ALASKA STATE COMMISSION FOR HUMAN RIGHTS
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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY, EXECUTIVE DIRECTOR, ALASKA STATE COMMISSION FOR HUMAN RIGHTS *ex rel.* EVANGELINA GONZALEZ, Complainant, v. DUKE INVESTMENTS, LLC., Respondent.	ASCHR No. J-10-007 OAH No. 13-0776-HRC

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the administrative record, are in agreement with and adopt the Recommended Decision of Administrative Law Judge Jeffrey A. Friedman dated October 30, 2013.

Pursuant to the Recommended Decision, Respondent shall pay Ms. Gonzalez $101,293.86 in backpay; if Respondent resumes business in the future it shall: (1) adopt and disseminate a policy of nondiscrimination that incorporates the Alaska Human Rights Law, including a policy prohibiting discrimination because of disability; (2) provide training to its managers, supervisors, and employees in the laws prohibiting discrimination in employment, with the training to be at least three hours long, and conducted in person by a trainer approved by the Commission prior to the training; and

(3) permit the Commission to inspect the premises, interview witnesses, and examine and copy documents to ensure compliance with the Commission's order.

The Commissioners note that this case proceeded as a default action pursuant to AS 44.62.530 and thus the only evidence regarding backpay was produced by the executive director given that Respondent did not participate. Based on the only evidence presented, the administrative law judge issued his Recommended Decision and the Commission has adopted it. However, it is possible that a lengthy period of backpay as was awarded in this case would not be considered appropriate in other actions if contrary evidence regarding mitigation of remedies was present for consideration.

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.

IT IS SO ORDERED.

DATED: January 30, 2014

Christa Bruce, Commissioner

DATED: January 30, 2014

Jason Hart, Commissioner

DATED: January 30, 2014

Grace Merkes, Commissioner

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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.* EVANJELINA GONZALEZ,	)	
Complainant,	)	
v.	)	
DUKE INVESTMENTS, LLC,	)	
Respondent.	)	OAH No. 13-0776-HRC ASCHR No. J-10-007

RECOMMENDED DECISION

I. Introduction

Evanjelina Gonzalez was employed as a server at Chili's Grill and Bar, a franchise restaurant owned and operated by Duke Investments, LLC. She injured her shoulder in 2008. After she recovered sufficiently to perform light duty work, her employer refused to allow her to return to work.

Ms. Gonzalez filed a complaint with the Alaska State Commission for Human Rights. The Commission investigated her complaint and ultimately issued an Accusation alleging a violation of AS 18.80.220. Duke Investments did not respond to the Accusation.

The Executive Director has filed a Motion for Order of Default. That motion requests a finding that Duke Investments has discriminated against Ms. Gonzalez, and requests specific relief against Duke Investments. Based on the evidence presented, Duke Investments did violate AS 18.80.220.

II. Facts

Ms. Gonzalez worked as a food and beverage server at Chili's Grill and Bar.[1] Chili's Grill and Bar is the business name used by Duke Investments.[2] Ms. Gonzalez injured her shoulder at work twice in 2008. Ms. Gonzalez received Workers Compensation benefits because

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[1] Except where otherwise noted, the factual findings are based on Ms. Gonzalez's affidavit, which was attached as Exhibit 2 to the Motion for Order of Default.

[2] Exhibit 1, page 1.

of those injuries. She was restricted to lifting no more than ten pounds as a result of those injuries. Ms. Gonzalez had surgery in January of 2009, and, after a recovery period, was released to work on August 5, 2009, subject to a ten pound lifting restriction. She spoke with a manager who gave her two reasons for not being allowed to return to work. He said she couldn't return because of her limitations, and also because she was suing Chili's.[3] The manager did not discuss the possibility of making reasonable accommodations that would allow her to work despite the lifting restriction, and did not offer to reassign her to another position where lifting more than ten pounds would not be a requirement.

Ms. Gonzalez worked through December 9, 2008, averaging $721.77 per week for the 49 weeks she worked that year. The Chili's location she had worked at closed for business on March 4, 2012. Between August 5, 2009 and March 4, 2012, Ms. Gonzalez looked for work, but was unable to find other employment. She was available for work throughout that time, except for a seven week period when she was recovering from her second shoulder surgery.

III. Discussion

A. Duke Investments is in Default

Hearings before the Commission are governed by the procedures in the Administrative Procedure Act (APA), unless otherwise provided in AS 18.80.[4] The APA provides

> 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.[5]

As reflected in the Office of Administrative Hearings' file, Duke Investments has been sent multiple notices in this matter.[6] Duke Investments has not entered an appearance, has not filed an Answer to the Accusation,[7] and did not participate in the case planning conference. Duke Investments has not opposed the pending motion. Because Duke Investments has not filed a

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[3] Ms. Gonzalez had not sued Chili's or Duke Investments. The manager may have been referring to Ms. Gonzalez's workers compensation claim. While it would be improper to retaliate against her simply for asserting a claim for workers compensation (AS 23.30.247), that issue is not within the Commission's jurisdiction.

[4] AS 18.80.120(b).

[5] AS 44.62.530.

[6] Commission staff also made multiple attempts to communicate with Duke Investments, most of which were unsuccessful. *See* Exhibit 7, Affidavit of Andrew Sundboom; Exhibit 8, Affidavit of Jean Kizer; and Exhibit 9, Affidavit of Carolyn Thomas.

[7] The "Answer" would constitute a Notice of Defense if it had been filed.

notice of defense, the Commission may take action based upon the evidence presented by the Executive Director.[8]

B. Evidence That May be Relied On

The technical rules of evidence do not apply to APA hearings. Instead,

> Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action.[9]

Presenting evidence by affidavit is specifically allowed.[10] In a contested case, a party wishing to rely on an affidavit must provide advance notice and allow the opposing party an opportunity to cross-examine the affiant.[11] When the opposing party is in default, however, the notice and opportunity to cross-examine is not required.[12]

In addition to the affidavit evidence, the Executive Director argues that Duke Investments' admissions may be relied on. Duke Investments failed to answer the accusation. Any allegation in the accusation that is not denied in the answer is "considered admitted."[13] Duke Investment also did not respond to Requests for Admission submitted pursuant to Civil Rule 36.[14] A request for admission is admitted if not objected to with 30 days.[15]

Because Duke Investments is in default, the APA permits the Commission to take action based on "respondent's express admissions[.]"[16] However, the admissions in question here are not *express* admissions. They are admissions by operation of law based on Duke Investments' failure to respond to the Executive Director's Accusation and discovery request. The APA's default rule only allows reliance on express admissions. For the word "express" to have meaning

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8 The Executive Director filed a notice indicating that Duke Investments is in Bankruptcy. This action is not stayed by the automatic stay provisions in the Bankruptcy law because it is an exercise of the state's police and regulatory powers. *See Universal Life Church v. U.S.*, 128 F.3d 1294, 1297 (9th Cir. 1997). The Executive Director has stated that recovery of any back pay would occur only after the bankruptcy proceedings end. This decision does not address when and whether the back pay award may be enforced against Duke Investments.

9 AS 44.62.460(d).

10 AS 44.62.470(a).

11 *Id.*

12 AS 44.62.530.

13 6 AAC 30.410(i).

14 The civil discovery rules are applicable in Commission hearings. 6 AAC 30.510(a).

15 Civil Rule 36(a).

16 AS 44.62.530.

in this statute it must distinguish between admissions that were actually made, and those that have been implied by operation of law. There are only implied admissions in evidence in this case. Those admissions may not be relied on.[17]

C. Duke Investments Unlawfully Discriminated Against Ms. Gonzalez

It is unlawful to refuse employment to a person because of the person's physical disability when the "reasonable demands of the position do not require distinction" based on that physical disability.[18] A physical disability includes any physical impairment that substantially limits one or more major life activities.[19] Major life activities include performing manual tasks and working.[20] Alaska law also imposes a duty on an employer to reasonably accommodate a disability.[21]

In order to establish a prima facie claim for disability discrimination, the Executive Director must show (1) that Ms. Gonzalez has a disability as defined by Alaska law, (2) that she could perform the essential functions of the position with or without a reasonable accommodation, and (3) that Ms. Gonzalez has suffered an adverse employment decision because of her disability.[22]

Ms. Gonzalez has a shoulder injury that restricts her ability to perform the manual task of lifting, and interferes with the life activity of working at any job where lifting more than ten pounds is a requirement.[23] Thus, she has a disability. Ms. Gonzalez has also suffered an adverse employment decision because of her disability. Duke Investments' manager told her that she could not return to work because of her disability.[24] This statement may be relied on for the truth of the matter asserted because the statement is not within the definition of hearsay.[25]

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[17] A different result was reached in *Hubbard v. Alaska Computer Essentials*, OAH No. 08-0185-HRC (Human Rights Commission 2009). However, that case was based on a complaint filed before the 2006 amendments to AS 18.80 making the APA procedures applicable to Commission hearings. *Hubbard*, page 1 and page 4, n.30.

[18] AS 18.80.220(a)(1).

[19] AS 18.80.300(14). AS 18.80.300(15) defines physical impairment to include a condition affecting the musculoskeletal system.

[20] AS 18.80.300(10).

[21] *Moody-Herrera v. State*, 967 P.3d 79, 87 (Alaska 1998).

[22] *Smith v. Anchorage School District*, 240 P.3d 834, 843 (Alaska 2010).

[23] Affidavit of Ms. Gonzalez, ¶¶ 6, 17 – 18.

[24] Affidavit of Ms. Gonzalez, ¶ 7. The manager provided two reasons for refusing to allow Ms. Gonzalez to return to work. Only one of those reasons constitutes a violation of AS 18.80. In a mixed motive case, the employee need only show that the discriminatory motive was a motivating factor for the adverse employment decision. The burden then shifts to the employer to show that it would have made the same decision without considering the impermissible factor. *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 662 – 663 (Alaska 2006). There is sufficient direct evidence of Duke Investments' discriminatory motive to shift the burden to Duke

The more difficult question is whether Ms. Gonzalez could have performed the essential functions of the position with or without a reasonable accommodation.

Restaurants use different models for serving food to customers and for clearing the table after the customer leaves. The record contains no evidence of how these tasks were accomplished at Duke Investments' restaurant. Were most items obtained by the customer from a self-serve buffet or brought to the table by the server? If brought to the table, was this done individually or by more than one server at a time? Was it brought on a tray or a rolling cart? Did the people who bring the food to the table clear afterwards, or were there different employees for that task? The record does disclose that Ms. Gonzalez was restricted to lifting no more than ten pounds, and this restriction limited her ability to perform some of the tasks normally required of a server, but it is not known whether those lifting tasks were essential functions of the job.

There is also evidence that at one time Duke Investments had light duty work available for Ms. Gonzalez to perform,[26] and that she believed she could remain employed by being transferred to a hostess or manager position.[27] Assigning light duty or transferring an employee to a different position can be reasonable accommodations in the right circumstances.[28] In order to determine whether those accommodations, or any other potential accommodations, were reasonable, Ms. Gonzalez and Duke Investments were expected to engage in an interactive process.[29] This process clarifies what the individual may need to remain employed, and what an appropriate accommodation to that need may be.[30] As part of the process, an employer must "analyze job functions to establish the essential and nonessential job tasks."[31]

Chili's did not engage in any type of interactive process with Ms. Gonzalez. Instead, it simply told her she could not return to work. When the employer fails to engage in the interactive process, liability may be imposed if there is sufficient

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Investments, and because it has defaulted, Duke Investments has not proven by a preponderance of the evidence that it would have refused to allow Ms. Gonzalez to return to work even without considering her disability.

[25] Alaska Evidence Rule 801(d)(2)(C) & (D) (admissions by authorized representative or agent of party opponent not hearsay). Because the statement is not hearsay, the limitation on use of hearsay in AS 44.62.460(d) does not apply.

[26] Exhibit 3.

[27] Affidavit of Ms. Gonzalez, ¶ 8.

[28] *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1111 (9th Cir. 2000), *vacated on other grounds* 535 U.S. 291 (2002).

[29] *Id.*

[30] *Barnett*, 228 F.3d at 1112.

[31] *Barnett,* 228 F.3d at 1115.

> evidence to allow a fact finder to conclude that there were at least plausible options that the employer should have explored, no matter what the outcome of that exploration ultimately was.[32]

It is at least plausible that Ms. Gonzalez could have been assigned light duty tasks to assist other servers, or been transferred to a hostess position. Thus, Duke Investments is liable for a violation of AS 18.80.

D. Remedy

When a party is found to have engaged in a discriminatory practice, the Commission is required to order that the party refrain from engaging in that practice in the future.[33] The Commission may also order other appropriate relief, including requirements for training and posting of notices and awards of back pay to employees harmed by the discriminatory practice.[34] The Executive Director has requested these items as relief, and all are appropriate in this case. The Executive Director has also requested that Duke Investments adopt and disseminate a policy of nondiscrimination, and that relief is also appropriate under AS 18.80.130(a)(1).[35]

The Executive Director has calculated Ms. Gonzalez's back pay based on her average income of $721.77 per week.[36] This calculation does not include back pay for the seven weeks during which Ms. Gonzalez was recovering from her second shoulder surgery. It provides interest calculated quarterly at an annual interest rate of 3.75%,[37] and the calculation shows Ms. Gonzalez accruing back pay only through the date Duke Investments closed its Anchorage restaurant. The total back pay owed to Ms. Gonzalez, including interest through September 30, 2013, is $101,293.86.[38]

IV. Recommendation

Duke Investments engaged in discriminatory conduct when it refused to allow Ms. Gonzalez to return to work, and did not engage in an interactive process to determine whether she could perform the essential functions of her job with or without a reasonable

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32 *Anchorage School District v. Alaska State Commission for Human Rights*, Case No. 3AN-10-10122CI (Superior Court 2011), page 19, available on line at http://aws.state.ak.us/officeofadminhearings/Documents/HRC/HRC090233%20Superior%20Ct%20decision.pdf.

33 AS 18.80.130(a).

34 As 18.80.130(a)(1).

35 *See Parrish v. A B & M Enterprises*, OAH No. 11-0064-HRC (ASCHR 2012) (requiring adoption and dissemination of policy prohibiting discrimination), available on line at http://aws.state.ak.us/officeofadminhearings/Documents/HRC/HRC110064.pdf.

36 *See* Exhibit 13.

37 Pursuant to AS 18.80.130(f), the interest rate is the rate established by AS 09.30.070.

38 *Id.*

accommodation. The Commission should order Duke Investments to refrain from engaging in this discriminatory practice. In addition, the Commission's order should award Ms. Gonzalez back pay, including interest, in the amount of $101,293.86. The Commission's order should also require Duke Investments, if it resumes business in the future, to: 1) adopt and disseminate a policy of nondiscrimination that incorporates the Alaska Human Rights Law, including a policy prohibiting discrimination because of disability; 2) provide training to its mangers, supervisors, and employees in the laws prohibiting discrimination in employment, with the training to be at least three hours long, and conducted in person by a trainer approved by the Commission prior to the training; and 3) permit the Commission to inspect the premises, interview witnesses, and examine and copy documents to ensure compliance with the Commission's order.

DATED this 30th day of October, 2013.

Signed
Jeffrey A. Friedman
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]