Kopf participated in that conference by telephone, as did counsel for the Executive Director.⁸ Various prehearing deadlines were mutually agreed to during that conference, and memorialized in the Scheduling Order sent to the parties. One of the issues raised during the scheduling conference was the location of the hearing,⁹ and a date was set by which either party could file a motion to hold the hearing in a different location. The hearing in this matter was set to be held on May 24, 2011. In March, the Executive Director requested a discovery conference. The asserted reason for this request was Mr. Kopf's failure to appear at his deposition despite having been served with a valid subpoena.¹⁰ A discovery conference was scheduled, and notice of that conference was mailed and e-mailed to Mr. Kopf.¹¹

Mr. Kopf was not available at the phone number in the case file, and did not participate in the discovery conference. During that conference, counsel for the Executive Director indicated that Mr. Kopf had also failed to respond to written discovery requests.¹² An order was issued that included the following warning:

Mr. Kopf is hereby notified that he should contact Mr. Koteff and arrange to participate in the discovery process or, if he has objections to the discovery process he should file an appropriate motion stating his reasons. If Mr. [Kopf¹³] does not participate in and respond to discovery, or if he does not participate in other prehearing proceedings or in the hearing itself, rulings may be made against him without his participation and opportunity to provide testimony, evidence, or argument.

The Executive Director may file motions related to the discovery process or charges in the Accusation. Mr. Kopf is reminded that he has an opportunity to respond to those motions, and that if he does not respond within the applicable time limits, orders will be entered without his response.¹⁴

Neither this notice nor any other document sent by first class mail or e-mail to Mr. Kopf has been returned to OAH as undeliverable.

⁸ See Scheduling Order dated February 17, 2011.

⁹ In the *Dowler* matter, the assigned ALJ had granted Mr. Kopf's request to move the hearing pursuant to AS 44.62.410(a), but a three member panel of ASCHR reversed that ruling and ordered that the hearing be held in Anchorage.

¹⁰ Request for Discovery Conference dated March 22, 2011.

¹¹ Notice of Status Conference dated March 30, 2011.

¹² Order Regarding Case Status dated April 8, 2011.

¹³ The original order had an incorrect name. A corrected order with Mr. Kopf's name was issued on April 12, 2011.

¹⁴ Order Regarding Case Status (emphasis in original).

Pursuant to the scheduling order, the Executive Director filed a witness list and exhibit list on May 17, 2011. Mr. Kopf did not file a witness list or exhibit list. Mr. Kopf did not appear for the May 24, 2011 hearing.¹⁵ A voice mail message was left for Mr. Kopf informing him that the hearing was in progress and asking him to call the Office of Administrative Hearings if he wished to participate.¹⁶ The Executive Director was granted thirty days in which to file a motion to establish grounds for finding that a violation of AS 18.80 may have occurred.

On June 23, 2011, the Executive Director requested a short extension of time in which to file her motion.¹⁷ Mr. Kopf promptly filed an opposition to that request.¹⁸ His opposition was based on his status as a self-represented litigant who was unfamiliar with the rules and procedures. He also indicated that he has medical problems and is under severe financial stress, requiring him to devote most of his time to protecting his business.

In the alternative, Mr. Kopf asked for more time to respond to the Accusation in this matter. He stated: "Given more time I believe I may be able to gather the time and energy to present my case and witnesses."¹⁹ Mr. Kopf also requested that any hearing be held in Fairbanks rather than in Anchorage, and renewed his request for a different judge.²⁰

The Executive Director filed a pleading entitled Motion for Default on June 29, 2011.

An order responding to the Executive Director's request for an extension of time, and to Mr. Kopf's opposition, was issued on July 6, 2011. The requested extension was granted. In addition, this order noted that the Motion for Default had been filed. Mr. Kopf was informed that he could respond to that motion:

He can do so in two ways. First, he may argue and submit evidence as to why he should not be deemed to be in default. He would need to explain why his prior non-participation and failure to appear at the hearing should be excused. If he is successful in avoiding a default, then a hearing will be set as promptly as reasonable. Mr. Kopf would then have an opportunity at that time to request a transfer of venue to Fairbanks.

Second, even if he is in default, Mr. Kopf may argue that the evidence presented by the Executive Director does not establish a violation of AS 18.80.^[21]

Mr. Kopf submitted an opposition dated July 22, 2011.

¹⁵ Two recordings dated May 24, 2011 in *Kosal v. Kopf*, OAH No. 11-0024-HRC.

¹⁶ *Id.*

¹⁷ Request dated June 23, 2011.

¹⁸ Request of denial of motion for extension of default, dated June 27, 2011.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Order dated July 6, 2011 (internal footnote omitted).

III. DISCUSSION

A. Default

1. Request for different ALJ

On several occasions, Mr. Kopf has asked that a different administrative law judge (ALJ) be assigned to this matter. Although he has not followed the proper procedure for requesting a different ALJ, the issue will be addressed because an ALJ has an obligation to voluntarily withdraw from a proceeding if he or she cannot provide a fair hearing.²² Mr. Kopf believes I am biased because, in the *Dowler* matter, Ms. Dowler injected a claim of alleged anti-Semitism into the hearing. Specifically, Ms. Dowler stated that Mr. Kopf had claimed that Hitler was his friend.

In addition, Mr. Kopf suggests that I may be intimidated by ASCHR staff. During the *Dowler* hearing, several staff members attended the hearing and, according to Mr. Kopf, stared at the judge. Finally, Mr. Kopf is concerned that there is inherent bias because the Commission pays for the cost of the hearing, which includes a portion of the ALJ's salary.

First, if Mr. Kopf has ever said that Hitler was his friend, it was clearly not meant to be taken literally since Adolph Hitler would be over 120 years old if he were still alive. Such a statement could be meant to suggest he agreed with some of Hitler's views, many of which are clearly offensive to most people in this country. In the context of both this case and the *Dowler* hearing, however, the allegation by Ms. Dowler that Mr. Kopf had said this has been ignored. This alleged fact was disregarded in the *Dowler* case because it was not relevant to the charges in that Accusation. Having disregarded this allegation in the *Dowler* case, it is easy to disregard it in this case as the only question in this case is Mr. Kopf's motivation for banning Ms. Kosal from his store. There is no allegation of anti-Semitism or religious discrimination of any kind in this case.²³

That Commission staff attended the prior hearing was not perceived by me as intimidating. From my perspective, they appeared to be observers with a particular interest in

²² AS 44.62.450(c); AS 44.64.070(a).

²³ It is my opinion that Mr. Kopf has sincere, deeply held religious views. It is not my belief that Mr. Kopf hates Catholics, Jews, or any other group with different religious views, though it was found in the *Dowler* case that he has made some comments that Catholics would likely find offensive. If Mr. Kopf ever said anything to imply that he agreed with some of Hitler's views, it was an insensitive statement by him, but not an indication that he has any ill-will towards Jews.

the outcome of the case. If the Executive Director had not proven her case, I would have had no trouble issuing a ruling stating that the charges had not been proven.

Finally, the manner in which the Office of Administrative Hearings is funded does not affect the outcome of any hearing. Agencies reimburse OAH for the cost of conducting a hearing based primarily on the amount of time devoted to that hearing. The reimbursement is the same regardless of which party prevails, and the agency has no discretion not to pay for that cost. In addition, individual ALJs are insulated from the accounting process, and there is no overt or subtle pressure to resolve cases in favor of any agency based on the cost of the hearing, or any other factor.

Administrative Law Judges must decide cases based on the applicable law and the facts that have been proven at the hearing. In doing so, they must disregard allegations that are not relevant or have not been proven, and often must set aside their own personal opinions about the issues before them. At times, they must disregard potentially inflammatory comments such as Ms. Dowler's claim that Mr. Kopf said Hitler was his friend.

If Ms. Dowler was attempting to create a bias against Mr. Kopf, or if the ASCHR staff were attempting to intimidate, those efforts were not successful. I am confident that I was able to provide Mr. Kopf with a fair hearing in both the *Dowler* matter and in this case.

2. The default should not be set aside

In an administrative proceeding such as this one that is governed by the Administrative Procedure Act, a default occurs when the respondent does not appear at the hearing.²⁴ Once a default occurs, the decisionmaking authority may take action based on the respondent's admissions and other evidence in the record, and evidence may be taken without further notice to the respondent.²⁵ Once Mr. Kopf failed to appear at the hearing, the Executive Director could have presented her evidence immediately, and argued for a recommended decision based on that evidence.

Instead of immediately presenting her evidence, the Executive Director asked for an opportunity to file her legal argument and evidence by motion. That request was granted.²⁶

²⁴ AS 44.62.530.

²⁵ *Id.*

²⁶ Granting that request was discretionary. The Executive Director could have been required to present her evidence at the time set for the hearing. Allowing the motion to be made gave Mr. Kopf another, limited opportunity to participate as the motion would be served on him.

When the Executive Director requested additional time in which to file her motion, Mr. Kopf objected and asked that he be given an opportunity to present a defense to the Accusation.

The relevant portion of the default statute states:

If the respondent does not file a notice of defense or does not appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without notice to the respondent.^[27]

There is no explicit provision for setting aside the default once it has occurred, but there is also no explicit prohibition against setting aside a default in an appropriate case. Thus, Mr. Kopf's various pleadings will be considered to determine whether he has established grounds for setting aside the default, thereby giving him an opportunity to present evidence in his defense at a hearing.

Because there appears to be no relevant case law addressing defaults in the administrative context, this decision looks to cases addressing defaults pursuant to Civil Rule 55. The Supreme Court has set out factors to consider in deciding whether to set aside a default in a civil case.²⁸

In exercising its discretion to set aside an entry of default, a court should consider the following factors: whether the defendant has established the required meritorious defense, prejudice to plaintiffs, the culpability of defendant's conduct, the length of the period of default, the size of any potential award to plaintiffs, and alternative sanctions against the defendant.^[29]

As to the first factor, it is possible that Mr. Kopf has a meritorious defense to the Accusation. There are two questions that need to be answered in determining whether Mr. Kopf violated AS 18.80 when he banned Ms. Kosal from his store:³⁰ First, what was Mr. Kopf's reason for banning her, and second, does AS 18.80.220(4) prohibit retaliation against a person who testifies at a hearing if the retaliation is due to a genuinely-held belief that the person testified falsely.

Mr. Kopf asserts that Ms. Kosal and others are engaged in a concerted effort to cause him financial loss so that Ms. Dowler can regain management control of his store.³¹ He asserts that

²⁷ AS 44.62.530.

²⁸ *Heriz v. Berzanske*, 704 P.3d 767, 771 (Alaska 1985)(superseded by statute on other grounds, *McConkey v. Hart*, 930 P.2d 402, 407 n. 4 (Alaska 1997)).

²⁹ *Heriz*, 704 P.3d at 771.

³⁰ Based on the record in this case, Mr. Kopf admits that Ms. Kosal was banned from his store after she testified by deposition and at the hearing in the *Dowler* matter.

³¹ His assertions can be found in Mr. Kopf's Request for Denial of Motion for Extension of Time, dated June 27, 2011, his pleading dated July 22, 2011, and his Reply dated August 2, 2011.

the *Dowler* matter was decided wrongly, and that Ms. Kosal lied during her testimony in that matter. He also notes that he was aware that Ms. Kosal had testified against him in her deposition a month before the hearing, but did not ban her at that time. He states that his employees were afraid of Ms. Kosal, and that others advised him to ban her from the store as she was looking for a reason to sue him. Because Mr. Kopf did not immediately ban Ms. Kosal after the deposition testimony, and because he claims to have other reasons for not wanting to allow her in his store, Mr. Kopf's motivation for banning Ms. Kosal might not have been her testimony at either the deposition or the hearing.

On the other hand, Mr. Kopf's attorney stated in a letter to the Commission's investigator that there were three reasons for banning Ms. Kosal from the store.

(1) because she testified falsely, contrary to objective facts proven by other evidence, showing a willingness to perjure herself in order to convince the hearing officer of what she knew was untrue, or to obstruct justice. Other witnesses testified against Mr Kopf and were not later asked to leave the premises, so there is no support for her claim that she was asked to leave in retaliation for testifying. Other reasons were (2) to avoid risk of injury and claims being asserted against the business or its owner by customers or members of the public arising out of Ms Kosal's coming onto the premises, repeatedly, under the influence of alcohol or drugs which exposed others to risk of injury; and (3) to avoid claims from customers or the general public, specifically parents with young children, who may have seen Ms Kosal coming onto the premises wearing no pants.^[32]

According to this statement, at least one reason for banning Ms. Kosal was her testimony.³³ The different reasons asserted at different times would make it difficult, for Mr. Kopf to prove at a hearing that the reason he banned Ms. Kosal was not because of her testimony during the Commission proceedings, but it would not be impossible for him to prove this different motivation. He could potentially show that his attorney's statement was mistaken, and that Ms. Kosal's participation in the proceedings was not a motivating factor. Accordingly, this factor weighs in favor of setting aside Mr. Kopf's default.

The next factor concerns prejudice to Ms. Kosal. She is currently banned from shopping at Mr. Kopf's store. This would create at least some inconvenience,³⁴ but does not otherwise

³² Motion for Default, Exhibit 3. *See* Evidence Rule 801(d)(2) (admissions by party opponent excluded from the definition of hearsay).

³³ This statement also raises the legal question of whether false testimony in a proceeding is protected activity.

³⁴ Affidavit of Tomorrow Kosal, ¶¶ 18 and 19. *But see* Mr. Kopf's Addendum dated August 7, 2011. He asserts that Ms. Kosal lives equally close to a Tesoro convenience store and could shop there without inconvenience.

interfere with Ms. Kosal's daily activities or civil rights. The right to access any place of public accommodation is important, but because Mr. Kopf might have a meritorious defense to the Accusation – and therefore a legal right to ban her from his store – this factor is given only slight weight in favor of upholding the default. Similarly, because he might have a meritorious defense, the culpability of defendant's conduct is given no weight either way in determining whether to set aside the default.

The fourth factor, the length of the default, weighs heavily against setting aside the default. Mr. Kopf waited a month before asking for an opportunity to present his case. Although he has made many statements about his lack of legal experience as well as the medical and financial burdens he is suffering from, his assertions provide few details and no substantive explanation as to why he did not appear for the hearing. In addition, Mr. Kopf did not attend his deposition nor respond to discovery requests, and did not appear for a discovery conference scheduled in this matter. He did not participate in the litigation process for more than three months prior to the hearing date, and for another month after the hearing date.³⁵

The size of any potential award or other sanctions weighs against setting aside the default. The Accusation does not request a monetary award. Instead, it asks for a ruling that Mr. Kopf has violated AS 18.80, that he allow Ms. Kosal to shop in his store, that he inform his employees not to retaliate against her, that he adopt and post policies prohibiting discrimination, and that he obtain training. An award of this nature would create a burden, but not a large burden, on Mr. Kopf.³⁶

Whether a default should be set aside "is a question of equity, left to the discretion of the trial court upon a showing of a meritorious defense."³⁷ Mr. Kopf has made the initial showing of a potentially meritorious defense. The other factors, however, are either neutral or weigh against

Based on her affidavit, however, she previously did shop at Mr. Kopf's store, and Mr. Kopf cannot prevent her from continuing to shop at her preferred store for an illegal reason.

³⁵ Mr. Kopf has prior experience in this type of litigation. He was the respondent in the *Dowler* matter. As such, he is aware of the process of presenting evidence at a hearing and cross-examining witnesses. He has some prior knowledge of the discovery process, and the requirement of participating in pre-hearing events. Given his prior experience in the *Dowler* matter, and the written and oral notices to him, a *pro se* party such as Mr. Kopf would know of the importance of appearing for his hearing and of making prompt contact with the Office of Administrative Hearings after he missed the hearing.

³⁶ Mr. Kopf raises concerns about the need to protect himself, his family, and his employees. There is no allegation that Ms. Kosal has done anything dangerous or threatening at his store. She is accused of coming to the store without appropriate clothing, and of coming to the store under the influence of drugs or alcohol. Mr. Kopf can always call the police if Ms. Kosal does something illegal, dangerous, or threatening, as long as a motivating factor for doing so is not the fact that she previously testified in the *Dowler* matter or complained of violations in this case.

³⁷ *Hertz*, 704 P.2d at 771.

setting aside the default. While there is a presumption of resolving cases on their merits, that presumption has been overcome in this case. This is primarily because of his failure to appear at the hearing or otherwise participate in the hearing process, but also because of the prejudice to Ms. Kosal, the length of the default, and the fact that only relatively modest sanctions are being sought against Mr. Kopf.

B. Liability

That Mr. Kopf defaulted when he failed to appear at the hearing does not mean that a ruling against him is appropriate. The Executive Director must still point to evidence in the record or introduce new evidence to show Mr. Kopf violated AS 18.80 and that she is entitled to the relief requested in the Accusation.

Mr. Kopf is accused of violating AS 18.80.220(a)(4) which states that it is unlawful for:

An employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against a person because the person has opposed any practices forbidden under AS 18.80.200—18.80.280 or because the person has filed a complaint, testified, or assisted in a proceeding under this chapter.

An employer includes a person who has one or more employees.³⁸ On the date Ms. Kosal was banned from the store, Mr. Kopf had at least one employee.³⁹ There is no dispute that Ms. Kosal testified in the *Dowler* proceeding, both at the hearing and in a pre-hearing deposition. Banning Ms. Kosal from the store would be a form of illegal discrimination, if motivated by an illegal reason.⁴⁰ Thus, it is necessary to determine whether the evidence submitted by the Executive Director establishes that illegal motivation.⁴¹

While there is some evidence in the record to the contrary, the Executive Director has met her burden of proving a violation of AS 18.80.220(a)(4). It is more likely true than not true that a motivating factor in Mr. Kopf's decision was that she testified against him.

Mr. Kopf first spoke with Ms. Kosal about her testimony on August 17, 2010.⁴² Ms. Kosal testified by deposition sometime after that date, and testified again during the hearing that

³⁸ AS 18.80.300(5).

³⁹ Affidavit of Tomorrow Kosal, ¶ 12. Mr. Kopf's opposition to the Motion for Default also refers to his employees.

⁴⁰ While store owners may have a general right to refuse service to anyone, they cannot refuse service for an illegal reason.

⁴¹ It is sufficient to prove that one of the motivating reasons for banning Ms. Kosal was her testimony in the prior hearing. See *Dowler* decision, page 13 (discussing mixed motive terminations).

⁴² Kosal affidavit, ¶5.

occurred in mid-September.⁴³ Ms. Kosal was banned from the store on September 29, 2010.⁴⁴ The interval between Ms. Kosal's testimony – both by deposition and at the hearing – and the date she was banned was short. This supports an inference that she was banned in retaliation for her testimony.⁴⁵ In addition, Mr. Kopf's attorney specifically stated that one reason for banning Ms. Kosal was she testified at the hearing.⁴⁶

The evidence that she was banned because of her testimony is intertwined with evidence that Mr. Kopf's motivation was at least partly based on his belief that Ms. Kosal's testimony was false. The Executive Director has not proven that Ms. Kosal would have been banned for her testimony if Mr. Kopf had believed her testimony to be truthful. Thus, it is necessary to address the question of whether an employer may take an adverse action against a person for testifying falsely in a hearing.

The Alaska Legislature has established a broad public policy against many forms of discrimination.⁴⁷ It has explicitly prohibited retaliation by an employer against a person who has testified in a hearing concerning employment discrimination.⁴⁸ This prohibition would be severely abridged, however, if an employer could retaliate against a person based only on the employer's own belief that the individual's testimony was false. Many employers defending against a charge of discrimination will have a good faith belief that testimony against the employer is false in some material respect. Many people would be afraid to testify in a hearing if by doing so they risked an adverse employment action, or other form of retaliation. And the fear of retaliation would be justified if retaliation were permitted based solely on the employer's determination that the testimony had been false. Alaska Statute AS 18.80.220(a)(4) does not provide an exception for retaliation based on a belief that the testimony was false, and the statute should not be interpreted to include such an exception.⁴⁹

⁴³ There is no evidence in the record establishing the precise dates of the deposition or hearing, but the Accusation alleges that the deposition was on September 2 and the hearing occurred September 15 – 17. Mr. Kopf's opposition to the Motion for Default states the deposition occurred about one month before the hearing.

⁴⁴ Kosal affidavit, ¶ 12.

⁴⁵ *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 505 (9th Cir. 1989) (59 days between EEOC fact finding conference and adverse employment action supports inference of retaliation).

⁴⁶ Motion for Default, Exhibit 3.

⁴⁷ AS 18.80.200.

⁴⁸ AS 18.80.220(a)(4).

⁴⁹ This decision does not address the question of whether an employer can retaliate against a person who testified falsely when it is the Commission or some other independent agency that has determined the testimony to have been false.

Three other issues will also be addressed here. First, the Motion for Default cites federal authority to show that retaliation by an employer against a former employee is illegal. That argument is unnecessary here because Alaska's anti-retaliation provision is broader than the federal statute. Federal law prohibits retaliation against an "employee."⁵⁰ Alaska law provides that it is illegal to discriminate against any "person" for testifying in a hearing, and "person" is defined more expansively than "employee."⁵¹ Ms. Kosal is a "person" under this definition regardless of whether she is or ever was also an employee. Alaska law makes it illegal for Mr. Kopf to ban any person from his store based on that person having testified in a Commission proceeding, and that prohibition is not limited to employees or former employees.

Second, Mr. Kopf questions whether he can be found in violation of AS 18.80.220 without a trial by jury. The United States Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.^[52]

Alaska's Constitution provides:

In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law.^[53]

This action is neither a civil case nor a suit at common law.⁵⁴ It is an administrative proceeding conducted pursuant to procedures created by statute and regulation. Neither the Commission, nor the ALJ conducting a hearing on behalf of the Commission, may deviate from the requirements of statute or regulation. If there is a constitutional infirmity in the procedures created by statute and regulation, that is something only a court can address.

Third, Mr. Kopf questions whether he can be found in violation of AS 18.80.220 without proof. There has been "proof" in this case. Ms. Kosal's affidavit is admissible sworn testimony. Statements made in Mr. Kopf's pleadings may be considered, and the letter written by his attorney is also admissible. While Mr. Kopf may not agree with the conclusions drawn from this evidence, there has been proof of the allegations.

⁵⁰ 42 USC §2000e-3(a).

⁵¹ Cf. AS 18.80.300(5) (definition of employee) with AS 18.80.300(13) (definition of person).

⁵² U.S. Constitution, 7th Amendment.

⁵³ Alaska Constitution, Art I, §16.

⁵⁴ The amount in controversy is also less than twenty dollars, as no amount of damages have been claimed.

C. Remedy

When there is a finding that a person has engaged in a discriminatory practice, the Commission is required to order the person to refrain from that practice.⁵⁵ In addition, the Commission has the discretion to order additional appropriate relief including training of the employer and its employees, and posting of signs.⁵⁶

Decisions by the Commission should be consistent with prior court decisions, prior Commission decisions, Commission guidelines, and policy statements.⁵⁷ Thus, to the extent the Commission has discretion to adopt remedies in this case, those remedies should be consistent with what the Commission has adopted in similar prior cases. Neither party has cited to other decisions, guidelines, or policy statements concerning how the Commission has exercised its discretion in the past regarding imposition of remedies. The Commission should independently ascertain that the remedies recommended here are consistent with prior actions.

The legislature has declared that certain types of discrimination create a significant threat against the “peace, order, health, safety, and general welfare of the state and its inhabitants.”⁵⁸ In order to assist in the enforcement of the laws against illegal employment discrimination, the legislature has made it illegal for an employer to retaliate against someone who has testified in a Commission proceeding.⁵⁹ In a case such as this one, where there are no monetary damages, any remedy should be aimed at ensuring that the illegal practice ends and does not re-occur. It is also important that the remedy affirm that people who testify in Commission proceedings are entitled to protections.

Based on the evidence in this case, and the requested relief in the Accusation, the Commission should issue an order with the following provisions:

1. That Mr. Kopf did violate AS 18.80.220(a)(4);
2. That Mr. Kopf cease any further retaliatory action against Ms. Kosal and that she be permitted to shop in his store and avail herself of all the services, goods, facilities, advantages, and privileges of the Goldstream Store that are afford to other members of the general public;

⁵⁵ AS 18.80.130(a).

⁵⁶ AS 18.80.130(a)(1).

⁵⁷ 6 AAC 30.910(a).

⁵⁸ AS 18.80.200(a).

⁵⁹ AS 18.80.220(a)(4).

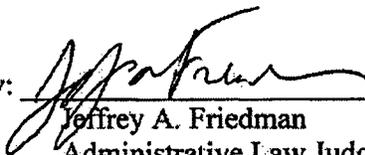
3. That Mr. Kopf inform all of his employees to cease any retaliatory actions against Ms. Kosal and to allow her to shop in his store and avail herself of all the services, goods, facilities, advantages, and privileges of the Goldstream Store that are afforded to other members of the general public;
4. That Mr. Kopf adopt and disseminate to all employees and post in a conspicuous place observable to the general public a policy of nondiscrimination under the Alaska Human Rights Law that includes a policy prohibiting retaliation against any person who exercises their rights under the Human Rights Law.

The Executive Director has also asked that Mr. Kopf and his employees be ordered to obtain training. Because the issue in this case was narrow, and because the recommended remedies include adopting and posting of a policy directed at that issue, additional training seems unnecessary. Receipt of the Commission's decision in this case, along with the other remedies ordered, should be sufficient to fully inform Mr. Kopf of his obligation not to retaliate against any person for having participated in a Commission proceeding, and not to allow his employees to retaliate.

IV. RECOMMENDATION

Mr. Kopf has raised concerns that Ms. Kosal and others are working to harm his business to the extent that he loses ownership of it. He has also strongly argued that the *Dowler* decision was decided incorrectly. Even assuming he is correct on both of those points, however, the result here would not change. The question in this case is not whether Ms. Kosal was doing anything wrong, but whether Mr. Kopf's decision to ban her from the store was motivated by the fact that she had previously testified in a Commission proceeding. The weight of the evidence is that he was so motivated. Accordingly, the remedies discussed in section III C, above, should be imposed.

DATED this 10th day of August, 2011.

By: 
Jeffrey A. Friedman
Administrative Law Judge