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

ALASKA STATE COMMISSION FOR HUMAN RIGHTS, JEAN KIZER, ACTING EXECUTIVE DIRECTOR, *ex rel.* MICHAEL HANSEN, Complainant, v. THE NEW PRINTER'S WORKSHOP, Respondent.	ASCHR No. J-07-093 OAH No. 10-0264-HRC

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FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, hereby **ADOPT** the Administrative Law Judge's Revised Recommended Decision dated June 9, 2010.

The Commission imposes the following remedies consistent with the Revised Recommended Decision:

(1) The New Printer's Workshop violated AS 18.80.220(a)(4) by discharging Michael Hansen from his employment in retaliation for Mr. Hansen's filing of a complaint with the Alaska State Commission for Human Rights;

(2) The New Printer's Workshop shall, within 15 days of the date of this Order, serve on the Executive Director a proposed written policy of nondiscrimination under AS 18.80 and shall within 30 days of the date of this Order, adopt, disseminate, and adhere to a written policy of nondiscrimination under AS 18.80 that has been approved by the Executive Director;

(3) The New Printer's Workshop shall, within 45 days of the date of this Order, obtain training in nondiscriminatory employment practices for its managers, supervisor, and any employees, that has been approved by the Executive Director, and shall within 15 days of the training, report to the Executive Director on the training in such a manner as may be prescribed by the Executive Director;

(4) The New Printer's Workshop is liable to Michael Hansen for two weeks' back pay in the amount of $1,440.00, with interest thereon at the rate of 3.5% per year, as damages, and shall pay the back pay damages to Mr. Hansen within 30 days of the date of this order;

(5) The New Printer's Workshop shall remove any reference to events occurring on or after April 20, 2007, from Mr. Hansen's personnel records and shall not disclose to any other employer or prospective employer that Mr. Hansen filed complaints under AS 18.80 while employed by New Printer's Workshop.

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: June 20, 2011

Mark S. Fish, Commissioner

DATED: June 20, 2011

Grace E. Merkes, Commissioner

DATED: June 20, 2011

Karen Rhoades, Commissioner

CERTIFICATE OF SERVICE

This is to certify that on June 20, 2011, a copy of the foregoing was hand-delivered to:

Lauri J. Owen, Human Rights Attorney
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, AK 99501

And mailed by first-class mail U.S. mail, postage prepaid, to:

Jerry S. Crider, Owner
The New printer's Workshop
605 Barrow Street, Suite 2
Anchorage, AK 99501

ALJ Andrew M. Hemenway
Office of Administrative Hearings
State of Alaska
P. O. Box 110231
Juneau, AK 99811-0231

Margaret Taylor

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

Jean M. Kizer *ex rel.* MICHAEL HANSEN, Complainant,	)	
v.	)	
THE NEW PRINTER'S WORKSHOP, Respondent	)	OAH No. 09-0299-HRC ASCHR No. J-07-093

REVISED RECOMMENDED DECISION

I. Introduction

Michael Hansen filed a complaint with the Human Rights Commission alleging that his employer, The New Printer's Workshop, had discriminated against him on the basis of his sex. A month after Mr. Hansen filed the complaint, Mr. Hansen's employment terminated. Mr. Hansen supplemented his complaint to allege a retaliatory discharge.

The executive director dismissed the allegation of discrimination on the basis of sex, but maintained the allegation of retaliatory discharge, and the matter was referred for hearing on that allegation.

The assigned administrative law judge conducted a hearing on November 4, 2009. Mr. Hansen, Jerry Crider (the owner of the business), and two former employees testified, as did the prior owner of the business. The administrative law judge issued a decision recommending that the complaint be dismissed based on a finding that Mr. Hansen quit and was not discharged, and on the legal conclusion that there was not direct evidence of retaliatory intent. If the complaint were sustained by the commission, the administrative law judge recommended an award of two weeks' back pay as a remedy.

The executive director filed objections to the finding of no discharge and to the legal conclusion that there was not direct evidence of retaliatory intent, but did not object to the proposed remedy in the event the complaint were sustained by the commission. The administrative law judge granted reconsideration and now issues this revised decision finding that Mr. Crider discharged Mr. Hansen and concluding that there is direct evidence of retaliatory intent. Because Mr. Crider did not meet his burden of proof under a mixed-motive analysis, he is liable for retaliatory discharge. Two weeks' back pay remains the recommended remedy.

II. Facts

The New Printer's Workshop is a small printing business in Anchorage, primarily engaged in designing and manufacturing rubber stamps, stencils, and engraved signs and seals, with a small amount of printing work, grossing about $160-180,000 per year.[1] For a number of years prior to 2005, Thea Flowers had owned and operated the business, which was a two-person operation. Ms. Flowers was responsible for the administrative side of the business, which involved taking orders, invoicing customers, maintaining inventory and paying the bills. Her associate took care of the production side of the business, which primarily involved manufacturing stamps and doing some engraving.

In March, 2005, Ms. Flowers hired Michael Hansen to take over the production duties.[2] Mr. Hansen was good at his job, and she gave him two raises from his initial pay of $14 per hour to $15.50 per hour.

In 2006, Ms. Flowers placed the business on the market for about $175,000.[3] Mr. Hansen told Ms. Flowers that he was interested in purchasing the business.[4] However, Mr. Hansen viewed it as worth considerably less than she was asking; he offered her only $40,000.[5] Ms. Flowers did not accept his offer and continued looking for another buyer. At some point during the summer of 2006, Mr. Hansen made a threatening remark to Ms. Flowers.[6] If not for the fact that she needed his assistance to produce the firm's products, she would have terminated his employment.[7]

Jerry Crider is an accountant who owns a couple of small businesses and was interested in another business opportunity. His role in his businesses was to provide the accounting and administrative services; management, and in particular personnel, was the responsibility of others.[8] In June, 2006, Mr. Crider bought the New Printer's Workshop from Ms. Flowers for

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1 Jerry Crider Deposition p. 15, l. 16 [deposition testimony is hereinafter referenced by the witness's initials, *e.g.*, "JC Depo."]; Jerry Crider hearing testimony, Digital Recording, November 5, No. 3, at 0 hours, 7 minutes [hearing testimony is hereinafter referenced by the witness's initials, the date of the recording (4 for November 4, 5 for November 5) and for recordings on November 5, the recording number (*e.g.*, #5.1 is the first digital segment recorded on November 5), at the specified hours and minutes, *e.g.*, JC#5.3 0:07].

2 Mr. Hansen testified it was in late spring or early summer. MH#4 1:06.

3 Mr. Hansen testified that the asking price was $150,000; Mr. Crider said it was $200,000.

4 MH#4 2:41.

5 JC Depo., p. 41, ll. 8-13; MH#4 2:41-2:46.

6 Ms. Flowers testified that he told her, "I know where you live and I've got a gun." Ms. Flowers was unable to recall what had prompted his remark. TF#5.5 0:04.

7 TF#5.5 0:22.

8 Mr. Crider's primary business (apart from his own accounting, which was conducted out of a home office) was a sandwich shop which he operated with Nancy Burgess. Ms. Burgess managed personnel at the restaurant.

$175,000.[9] Ms. Flowers gave him a good report on Mr. Hansen's work ability, but also mentioned his threatening remark. Mr. Crider gave Mr. Hansen a raise to $16.50 an hour and kept him on.[10] Mr. Crider told Mr. Hansen what his goals for the business were, and said that "he was going to be important" to the business.[11]

After Mr. Crider purchased the business, Ms. Flowers stayed on as his employee to assist in the transition to new ownership. Mr. Crider hired a young man, Jacob Finnel. Ms. Flowers trained Mr. Finnel in the administrative side of the business, but Mr. Crider's plan was that Mr. Hansen and Mr. Finnel would both learn all aspects of the operation.[12] However, within a few months Mr. Finnel abruptly quit,[13] in part because he was not comfortable working with Mr. Hansen,[14] and Mr. Crider brought in the wife of a friend to help out while he looked for a new employee.[15] In the fall of 2006, Mr. Crider hired Ellen Kubiak to learn the administrative side of the operation.[16] Ms. Kubiak had worked for about 20 years at Arctic Office Supply, and had dealt with Ms. Flowers for a long time in that capacity.[17] Ms. Flowers spent some time training Ms. Kubiak.[18] In addition to taking over the administrative side of the operation, Mr. Crider anticipated that Ms. Kubiak, who had a strong background in sales, would generate additional business.[19] Once Ms. Kubiak was trained, Ms. Flowers stopped working at the business, although she remained in town until July, 2007.[20] When Ms. Flowers stopped working at the business, Mr. Crider gave Mr. Hansen another raise, this one to $18 per hour.[21]

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9 JC#5.1 0:17; JC#5.3 0:32.

10 MH#4 1:12; JC#5.1 0:19.

11 JC#5.1 0:32.

12 JC#5.1 0:30.

13 Ex. 5, p. 7.

14 Mr. Hansen's view was that Mr. Finnel did not regard the job as a permanent opportunity, that he got "stressed", and that he had "limited" skills and was not a "really good" employee. MH#4 1:14-1:18. Mr. Crider testified that Mr. Hansen brought a firearm to work, which disturbed Mr. Finnel. Mr. Crider testified that he instructed Mr. Hansen not to bring a weapon to the business. JC#5.1 0:35. Mr. Hansen denied that he ever had. Ms. Flowers confirmed that Mr. Crider had told her that Mr. Hansen had brought a firearm to the business, and that the incident disturbed Mr. Finnel. TF#5.5 0:15.

15 MH#4 1:12.

16 Mr. Crider testified that Ms. Kubiak was hired in December. JC#5.1 0:18. Ms. Flowers testified that she was hired in October. TF#5.5 0:11. In view of the fact that all the witnesses agreed that Mr. Finnel lasted only a couple of months, the earlier hire date for Ms. Kubiak seems more likely.

17 EK#4 4:18, 4:33.

18 EK#4 4:31 (eight days); TF#5.5 0:11 (six weeks).

19 EK#4 4:29; JC#5.3 0:40.

20 TF#5.5 0:09.

21 MH#4 1:12.

Mr. Crider stopped by the business regularly.[22] By early 2007, it was apparent to Mr. Crider that Mr. Hansen and Ms. Kubiak could not effectively work together. Mr. Hansen had low tolerance for stress and for substandard performance in the workplace.[23] Mr. Hansen made a number of complaints to Mr. Crider regarding Ms. Kubiak's job performance and behavior. Mr. Hansen asserted that Ms. Kubiak was falling asleep on the job due to the use of prescription drugs, lacked even minimal computer skills, continually made mistakes, and was distributing drugs from the workplace. In addition, without telling Mr. Crider, Mr. Hansen brought his complaints about Ms. Kubiak's alleged use and distribution of drugs to the attention of the Department of Labor and Workforce Development and to police.[24] Ms. Kubiak, for her part, told Mr. Crider that Mr. Hansen was habitually tardy, absent, or sleeping on the job,[25] that he smoked marijuana at the workplace,[26] that he was verbally abusive to her[27] and that he watched pornography on his computer at work and sexually harassed her.[28] One incident that was particularly disturbing to Ms. Kubiak occurred in late winter, when Ms. Kubiak's adult sons came to the shop and observed salacious images on Mr. Hansen's computer.[29]

Mr. Crider discussed Ms. Kubiak's concerns with Mr. Hansen. Mr. Hansen indicated to Mr. Crider that he believed that the business would be better off without Ms. Kubiak, and that he was willing to operate the business himself if Mr. Crider would give him a sufficient raise.[30] Mr. Crider had other ideas, however. Mr. Crider planned on growing the business, and he did not want to put Mr. Hansen in charge as a one-man operation.[31] Mr. Crider checked Mr. Hansen's

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22 Ms. Kubiak testified he was in and out "all the time." EK#4 3:58. Mr. Crider testified that when he first bought the business he stopped by about twice a week for an hour or so. JC#5.1 0:19. By April, Mr. Crider testified, he was stopping by at least once a week to pick up the mail. JC#5.4 0:39.

23 Mr. Hansen suffers from chronic depression and post-traumatic stress syndrome. MH#4 2:15. He testified that he is a meticulous worker.

24 MH#4 2:26-2:29.

25 Ex. 5, p. 2; EK#4 4:12.

26 Ms. Kubiak testified that she saw Mr. Hansen smoking marijuana regularly, and that the landlord called to complain about him smoking marijuana, and that she told Mr. Crider about it. ED#4 4:34, 5:22. Mr. Crider testified that the landlord called him concerning the matter. JC#5.1 0:47.

27 JC#5.1 0:45; JC #5.3 0:53.

28 JC Depo., p. 54; EK#4 5:09, 5:17.

29 Mr. Crider told the commission's investigator that Ms. Kubiak reported this incident to him and that "[s]he made a big huge deal of it, about how upsetting it was." Ex. 5, p. 6. Ms. Kubiak discussed the incident in her deposition and in her testimony. EK Depo at 20-21; EK#4 4:21. Their testimony on this issue was credible because it was consistent on multiple occasions, and it was not rebutted (the executive director objected to the admission of statements purportedly written by Ms. Kubiak's sons concerning the incident, and neither party called them as witnesses).

30 JC Depo., p. 40; p. 85-86. Mr. Hansen denied making any such statements. MH#4 2:54, 2:58, 3:12. However, he agreed that he could have run the business by himself, and he did not deny that he believed his services were worth as much as $25 per hour. MH#4 2:53-2:58.

31 JC Depo., p. 40, p. 88.

computer and found that he had accessed sexually suggestive sites.[32] He told Mr. Hansen that he needed to get along with Ms. Kubiak.[33]

Mr. Crider also discussed Mr. Hansen's concerns with Ms. Kubiak. Although she was taking a variety of prescription medications, Ms. Kubiak denied any illegal drug use. Ms. Kubiak provided physician's reports showing that her drug use was consistent with the prescribed dosages and medications.[34] Ms. Kubiak is diabetic, however, and she did occasionally have functional issues as a result.[35]

Mr. Crider did not accept Mr. Hansen's general allegations that Ms. Kubiak was incompetent and a drug abuser.[36] He mistrusted Mr. Hansen, believing that Mr. Hansen was exaggerating Ms. Kubiak's problems and that his real motive was to get rid of any other employees so that he could run the business himself and thereby maximize his own income.[37] By March, 2007, after a series of increasingly confrontational meetings with Mr. Hansen concerning Ms. Kubiak's behavior and job performance,[38] Mr. Crider decided to hire a third employee. Mr. Crider's plan was to have Mr. Hansen train the new employee in the production side of the operation and then to discharge Mr. Hansen and give his job to the new employee.[39] He could not let Mr. Hansen go until the new employee was fully trained, however, because Mr. Hansen's knowledge of the operational side of the business was crucial.[40] The new employee was Nelson Robinson. He started work in March, 2007. Mr. Crider instructed Mr. Hansen to teach Mr. Robinson all of the production side of the operation, as well as the preparation of the daily cash reports (which Mr. Hansen had been doing).[41] Mr. Robinson did not perform the latter duty well and in mid-March Mr. Crider took over preparing the daily cash reports.[42]

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32 Ex. 5, p. 6; JC#5.1 0:37.

33 MH#4 3:38.

34 JC Depo., p. 26, l. 20-p. 27 l. 4; JC#5.3 0:49.

35 JC Depo., p. 59, ll. 12-p. 60, l. 3; EK#4 4:40, 4:42. Ms. Kubiak testified she told her co-workers to contact her partner if she showed symptoms resulting from her diabetes. JC#5.3 0:43.

36 MH#4 1:45.

37 *See, e.g.*, JC#5.3 1:26 (suggesting Mr. Hansen fabricated evidence of errors by Ms. Kubiak); JC#5.3 0:49-50 (disagreeing with Mr. Hansen's characterization of Ms. Kubiak's drug use).

38 Ex. 5, p. 3; JC#5.1 0:48.

39 Ex. 5, p. 3; NR 2/21/2008 HRC Interview (hereinafter, "HRC #3"), p. 2. Mr. Robinson testified that Mr. Hansen did not tell him this in so many words, but that "it was pretty easy to figure it out." NR#4 0:08-0:09; 0:19. Ms. Kubiak and Ms. Flowers testified that Mr. Crider told them that he planned on replacing Mr. Hansen. EK#4 4:14; TF#5.5 0:19. Ms. Burgess testified that Mr. Crider had tried to get her then-husband to go to work for him at New Printer's Workshop. NB#5.5 0:54, 0:57. *See also* JC#5.3 1:19.

40 Ex. 5, p. 7; JC Depo., p. 33, ll. 13-25; JC#5.3 1:46.

41 JC#5.1 0:31.

42 MH#4 2:06; JC5.1 0:20-22. *See* Exhibit A.

After he began working, Mr. Robinson realized that Mr. Hansen was a capable employee, but that Ms. Kubiak was not.[43] Soon, Mr. Robinson, too, began to complain to Mr. Crider about Ms. Kubiak's performance.[44] Mr. Crider realized that Ms. Kubiak was making mistakes in her work.[45] Mr. Crider began thinking about terminating her instead of Mr. Hansen.[46] At the same time Mr. Hansen began finding fault with Mr. Robinson's job performance.[47]

On April 13, 2007, Mr. Hansen filed a complaint with the Human Rights Commission, alleging that Mr. Crider had discriminated against him on the basis of his sex by allowing Ms. Kubiak but not him to take time off and by disciplining him for work errors that were Ms. Kubiak's fault.[48] The complaint was delivered to the business by messenger on April 20, where Mr. Hansen signed for it.[49] At some point after Mr. Crider learned that Mr. Hansen had filed a complaint with the Human Rights Commission[50] he commented on it to Ms. Kubiak.[51]

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43 HCR #3, p. 2.

44 Ex. 5, p. 6; NR#4 0:12; NR Statement, 1/29/08, [hereinafter, "HRC #1"]p. 2.

45 EK#4 4:01; JC Depo. 60-61.

46 HCR #3, p. 4; NR#4 46:50; HRC #3, p. 3, Q. 17.

47 JC#5.1 0:05.

48 Ex. 7, p. 2.

49 Ex. 10.

50 It is unclear when Mr. Crider learned of the complaint. Initially, he told an investigator he learned of it "[a] week or two before I let Michael go," referencing receipt of a certified letter. Ex. 5, p. 5 (5/22/08). But the complaint was not served by certified mail; it was delivered to the office by messenger on April 20, and Mr. Hansen signed for it. *See* Ex. 5, p. 5 (investigator note "We send ours by messenger, not certified mail"). Moreover, Mr. Hansen told the investigator, "I remember getting the complaint, I just don't know when," and stated "I just don't know" when asked if he knew it was "before [Mr. Hansen terminated]." Ex. 5, p. 6. At his deposition, Mr. Hansen was equally unsure. JC Depo., pp. 83-84. He stated, "one of them [the human rights complaints] we got a while after the fact because he signed for it and just threw it in the back." JC Depo., p. 84 ll. 23-24. Nonetheless, he agreed that it "seems right" that he got some form of notice about Mr. Hansen's complaint a week or two before he was terminated. JC Depo., p. 85, l. 8. At the hearing, Mr. Crider testified that he could not recall when he learned that Mr. Hansen had filed the complaint. JC#5.4 0:02-03. His only clear recollection was that at some point, after Ms. Kubiak returned to work, he was going through the mail and she saw some paperwork from the commission. JC#5.3 0:33, 1:00. Ms. Kubiak was not working when the complaint was delivered to the office, and she did not return until after Mr. Hansen was discharged.

51 JC Depo., p. 85, ll. 13-19. When this occurred is unclear. When first interviewed by commission staff, Ms. Kubiak denied hearing about the complaint until after Mr. Hansen had been discharged; she said she learned about it in a conversation with Mr. Crider after he left, when they filed complaints for a protective order against Mr. Hansen. Supp. Ex., Kubiak 5/20/08 Interview p. 4, Q. 17, 18. Ms. Kubiak later stated, in her deposition, "Yes, we talked about it when Mike filed a complaint." However, notwithstanding this specific comment, Ms. Kubiak's overall deposition testimony on when such a conversation occurred was hopelessly muddled. She did not distinguish between a conversation about the complaint, and observations that she made to Mr. Crider generally about Mr. Hansen's behavior. *See generally*, EK Depo. pp. 18-19. Similarly, Ms. Kubiak's hearing testimony can be understood to mean that when Mr. Crider said, in reference to a "complaint", that he would take care of the problem, the "complaint" was her complaint about Mr. Hansen, the "problem" was Mr. Hansen's behavior, and that Mr. Crider planned on "taking care of it" because he had already made plans to replace Mr. Hansen with Mr. Robinson. EK#4 4:03, 4:07-08, 5:13. Mr. Crider's testimony was that Ms. Kubiak first learned that a complaint had been filed sometime after she returned from her lengthy absence, when she saw him going through paperwork from the commission. JC#5.3 1:56.

Around mid-April, Ms. Kubiak was hospitalized and was out of the office for several weeks.[52] By early May, Mr. Hansen was no longer willing to continue working with Ms. Kubiak.[53] He told Mr. Crider that the business could be run without her, and that if she came back to work he would quit.[54] Mr. Crider checked with the Department of Labor and Workforce Development and learned that because Mr. Hansen was an at-will employee, he could discharge him any reason. Mr. Crider decided to force Mr. Hansen's hand, and that if Mr. Hansen did not quit when Ms. Kubiak returned, he would discharge him.[55]

On the evening of Friday, May 11, Mr. Crider changed the locks on the business, without informing Mr. Hansen. He told Mr. Robinson and Ms. Kubiak to come in late on Monday.[56] Over the weekend, Mr. Hansen stopped by to pick up his bicycle, which was stored inside, and was unable to get in.[57] He got together with Mr. Robinson, who called Ms. Kubiak. Mr. Hansen overheard Ms. Kubiak tell Mr. Robinson that Mr. Crider planned on firing Mr. Hansen.[58]

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[52] Ms. Kubiak missed work on a couple of occasions for medical reasons. Her timecards, provided at the hearing, indicate that she worked on April 16-17, and did not return until May 14, the day Mr. Hansen's employment terminated. Ex. E. It appears that this absence was in connection with an injury incurred when she fell while getting out of her vehicle.

[53] Mr. Hansen twice spoke with commission staff during the week of May 7-10, and told them he was at a breaking point. Supp. Ex., Hansen Conversation Notes, 5/7/2007, 5/10/2007.

[54] Ex. 5, p. 7.

[55] JC Depo. p. 30, ll. 10-11.

[56] NR#4 1:30.

[57] MH#4 2:02.

[58] About a year after the incident, Mr. Hansen drafted a letter that Mr. Robinson signed, stating that Mr. Robinson called Ms. Kubiak while sitting in his truck with Michael Hansen, and that Ms. Kubiak told him Mr. Hansen was being fired because he had filed a complaint. Ex. 2 (7/29/08); NR#4 0:31-32. At the hearing, Mr. Robinson testified that the letter was accurate. NR#4 0:17.

Mr. Robinson's assertion that Ms. Kubiak told him that Mr. Hansen was fired because he had filed a complaint is not persuasive. He did not mention the telephone conversation when interviewed by the commission's investigator in February, 2008. HCR # 3. Rather, at that time Mr. Robinson simply stated that he "had a feeling [the complaint] had a lot to do with his termination"; when asked, "How do you know that?" Mr. Robinson did not say "I knew because Ellen Kubiak told me that was why when I spoke with her on the phone the day before Mike was fired." Rather, he said he knew because in light of the timing it seemed "obvious." He specifically stated that "I didn't know for sure" whether the complaint was the reason for the discharge. *Id.*, p. 4, #19. There is also no mention of any such phone call in a prior statement that Mr. Hansen apparently drafted for Mr. Robinson. *See* HCR #1. After he dropped off the second statement that Mr. Hansen had drafted for him, this one asserting that Ms. Kubiak had made such a statement, Mr. Robinson told the commission's investigator that he didn't really recall the conversation, but that "Mike isn't lying." Supp. Ex., Robinson Interview, 7/29/2008.

Notwithstanding Mr. Robinson's inability to recall the conversation, the preponderance of the evidence is that Mr. Robinson and Ms. Kubiak did speak and that Mr. Hansen overheard the call. When first interviewed by commission staff, Ms. Kubiak stated that she told Mr. Robinson that she didn't know what was going on. Supp. Ex., Kubiak Interview, 523/2008, p. 4, #17. At her deposition, Ms. Kubiak testified that on "a Sunday morning...Nelson and Mike were on the phone [with me] because apparently Jerry changed the locks....and I said, I don't know anything...I said, well, just call Jerry." EK Depo. p. 21, ll. 17-23. At the hearing Ms. Kubiak testified that she told Mr. Robinson that Mr. Hansen was being fired because of an issue concerning invoices. EK#4 4:24. Mr. Robinson, in an interview with the commission staff after he dropped off the letter Mr. Hansen had written for him, said much the same ("she was saying some bullshit about him being fired and invoices and stuff."). Supp. Ex., Robinson

On Monday, May 14, when Mr. Hansen arrived for work, he found the doors locked. After a few minutes, Mr. Crider, who had arrived earlier, let him in. The two had a confrontation, and Mr. Crider discharged Mr. Hansen. Mr. Hansen became irate and, after collecting his effects, he left.[59] When Mr. Robinson showed up, Mr. Crider told him he had let Mr. Hansen go, and that Mr. Robinson would be taking over his job.[60]

The termination of Mr. Hansen's employment precipitated a flurry of formal legal filings. On May 17, Mr. Hansen filed a claim for unpaid wages with the Department of Labor and Workforce Development[61] and in response to it Mr. Crider filled out a Department of Labor form stating that Mr. Hansen had been discharged for job performance-related issues.[62] On May 22, Mr. Hansen filed a complaint with the Human Rights Commission, alleging retaliatory discharge.[63] On May 29, 2007, after the UPS delivery man, Mike, came to the business and told Ms. Kubiak that Mr. Hansen was vindictive and that he had taken inventory from the business and was planning to open his own shop to compete with Mr. Crider's, Mr. Crider, Mike and Ms. Kubiak all filed complaints for a protective order against Mr. Hansen.[64] Ms. Kubiak's complaint resulted in a 20-day protective order issued on May 31.[65] Mr. Hansen also pursued a claim for Social Security disability benefits, which resulted in a finding that he was disabled as of May 14, 2007, and entitled to disability payments beginning in November, 2007.[66] In addition, some months later, Mr. Hansen filed a wage claim against Mr. Hansen in small claims court.[67] Mr. Hansen's regular wage at the time of his discharge was $18 per hour, or $720 per week. He was unemployed for several weeks but found temporary work during the summer.

Interview, 7/29/2008, p. 1, #2. Apparently the first person to say that Ms. Kubiak had said that Mr. Hansen was being fired because he had filed a complaint was Mr. Hansen, in an interview with the commission's investigator on June 25, 2008, more than a year after the event. Supp. Ex., Hansen Interview 6/25/2008, p. 2, #2. His self-serving assertion, long after the events in question, is not persuasive, however. Ms. Kubiak denied making such a statement. Moreover, Mr. Robinson did not independently recall such a statement, and he specifically described Ms. Kubiak as having mentioned invoices in the conversation, which is what Mr. Crider insisted was the actual immediate cause of his decision to confront Mr. Hansen.

59 JC Depo., p. 30. Mr. Hansen testified that when Mr. Crider let him in, he said "Get your shit out of here." MH#4 2:02. Mr. Crider testified that he told Mr. Hansen that Ms. Kubiak was coming back to work, and "We need to talk." JC#5.2 0:25. He added that when he continued the conversation, Mr. Hansen stood up and said, "That's it, I'm out of here." JC#5.2 0:40.

60 NR#1 0:43.

61 Ex. 4; MH#4 3:17.

62 Ex. 4.

63 Amended Accusation, ¶11.

64 Ex. 1; MH#4 2:30; EK#1 4:57.

65 Id.

66 Ex. 2.

67 Ex. 5, p. 1. According to Mr. Hansen, this happened about six months later. MH#4 3:21.

Mr. Robinson was discharged in November, 2007, because he stopped showing up for work.[68] At about that same time, Mr. Hansen started up his own business, offering services similar to those offered by Mr. Crider's business.[69] Sometime after Mr. Robinson stopped working at the business, Mr. Crider realized that Ms. Kubiak's performance would not improve,[70] and Ms. Kubiak left the job.[71]

III. Discussion

A. Applicable Law

An employer may not discharge an employee in retaliation for filing a complaint with the commission.[72] In a case involving an alleged retaliatory discharge based on the filing of a complaint, the burden of coming forward with evidence shifts.[73] The employee must present evidence sufficient to support a prima facie case that the complaint was filed (protected activity), that the discharge occurred (adverse employment action), and that the discharge was in retaliation for filing the complaint (causation). When a prima facie case has been made, the employer must come forward with evidence sufficient to rebut the prima facie case, from which it could reasonably be inferred that the employer had other, legitimate, reasons to discharge the employee.

In this case, there is no dispute that a complaint was filed, and the proximity in time between the filing of the complaint and the termination of Mr. Hansen's employment is sufficient to establish a prima facie case of causation.[74] Moreover, there is ample evidence to support a prima facie case that Mr. Hansen was discharged.[75] However, Mr. Crider presented evidence sufficient to rebut the prima facie case as to whether the discharge (if it occurred) was in retaliation for filing a complaint.[76] When a prima facie case has been made and rebutted, the ultimate burden of proof as to protected activity and an adverse employment action remains with

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68 NR#4 0:18; EK#4 4:50.

69 MH#4 3:32.

70 JC#5.3 0:55.

71 JC Depo., p. 61, ll.12-15; p. 73, l. 1.

72 AS 18.80.220(a)(4).

73 Raad v. Alaska State Commission for Human Rights, 86 P. 3d 899, 905 (Alaska 2004) [hereinafter, Raad] *citing* Veco, Inc. v. Rosebrock, 970 P.2d 906 (Alaska 1999) [hereinafter, Veco].

74 *See, e.g.,* Veco, 970 P.2d at 919.

75 Among other things, Mr. Crider provided a discharge statement to the Department of Labor and Workforce Development identifying a variety of grounds for discharging Mr. Hansen.

76 Mr. Crider, Mr. Robinson, Ms. Kubiak, Ms. Flowers, and Ms. Burgess all testified that Mr. Crider had decided to terminate Mr. Hansen (an at will employee) before the complaint was filed, because of the ongoing conflicts between him and Ms. Kubiak. Mr. Crider testified that Mr. Hansen quit before he could fire him.

the employee, but the burden of proof on causation depends on the nature of the evidence presented by the employee to establish the prima facie case.

If the employee presented direct evidence that retaliation played a part in the alleged discharge, the claim of retaliatory discharge is considered under the mixed-motive analysis.[77] In a mixed-motive case, the employee prevails unless the employer proves that even if there was a discharge and an illegitimate motive was a motivating factor, the employer would have discharged the employee at the same time even if no complaint had been filed.[78]

If the employee has not presented direct evidence that retaliation played a part in alleged discharge, the claim of retaliatory discharge is considered under the pretext analysis.[79] In a pretext case, the employee prevails if the employee proves that the employer discharged the employee, and that retaliation was a determinative ("but for") cause,[80] that is, "that [illegitimate] reasons more likely motivated the employer,"[81] typically by proving that the asserted reasons are, in fact, pretextual.[82]

B. Mr. Hansen Was Discharged

For purposes of the Human Rights Act, a termination of employment is a "discharge" if it is an actual discharge or a constructive discharge.[83] An actual discharge is the termination of employment by the employer against the employee's will.[84] A voluntary resignation by the employee is not an actual discharge,[85] but it may be a constructive discharge. Thus, the threshold factual issue in this case is whether Mr. Hansen was actually or constructively discharged. The burden of proof on that issue is on the employee.

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77 Era Aviation, Inc. v. Lindfors, 17 P.3d 40, 44 (Alaska 2001) [hereinafter, Era Aviation], *citing* Veco.

78 *See* Era Aviation, 17 P.3d at 434 ("The employer must show that it would have made the same decision even absent considerations of gender.").

79 Reust v. Alaska Petroleum Contractors, 127 P.3d 807, 815 (Alaska 2005) ("the employee...must prove that the explanation was a pretext for retaliation."); Era Aviation, 17 P.3d at 43-44, *citing* Veco.

80 *See* Era Aviation, 17 P.3d 40, 45 n. 23 (Alaska 2001) ("some district courts use 'but for' or 'because of' language" in a pretext instruction). In Era Aviation, the employer argued that the superior court had erred, in a pretext case, by not submitting a "but for" instruction. 17 P.3d 43. The supreme court found that the jury instruction was in error, because it permitted the jury to find for the plaintiff (in a pretext case) if sex was a factor; however, the error was deemed harmless in light of the instructions as a whole.

81 Raad, 86 P. 3d at 906 (Alaska 2004), *citing* State, Department of Fish & Game v. Meyer, 906 P.2d 1365, 1375 (Alaska 1995).

82 *See* Lincoln v. Interior Region Housing Authority, 30 P.3d 582, 586-587 (Alaska 2001), *citing* Veco, 970 P.2d at 919.

83 Chertkova v. Connecticut General Life Insurance Company, 92 F.3d 81, 87 (2d Cir. 1996) [hereinafter, Chertkova].

84 Marks v. National Communications Association, 72 F.Supp. 2d 322, 328 (S.D.N.Y. 1999).

85 *See, e.g.,* Khaleel v. Metro One Loss Prevention Services Group, 469 F. Supp. 2d 130 (S.D.N.Y. 2007); Mattera v. Gambro, Inc., 2004 WL 723239 (10th Cir. 2004).

An actual discharge occurs when the employer tells the employee that the employment relationship is terminated (*e.g.*, "you're fired") or when the employer "engages in conduct that 'would logically lead a prudent person to believe his tenure has been terminated.'"[86] The employee must reasonably perceive that that the employer actually intended[87] to dispense with the employee's services.[88]

There is clear and convincing evidence that if Mr. Hansen did not quit, Mr. Crider intended to discharge him. Indeed, Mr. Crider himself so testified. But that Mr. Crider intended to fire Mr. Crider if he did not quit does not mean that Mr. Hansen did not resign. Mr. Hansen, only several days previously, reportedly told commission staff that he was "emotionally exhausted," "fragile," and that "he [was] fed up with his job...and want[ed] to know if it would affect his case if he quit."[89] Mr. Crider testified that Mr. Hansen had previously threatened to quit. If Mr. Hansen quit out of frustration and anger that Mr. Crider had elected to keep Ms. Kubiak on the job, he was not actually discharged. Only if he reasonably perceived, based on Mr. Crider's words and conduct on or before May 14, that he was being terminated, would Mr. Hansen's termination be considered an actual discharge.

Mr. Hansen has not asserted that prior to the weekend of May 12-13, he anticipated being discharged. While acknowledging that he had ongoing conflicts with Ms. Kubiak, and that he and Mr. Crider had several "passionate discussions" about her, Mr. Hansen believed that the only rational course for Mr. Crider was to discharge Ms. Kubiak, whom he perceived as a threat to the success of the business. Mr. Crider had never disciplined Mr. Hansen,[90] and had given him multiple raises. Moreover, Mr. Hansen denied Mr. Crider's assertion that on May 10, Mr. Hansen had slammed invoices down and exclaimed that he hoped the business would fail. Mr. Hansen also denied that he ever brought a weapon to work, that he had accessed pornography on his computer, or that he had ever verbally abused or harassed Ms. Kubiak. In Mr. Hansen's version, nothing had occurred on the job that would have given Mr. Crider reason to let him go. The problem, in his view, was Ellen Kubiak. Finally, although the preponderance of the evidence establishes that over the weekend Mr. Hansen overheard Ms. Kubiak tell Mr. Robinson

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86 Chertkova, 92 F.3d at 88, *quoting* NLRB v. Trumbull Asphalt Company, 327 F.2d 841, 843 (8th Cir. 1964 (Blackmun, J.).

87 *See* Thomas v. Dillard Department Stores, 116 F.3d 1432, 1434 (11th Cir. 1997).

88 Chertkova, *supra*, *citing* NLRB v. Ridgeway Trucking Co., 622 F.2d 1222, 1224 (5th Cir. 1980).

89 Supp. Ex., Hansen Conversation, 5/7/2007, 5/10/2007.

90 Mr. Hansen denied that Mr. Crider had ever spoken to him about accessing pornography on his computer or about bringing a gun to the workplace because, he claimed, those events had never occurred. MH#4 3:31.

that Mr. Crider planned on firing Mr. Hansen, that was her statement, not a statement by Mr. Crider. Since nothing in Mr. Crider's prior actions had given Mr. Hansen (according to his own testimony) reason to believe that he would be fired, Mr. Hansen had no reason to believe that what she was telling him was what Mr. Crider actually intended to do. The determinative facts relating to whether he was actually discharged, then, are the events on the morning of May 14.

Mr. Hansen testified that when he showed up at the office on Monday morning, Mr. Crider let him in and said, "Get your shit out of here,"[91] a statement that, if it was made, would clearly communicate an actual intent to terminate his employment. However, Mr. Crider testified that when he let Mr. Hansen in, he said, "We need to talk."[92] Mr. Crider said that he told Mr. Hansen that he had decided to keep Ms. Kubiak on as an employee, and asked "[w]hat are you going to do [about it?],"[93] whereupon Mr. Hansen blew up and quit.

Neither Mr. Crider nor Mr. Hansen was a persuasive witness regarding the events of May 14,[94] and there is substantial evidence that Mr. Hansen quit. However, there is persuasive evidence, independent of the two self-interested principals' description of the confrontation on May 14, that Mr. Crider discharged Mr. Hansen. First, Mr. Crider testified that he had, prior to May 14, contacted the Department of Labor and Workforce Development to inquire about his right to discharge an employee, and had learned that he could discharge an at-will employee, such as Mr. Hansen, at any time. Thus, by his own testimony, Mr. Crider saw no impediment to discharging Mr. Hansen and he therefore had no reason to try to maneuver Mr. Hansen into quitting before being fired. Second, immediately after the event, Mr. Crider submitted a discharge statement to the department in response to Mr. Hansen's application for unemployment benefits; in that statement, he described his reasons for discharging Mr. Hansen, and did not assert that Mr. Hansen had quit. Third, over a lengthy period of time that continued through his testimony at the hearing, Mr. Crider repeatedly (and for the most part consistently) described the termination of Mr. Hansen's employment in terms directly or indirectly indicative of a discharge, rather than of a resignation.[95]

In light of the evidence as a whole, the preponderance of the evidence is that when Mr. Hansen showed up for work on Monday, May 14, Mr. Crider discharged him.

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91 MH#4 2:02.

92 JC#5.2 0:25, 0:28, 0:39.

93 JC Depo., p. 30, ll. 7-8.

94 Neither Mr. Crider nor Mr. Hansen was a persuasive witness in general. *See* p. 16, *infra.*

95 In addition to repeatedly stating that he had "let him [Mr. Hansen] go" (a colloquialism for discharge), Mr. Crider at times state "I terminated him", and "I fired him." *See* Objections at 4, note 14.

C. Causation

The preponderance of the evidence is that Mr. Crider discharged Mr. Hansen on May 14. To establish a claim for retaliatory discharge it must be shown that retaliation for filing a complaint was a cause of the discharge. As previously observed, the legal framework applicable to that inquiry depends on whether there is direct evidence that retaliatory intent played a role in the discharge.

1. There Is Direct Evidence of Retaliatory Intent

Generally, direct evidence is evidence that directly establishes a fact, as compared with evidence from which the existence of a fact may reasonably be inferred. In that sense, direct evidence of a retaliatory or other impermissible intent for discharging an employee is typically unavailable, because employers generally to do not express or admit to harboring an illicit or otherwise improper reason for discharging an employee. Thus, in the context of retaliatory discharge, direct evidence is considered to mean something different than it does in the normal evidentiary context. In the context of retaliatory discharge, direct evidence includes circumstantial evidence "so long as the circumstantial evidence is sufficiently strong,"[96] that is, "strong enough to be functionally equivalent to direct proof."[97]

Circumstantial evidence of a wrongful intent may come in a variety of forms. Statements by supervisors or other employees (other than the direct expression of wrongful intent),[98] statistical evidence, and differential treatment of particular individuals are all circumstances that could, in a given case, support a reasonable inference of a wrongful intent. Circumstantial evidence is not considered sufficiently strong to warrant a mixed-motive analysis when it consists solely of ambiguous statements by a supervisor,[99] or of stray comments by co-employees not in a supervisory capacity.[100] In this case, the executive director cites to three evidentiary items as direct evidence of a wrongful intent: Mr. Crider's statement to Ms. Kubiak

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96 Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 435 (Alaska 2004). In this case, the court adopted the approach articulated in Tyler v. Bethlehem Steel Corporation, 958 F.2d 1176 (2d Cir. 1992). The executive director cites to two federal cases, Fernandes v. Costa Bros. Masonry, Inc., 119 F.3d 572 (1st Cir. 1999), and Croushorn v. Board of Trustees of University of Tennessee, 518 F. Supp. 9 (M.D. Tenn. 1980). Closing Argument at 11.

97 Mahan v. Arctic Catering, Inc., 133 P.3d 655, 662 (Alaska 2006).

98 For example, a statement "that may be viewed as directly reflecting the discriminatory attitude" could be considered direct evidence, even though it is not an admission or expression of wrongful intent. *See* Mahan v. Arctic Catering, Inc., 133 P.3d 655, 662 (Alaska 2006).

99 Kinzel, 93 P.2d at 435, *citing* Era Aviation, 17 P.3d 40 (Alaska 2000).

100 Kinzel, 93 P.2d at 435, *quoting* Ostrowski v. Atlantic Mutual Insurance Cos., 968 F.2d 171, 182 (2d Cir. 1992).

to "bide [her] time" and that he would "take care of it;"[101] Mr. Robinson's testimony that Ms. Kubiak told him that Mr. Hansen was fired for filing the complaint;[102] and Mr. Crider's alleged admission that the complaint was a factor in his decision.[103]

Ms. Kubiak's testimony that Mr. Crider told her to "bide her time" and that he would "take care of it" is not direct evidence of a wrongful intent, because it is ambiguous.[104] Her testimony, and the statement by Mr. Crider, was ambiguous in three respects. First, in context it is unclear whether, in saying that Mr. Crider told her he would take care of "it", Ms. Kubiak was referring to the complaint Mr. Hansen filed with the commission, or to her own complaint to Mr. Crider about a comment by Mr. Hansen that Ms. Kubiak had overheard.[105] Second, to say that he would "take care of it" could simply mean that Mr. Crider would deal with the complaint on its merits (Mr. Crider deemed the complaint frivolous, and commission staff did not sustain it). Mr. Crider's comment did not necessarily mean that he would deal with it by terminating Mr. Hansen. Third, to say that she should "bide her time" could be construed to mean that Mr. Crider had already decided to terminate Mr. Hansen for cause.[106]

Mr. Robinson's testimony, similarly, is not direct evidence of retaliatory intent. Mr. Robinson testified at the hearing that Ms. Kubiak told him that Mr. Hansen was being fired because he filed a complaint.[107] He did not testify that Ms. Kubiak told him that Mr. Crider had told her that is why he planned on firing Mr. Hansen, which would be direct evidence (in the form of an admission by Mr. Crider) of a wrongful intent. Ms. Kubiak's alleged assertion could have been based on her own perception, not anything Mr. Crider actually said. Moreover, as

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101 Closing Argument at 7, *citing* EK Depo. 25:24-25; 26:1-3.

102 Closing Argument at 7, *citing* "Robinson's testimony at hearing."

103 Closing Argument at 7.

104 Kinzel, 93 P.2d at 435, *citing* Era Aviation, 17 P.3d 40 (Alaska 2000).

105 *See* note 51, *supra*. In responding to a question regarding the complaint, Ms. Kubiak – whose answers to questions often strayed from the subject of the question – brought up a comment by Mr. Hansen that she overheard. Counsel then asked her, "What did Jerry say to you about it?" Ms. Kubiak responded that Mr. Crider had said he would "take care of it."

106 As the executive director observes, Mr. Crider's comments certainly can be read as an admission that he planned on firing Mr. Hansen in retaliation for his filing of a complaint, and Mr. Crider did not himself offer an alternative explanation for them at the hearing. Objections at 9, note 22. But it makes no difference whether Mr. Crider pointed out the ambiguity of his comments at the hearing: he expressly denied retaliatory intent, and his comments are, on their face, ambiguous. Because they are ambiguous, under directly applicable precedent (Kinzel), Mr. Crider's comments as a matter of law are not in themselves direct evidence of retaliatory intent.

107 At the hearing, Mr. Robinson was asked what Ms. Kubiak told him about the complaint Mr. Hansen filed. He answered, "She said Mike was being terminated because he filed a civil rights complaint," but he could not recall when that statement was made. NR#4 0:17, 0:32. In 2008, Mr. Hansen prepared a letter for Mr. Robinson's signature asserting that Mr. Robinson called Ms. Kubiak on his cell phone while the two were sitting in Mr. Robinson's truck, the day after the locks were changed, and that Ms. Kubiak said "it was because Jerry was mad that Mike had filed that complaint." HCR #2; *see* NR#4 0:32.

previously noted, Mr. Robinson's testimony that Ms. Kubiak had made such a statement was not persuasive.[108]

This leaves Mr. Crider's own alleged admission that the complaint was a factor in his decision to discharge Mr. Hansen (if he did not quit) as the only remaining alleged direct evidence of retaliatory intent. The executive director has not quoted or cited to any statement by Mr. Crider that was an admission that the filing of a complaint was a factor in his decision to terminate Mr. Hansen.[109] At the hearing Mr. Crider testified that the complaint didn't enter his mind.[110] Mr. Crider has repeatedly insisted that the immediately triggering event in the timing of the discharge was (apart from Mr. Robinson's readiness) an alleged incident on Thursday, May 10, when Mr. Hansen produced some past due bills from vendors and gave them to Mr. Crider, commenting that he hoped the business would fail.[111]

In the absence of any direct admission that the filing of a complaint was a factor in his decision to terminate Mr. Hansen, the executive director cites to Mr. Crider's admission that <u>if</u> he knew that the complaint had been filed, it would have been "on the list" of reasons to discharge Mr. Hansen and to his admission that he had received a copy of the complaint prior to May 14.[112] But, as previously explained, Mr. Crider's admission that he had received the complaint was not without reservation: he also asserted, in response to a follow-up question, that he was unsure whether he had received the complaint by May 14.[113] Mr. Crider's admissions that (1) he received the complaint prior to May 14 and that (2) the complaint would have been on the list of reasons to fire Mr. Hansen thus do not <u>prove</u> that retaliatory intent played a role in the termination of Mr. Hansen's employment.

Nonetheless, Mr. Crider's admissions that (1) he received the complaint prior to May 14, and (2) that the complaint would have been on the list of reasons to fire Mr. Hansen, are direct

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108 EK Depo at 20, l. 22. *See* note 58, *supra.*

109 No such admission was cited in the executive director's closing argument. *See* note 103, *supra.* Nor was any cited in the executive director's objections to the Recommended Decision; rather, in her objections the executive director references, without quoting or citation to the record, "Mr. Crider's admissions, under oath, during the hearing that he had factored Mr. Hansen's human rights complaint into his decision to 'let [Mr. Hansen] go." Objections at 8, note 21. The administrative law judge is unaware of any such admission by Mr. Crider, at any time.

110 JC#5.3 1:35. Mr. Crider testified that if he knew about the complaint, it would have been "on the list" of reasons to fire Mr. Hansen, but that he did not recall learning of the complaint before Mr. Hansen left his employment. JC#5.3 1:37-39; JC#5.4 0:14.

111 *See, e.g.,* Ex. 5, p. 5 (5/20/08); JC Depo. pp. 31, 46.

112 Objections at 8, note 21.

113 *See* notes 50, 51, *supra.* The executive director asserts that Mr. Hansen admitted at the hearing that he had received the complaint before Mr. Hansen's employment terminated. Objections at 8, note 21. The administrative law judge is unaware of any such admission at the hearing.

evidence of facts that, if both were proved, would create a logical implication (not just a reasonable inference) that retaliatory intent was one of the reasons Mr. Crider intended to discharge Mr. Hansen (if he did not quit) on May 14. His admissions are therefore direct evidence of retaliatory intent. Because there is direct evidence of retaliatory intent, a mixed-motive analysis applies to Mr. Hansen's claim of retaliatory discharge.

2. Mr. Crider Did Not Meet His Burden of Proof

Under a mixed-motive analysis, Mr. Hansen will prevail unless Mr. Crider proved that although the filing of a complaint with the Human Rights Commission may have been a motivating factor, he would have discharged Mr. Hansen no later than May 14, even if no complaint had been filed.[114]

Mr. Crider testified that that timing of the confrontation with Mr. Hansen on May 14 was the result of an incident on May 10, when Mr. Hansen slammed a pile of past-due invoices onto his desk and exclaimed, "I hope your business fails," or words to that effect, and his perception that, by that date, Mr. Robinson was sufficiently trained to take over the production duties. Mr. Hansen denied that the invoice event occurred.

Neither Mr. Crider nor Mr. Hansen was, overall, a persuasive witness. First, the events they were describing had occurred more than two and a half years prior to the hearing, and the lapse of time had affected their recollection. Both were unable to recall details, times, or specific events with clarity or precision. Second, both of them had a motive to dissemble; their testimony was self-serving. Third, both of them offered testimony that was, at times, internally inconsistent,[115] inconsistent with documented facts or more persuasive testimony,[116] or not supported by their own prior statements. Mr. Hansen's testimony was generally responsive as to facts helpful to his case, and less so with respect to other facts. Mr. Crider's testimony was generally not forthcoming; it was discursive and elliptical.

In light of the general lack of credibility demonstrated by Mr. Hansen and Mr. Crider, the occurrence or non-occurrence of the alleged incident involving invoices was not established. Because Mr. Crider has the burden of proof under a mixed-motive analysis, and he did not prove

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114 *See* Kinzel, *supra*, 17 P.3d at 434 ("The employer must show that it would have made the same decision even absent considerations of gender.").

115 For example, Mr. Crider told the commission's investigator that he did not consider the material that he found on Mr. Hansen's computer to be pornography, but he testified at the hearing that he considered it pornography. *See* Ex. 5, p. 6; JJC#5.1 0:37.

116 For example, Mr. Hansen denied that he threatened Ms. Flowers or that he had brought a weapon to the workplace, although Ms. Flowers (a highly credible witness) testified that Mr. Hansen had made a threatening remark to her, and Mr. Crider told him that he had brought a weapon to the workplace.

that the invoice incident occurred, the preponderance of the evidence is that the triggering event for the May 14 confrontation was something other than the invoice event. The only other triggering event cited by Mr. Crider is his perception that Mr. Robinson was by then competent to take over the production duties. Mr. Crider asserted that he had confirmed this with Mr. Robinson, but Mr. Robinson never mentioned any such discussions even though Mr. Crider said they had occurred on multiple occasions. Mr. Crider did not prove that the triggering event was his perception that Mr. Robinson was prepared.

On the facts that have been proven, two scenarios are plausible. Under one scenario, while Ms. Kubiak was out of the office, Mr. Crider decided, based on Mr. Robinson's input, that it would be better to keep Mr. Hansen as an employee than Ms. Kubiak, but that when he learned a complaint had been filed he changed his mind and went back to his original plan, which was to discharge Mr. Hansen. The second scenario is that while Ms. Kubiak was out of the office, notwithstanding Mr. Robinson's input, Mr. Crider never altered from his original plan, although he did have second thoughts. Under a mixed-motive analysis, to avoid liability Mr. Crider needed to prove that the second scenario is more likely true than the first. This he failed to do: he did not prove that there was a confrontation on May 10 or that Mr. Robinson had confirmed his preparedness to take over Mr. Hansen's duties. Moreover, Mr. Crider admitted that if he had learned of the complaint before May 14, it would have been "on the list" of things he considered. Proximity in time does not necessarily in itself establish causation.[117] However, since Mr. Crider did not prove that he was unaware that the complaint had been filed, and there is no persuasive evidence of any alternative explanation as to why he confronted Mr. Hansen on May 14, Mr. Crider has not shown by a preponderance of the evidence that the triggering event leading to the events of May 14 was something other than the filing of the complaint. Mr. Crider is therefore liable for retaliatory discharge under a mixed-motive theory.

D. Remedy

1. Back Pay

The commission has authority to award back pay as a remedy for retaliatory discharge.[118] Generally, back pay "should ordinarily be awarded where needed to put the claimant in the position he or she would have been but for...retaliatory treatment."[119] The measure of damages

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117 *See, e.g.,* Padob v. Entex Information Systems, 960 F.Supp. 806, 814 (S.D. N.Y. 1997).

118 *See* AS 18.80.130(a).

119 Haley *ex rel.* Block v. Parello, OAH No. 07-0665-HRC at 14 (Human Rights Commission 2009), *citing* Abermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). The commission has stated that in considering an award

in a wrongful discharge case involving an at-will employee is the amount of wages that would have been earned during "the likely duration of employment had the wrongful discharge not occurred."[120] The amount of wages is offset by actual earnings, but not by unemployment compensation.[121] The employer is entitled to a reduction in damages to the extent it proves, by clear and convincing evidence, a failure to mitigate damages.[122] Simple interest is due at the rate of 3.5% annually.[123]

The executive director seeks an award of back pay for one year from the date of discharge, "because that is the period of time in which Mr. Hansen actively sought to mitigate his damages."[124] But the period for which back pay should be awarded is determined by the time that Mr. Hansen would have remained employed, rather than by the period of time he sought to mitigate his damages.[125]

In this case, there is clear and convincing evidence that before Mr. Hansen filed a complaint, Mr. Crider had decided to discharge him as soon as it was commercially feasible: indeed, the accusation itself asserts that before Mr. Hansen filed a complaint, Mr. Crider had already decided to terminate either Mr. Hansen or Ms. Kubiak, because of the ongoing conflicts between them.[126] Mr. Robinson, Ms. Kubiak, Ms. Flowers and Ms. Burgess all testified, quite persuasively, that Mr. Crider had decided to discharge Mr. Hansen before Mr. Hansen filed a complaint alleging sexual discrimination by Mr. Crider. Both Mr. Crider and the former owner, Ms. Flowers, testified that the only reason they did not discharge Mr. Hansen sooner was because his knowledge of the production side of the business was critical to the ongoing operation.

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of back pay, its goal "is to make whole the victim of discrimination and to provide economic disincentives to employment discrimination." Webb v. VECO, ASCHR No. C-880295 at 12 (September 14, 1993).

120 Reust, 127 P.3d at 818.

121 Webb, at 17-18.

122 Webb, at 14, 17-18.

123 Webb, at 14. *See* AS 09.30.070; 6 AAC 30.480(b).

124 Closing Argument at 16.

125 Reust , 127 P.3d at 818. This limitation on damages is consistent with the treatment of damages for an employee whose employer discovers grounds for termination for cause after a retaliatory discharge. *See* Closing Argument at 15, *quoting* Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (O'Connor, J. concurring), and note 19, *citing* McKennon v. Nashville Banner Publishing Company, 513 U.S. 352, 362 (1994). McKennon holds that an employer who discovers grounds for discharge after the retaliatory discharge is not relieved from liability, but that damages are severed at the point the employer discovers those grounds. Thus, the case supports limiting damages to the period of time the employee would have remained employed, if the employer has pre-existing grounds for terminating an employee.

126 Amended Accusation, ¶5, ¶7.

Back pay is limited to the time for which Mr. Hansen would likely have remained employed by Mr. Crider if no complaint had been filed, that is, from May 14 until the date on which Mr. Robinson would have been adequately trained to replace Mr. Hansen. According to Mr. Crider, he considered Mr. Robinson adequately trained as of May 14.[127] However, Ms. Kubiak testified that after Mr. Hansen left, there was some equipment that Mr. Robinson did not yet know how to operate, and Mr. Crider testified that Mr. Hansen had not done a good job of training Mr. Robinson. Notably, however, after Mr. Hansen stopped working, the business continued to operate successfully. On balance, Mr. Hansen has not shown that he would likely have remained employed for more than two additional weeks, the period of time for which notice of discharge is typically provided. Mr. Hansen testified that he began looking for work a couple of weeks after his discharge; he has not shown that he is entitled to back pay in an amount greater than normal reasonable severance pay (two weeks' wages).

2. Other Relief

Mr. Crider testified that he was unaware that retaliatory discharge was prohibited. Mr. Crider does not manage personnel in his other business, and he did not have an employee policy in this or any of his other businesses. Therefore, in order to ensure that this business operates in compliance with applicable law, it is appropriate to order remedial measures. A proposed remedial order is attached.

IV. Conclusion

In this case, the preponderance of the evidence is that Mr. Crider discharged Mr. Hansen job on May 14, 2007. There is direct evidence that retaliatory intent was a factor in the discharge, and a mixed-motive analysis therefore applies. Mr. Crider did not prove by a preponderance of the evidence that he would have discharged Mr. Hansen on May 14 even if no complaint had been filed. Mr. Crider is therefore liable for retaliatory discharge. Back pay should be awarded for the period of time that Mr. Hansen would more likely than not have remained in Mr. Crider's employ. Mr. Hansen did not prove that he would have remained employed for more than two weeks after May 14, even in the absence of retaliatory intent, and back pay should therefore be limited to two weeks' pay. A remedial order is appropriate.

DATED June 9, 2010.

Andrew M. Hemenway
Administrative Law Judge

[127] MH#5.3 1:18.

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

Jean M. Kizer *ex rel.* MICHAEL HANSEN, Complainant,	)	
v.	)	
THE NEW PRINTER'S WORKSHOP, Respondent	)	OAH No. 09-0299-HRC ASCHR No. J-07-093

PROPOSED ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, and the Hearing Commissioners, having reviewed the hearing record, the Administrative Law Judge's Revised Recommended Decision dated June 9, 2010, is hereby **ADOPTED** by Commission.

Accordingly, based upon the adopted decision of the Administrative Law Judge,

IT IS HEREBY FOUND AND ORDERED:

(1) The New Printer's Workshop violated AS 18.80.220(a)(4) by discharging Michael Hansen from his employment in retaliation for Mr. Hansen's filing of a complaint with the Human Rights Commission;
(2) The New Printer's Workshop shall within 15 days of the date of this order serve on the Executive Director a proposed written policy of nondiscrimination under AS 18.80 and shall within 30 days of the date of this order adopt, disseminate, and adhere to a written policy of nondiscrimination under AS 18.80 that has been approved by the Executive Director;
(3) The New Printer's Workshop shall within 45 days of the date of this order obtain training in nondiscriminatory employment practices for its managers supervisors, and any employees, that has been approved by the Executive Director, and shall within 15 days of the training report to the Executive Director on the training in such a manner as may be prescribed by the Executive Director;
(4) The New Printer's Workshop is liable to Michael Hansen for two weeks' back pay in the amount of $1,440, with interest thereon at the rate of 3.5% per year, as damages and shall pay the back pay damages to Mr. Hansen within 30 days of the date of this order;
(5) The New Printer's Workshop shall remove any reference to events occurring on or after April 20, 2007, in Mr. Hansen's personnel records and shall not disclose to any other employer or prospective employer that Mr. Hansen filed complaints under AS 18.80 while employed by New Printer's Workshop.

DATED _____ _____
Commissioner Mark Fish

DATED _____ _____
Commissioner Grace Merkes

DATED _____ _____
Commissioner Karen Rhoades