ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY, EXECUTIVE DIRECTOR, ex rel. LESTER HUBBARD, Complainant, v. ALASKA COMPUTER ESSENTIALS Respondent.	)	ASCHR No. C-04-157 OAH No. 08-0185-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 Revised Recommended Decision on Summary Adjudication of June 29, 2009 and Revised draft Proposed Order is hereby ADOPTED by the Commission in its entirety.

IT IS therefore ORDERED:

(1) Alaska Computer Essentials, Inc., violated AS 18.80.230(a)(I) and Title III of the Americans with Disabilities Act of 1990 by failing to provide restrooms in its place of business or at an alternative location accessible to Lester Hubbard and other persons using wheelchairs for mobility;

(2) Alaska Computer Essentials, Inc., shall within 90 days of the date of this order adopt, disseminate, and adhere to a policy of nondiscrimination under the Alaska Human Rights Law that includes, but is not limited to, a policy prohibiting discrimination because of disability;

(3) Alaska Computer Essentials, Inc., shall, within 90 days of the date of this order, either (a) make or cause to be made any necessary modifications to its current business premises to provide restrooms for both sexes that are accessible to persons who use wheelchairs; or (b) submit to the Commission a proposal for offering alternative accessible arrangements for such persons;

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(4) Alaska Computer Essentials, Inc., shall, within 90 days of the date of this order, provide to the Commission staff either (a) objective, verifiable evidence that its current place of business has restrooms for both sexes that are accessible to persons who use wheelchairs for mobility; or (b) documentation describing in reasonable detail the specific alternative accessible arrangements that it proposes to make;

(5) Commission staff shall review the proposed alternative arrangements and within 15 days in writing either approve or disapprove the proposal and state the reasons. If the Commission staff disapproves the proposal, Alaska Computer Essentials, Inc., shall within 15 days provide to Commission staff a new proposal that addresses the reasons for disapproval;

(6) Beginning on the date of approval of a proposal, and continuing thereafter for a period of three years, Alaska Computer Essentials, Inc., shall submit to Commission staff a report describing the alternative arrangements provided for any disabled person for whom it makes alternative arrangements for the provision of its services, including a description of the alternative arrangements, the date(s) provided, the name of the disabled person, and the reason for the alternative arrangement.

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: October 29, 2009

Lester C. Lunceford, Commissioner

DATED: October 29, 2009

Randall H. Eledge, Commissioner

DATED: October 29, 2009

Karen Rhoades, Commissioner

CERTIFICATE OF SERVICE

This is to certify that on October 29, 2009,
A copy of the foregoing was hand-delivered
to:

Stephen Koteff, Human Rights Advocate
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, AK 99501-3669

and delivered by U.S. Mail, postage prepaid to:

George Elkins
Alaska Computer Essentials
2511 Sentry Drive Suite 211
Anchorage, AK 99518

Andrew Hemenway, Administrative Law Judge
Office of Administrative Hearings
State of Alaska
PO Box 110231
Juneau, AK 99811-0231

Margaret Taylor

Margaret Taylor
Commission Secretary

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

Paula M. Haley *ex rel.* LESTER HUBBARD, Complainant,	)	
v.	)	
ALASKA COMPUTER ESSENTIALS, Respondent	)	OAH No. 08-0185-HRC ASCHR No. C-04-157

REVISED RECOMMENDED DECISION ON SUMMARY ADJUDICATION

I. Introduction

This matter is pending on the executive director's motion for default judgment. The respondent failed to file an answer, did not respond to discovery requests, and did not respond to the motion for default judgment. The record supports summary adjudication against the respondent.

II. Facts

This proceeding was initiated by a complaint filed by Lester Hubbard on December 14, 2004, asserting that he had been discriminated against on the basis of a physical disability, paraplegia. Following an investigation, on November 16, 2007, commission staff issued its determination that substantial evidence supported the complainant's allegations.[1] Informal efforts to eliminate or remedy the alleged discrimination were unsuccessful. On April 4, 2008, the executive director notified the commission that conciliation had failed.[2] On April 7, 2008, the commission provided notice of the commencement of the hearing process requested the chief administrative law judge to appoint an administrative law judge.[3] On April 9, 2008, an administrative law judge was assigned to conduct the hearing.

The administrative law judge convened a telephonic prehearing conference on May 14, 2008. George Elkins appeared on behalf of the respondent, Alaska Computer Essentials, Inc.

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1 *See* 6 AAC 30.330(b).
2 *See* 6 AAC 30.3409(f)(1).
3 *See* AS 18.80.120(a), (b).

(ACE), and Human Rights Advocate Caitlyn Shortell represented the executive director. The parties agreed on a prehearing schedule and a hearing date.

Following the prehearing conference, and in conformity with the parties' agreement, the executive director filed an amended complaint on May 16, 2008. The amended complaint alleges the following: Lester Hubbard is an paraplegic who uses a wheelchair;[4] Mr. Hubbard enrolled in a class at ACE as a reemployment benefit under the Alaska Workers' Compensation statutes;[5] the bathrooms at ACE premises and classrooms were not wheelchair-accessible;[6] George Elkins is the owner of ACE;[7] to accommodate Mr. Hubbard, Mr. Elkins visited Mr. Hubbard in his hotel room to provide instruction but the accommodation was ineffective due to the lack of wireless communication;[8] Mr. Hubbard was unable to complete the course due to the lack of wheelchair-accessible bathrooms;[9] ACE has since moved to new premises, and Mr. Elkins has not provided access to confirm whether the premises have wheelchair-accessible bathrooms and are otherwise accessible to persons with disabilities.[10]

The administrative law judge issued a prehearing order on June 9, 2008, setting a hearing date of August 14, 2008. The order provided for prehearing discovery in accordance with the civil rules, with requests for discovery to be submitted by June 13, 2008, and responses to be filed within the time allowed by the civil rules. On June 15, 2008, the executive director filed discovery requests, including a request for inspection and requests for admission.[11] The request for inspection sought inspection of ACE's current premises at 2511 Sentry Drive, Suite 211, including public bathroom facilities.[12] The requests for admission included admissions that: ACE had established a six-hour per day class schedule for Mr. Hubbard at its former location, 907 East Dowling Road #13;[13] Mr. Hubbard was unable to fit his wheelchair into the bathroom at the former location;[14] ACE did not provide two separate handicap accessible bathrooms for

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4 Amended Complaint ¶4.
5 Amended Complaint ¶5.
6 Amended Complaint ¶6.
7 Amended Complaint ¶3.
8 Amended Complaint ¶9.
9 Amended Complaint ¶10.
10 Amended Complaint ¶11, ¶12.
11 Complainant's First Set of Interrogatories, Request [for] Production, Request for Entry Upon Land for Inspection and Other Purposes and Requests for Admission (June 13, 2008). Ms. Calik asserts that the discovery requests had been served on ACE on June 13.
12 Request for entry Upon Land and for Other Purposes No. 1.
13 Requests for Admissions Nos. 4, 5.
14 Requests for Admissions Nos. 7, 8.

men and women at its former location;[15] the toilet stall at that location lacked grab bars and had an inward opening door that could not be closed behind a wheelchair;[16] Mr. Hubbard was unable to complete the scheduled classes due to the lack of a wheelchair-accessible bathroom;[17] an attempt to accommodate Mr. Hubbard by providing lessons in his hotel room failed because Mr. Elkins' computer lacked a wireless internet connection;[18] and ACE's new premises (2511 Sentry Drive #211) had the same bathroom deficiencies as the former location (907 East Dowling Road #13).[19]

Counsel for the executive director contacted Mr. Elkins regarding the discovery requests, and, dissatisfied with Mr. Elkins' response, requested a status conference. The administrative law judge scheduled a status conference for June 24, 2008. Both parties participated initially, but during the course of the teleconference Mr. Elkins disconnected.

On June 27, 2008, the executive director filed a motion for sanctions based on the respondent's failure to respond to discovery requests. The motion was accompanied by a copy of the discovery requests and an affidavit by Human Rights Attorney Nevhiz Calik stating the following: Mr. Elkins agreed to allow inspection of ACE's current premises at 2511 Sentry Drive, Suite 211, on June 13, 2008;[20] at the scheduled time and location, Mr. Elkins met with Ms. Calik and Investigations Director Robert Eddy in the second floor offices of ACE;[21] Mr. Elkins allowed inspection of the first floor bathrooms, but stated that the second floor bathrooms were located in the office area of a different business and that he did not have a key to them;[22] Mr. Elkins "indicated" that ACE offered classes on both floors and that students used the bathrooms on both floors;[23] Mr. Elkins "indicated" that there was no elevator in the building;[24] on June 16, Mr. Elkins telephoned Ms. Calik and asked her not to contact him and told her that "he does not want anything to do with this case" and stated that he would "probably not" comply with the outstanding discovery requests;[25] in subsequent telephone conversations later that day,

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15 Request for Admission No. 9.
16 Requests for Admissions Nos. 11, 12, 13, 14.
17 Requests for Admissions Nos. 18, 19.
18 Requests for Admissions Nos. 22, 23.
19 Requests for Admissions Nos. 30, 31, 32.
20 Affidavit of N. Calik, ¶8.
21 Affidavit of N. Calik, ¶9.
22 Affidavit of N. Calik, ¶10, ¶11.
23 Affidavit of N. Calik, ¶11.
24 Affidavit of N. Calik, ¶12.
25 Affidavit of N. Calik, ¶19.

Mr. Elkins inquired whether limiting classes to the first floor would be satisfactory;[26] Ms. Calik responded that it would be necessary to inspect the first floor classroom and confirm ACE's access and use of the first floor classroom.[27] The bathrooms on the first floor at 2511 Sentry Drive are ADA-compliant.[28]

The administrative law judge scheduled a status teleconference for August 4, noting that sanctions would be considered, including rendering judgment by default or otherwise determining the central issues in the case.[29] Thereafter, at the request of the executive director, the hearing was continued and the status conference was rescheduled to October 2, 2008.

The administrative law judge convened the rescheduled status conference on October 2, 2008. Human Rights Attorney Caitlin Shortell represented the executive director, and George Elkins again appeared on behalf of Alaska Computer Essentials. At the status conference, Mr. Elkins stated that he would not take any further actions in the case and invited entry of a judgment in order to permit further litigation in the superior court. On October 13, 2008, the executive director filed a motion for default judgment.

III. Discussion

A. The Requests Are Admitted.

Pursuant to AS 18.80.50, the commission has adopted regulations governing procedures in administrative hearings conducted under AS 18.80.120.[30] Those regulations are set out at 6 AAC 30.410-.510. 6 AAC 30.510(a) provides that "[u]nless otherwise ordered or agreed to by the parties, the rules for discovery in civil proceedings in the courts of this state apply, except [for Civil Rule 16(a)(1)]." The prehearing order provides for discovery "in accordance with Civil Rules 26(b)-(e)[,] 28-34, [and] 36-37." Civil Rule 36(a) provides that each matter alleged in a request for admission "is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or the parties may agree to in writing..., the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the

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26 Affidavit of N. Calik, ¶20.

27 Affidavit of N. Calik, ¶21.

28 Motion for Default Judgment at 13. This fact has not been alleged; however, it was admitted by the executive director and is a reasonable inference from the facts alleged, viewing the facts favorably to ACE.

29 Notice of Status Conference, July 31, 2008.

30 For complaints filed on or after September 13, 2006, "the procedures in AS 44.62.330-.630 (Administrative Procedure Act) apply to [a hearing under AS 18.80.120] except as otherwise provided in [AS 18.80]." Sec. 14, Ch. 63, SLA 2006.

party's attorney." ACE made no response to the June 15 requests within the time allowed, and therefore they are admitted. The effect of the admission is that these matters are "conclusively established."[31]

B. The Record Establishes A Violation of AS 18.80.230

The amended complaint alleges violation of AS 18.80.230(a)(1), which states:

> (a) It is unlawful for the...lessee, manager, agent or employee of a public accommodation
>
> (1) to refuse, withhold from, or deny to a person any of its services, facilities, advantages, or privileges because of...physical...disability....

1. ACE is the Lessee and Operator of a Public Accommodation.

A "public accommodation" for purposes of AS 18.80.230(a) is:

> a place that caters or offers its services, goods, or facilities to the general public and includes a public in, restaurant, eating house, hotel, motel, soda fountain, soft drink parlor, tavern, night club, roadhouse, place where food or spirituous or mal liquors are sold for consumption, trailer park, resort, campground, barber shop, beauty parlor, bathroom, resthouse, theater, swimming pool, skating rink, golf course, café, ice cream parlor, transportation company, and all other public amusement and business establishments....[32]

While the term "public accommodation" as defined for purposes of AS 18.80.230(a) has not been interpreted by the Alaska courts,[33] the commission has promulgated a regulation, 6 AAC 30.990(a)(2), that defines "public accommodation" as including "educational institutions."[34] The admitted facts establish that ACE provides classroom instruction to its clients: it is an educational institution within the meaning of 6 AAC 30.990(a)(2).[35] Thus, as the lessee of the premises[36] and as the operator of the business establishment located there, ACE is subject to the provisions of 18 AAC 80.230(a)(1).

2. Violation of the ADA is Unlawful Discrimination Under AS 18.80.230(a)(1)

AS 18.80.230(a)(1) makes it unlawful to "refuse, withhold from, or deny....services, facilities, advantages, or privileges because of...physical...disability." In this case, there is no

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31 Alaska R. Civ. P. 36(b).

32 AS 18.80.300(16).

33 *See* Cole v. State Farm Insurance Corporation, 128 P.3d 171, 177 (Alaska 2006); Gilbert v. Sperbeck, 126 P.3d 1057, 1061 (Alaska 2005).

34 6 AAC 30.990(a)(2). The regulatory definition also includes "all places included in the meaning of that term as it appears in AS 18.80.300(7)." AS 18.80.300(7) defines the term "executive director"; it does not include the term "public accommodation" or the term "educational institution." Accordingly, although an educational institution is expressly defined as a public accommodation, it is unclear what additional types of places are within the scope of 6 AAC 30.990(a)(2)

35 *See* notes 13, 17, *supra*.

36 *See also* 28 C.F.R. §36.201(b) (both landlord and tenant are subject to the ADA).

allegation that ACE or Mr. Elkins refused, withheld or denied services to Mr. Hubbard. Rather, the complaint alleges that ACE violated AS 18.80.230(a)(1) because it discriminated against him by failing to comply with the provisions of the Americans With Disabilities Act (ADA).[37] Whether AS 18.80.230(a)(1) prohibits discrimination against disabled persons is not at issue.[38] However, although the Alaska Supreme Court has decided that violation of the ADA constitutes discrimination for purposes of AS 18.80.220,[39] the court has not yet decided whether a violation of the ADA constitutes discrimination for purposes of AS 18.80.230.[40]

It is the express "policy of the state and the purpose of [AS 18.80] to eliminate and prevent discrimination...in places of public accommodation...because of...physical or mental disability."[41] AS 18.80.230 is remedial legislation and should be broadly interpreted to achieve those goals,[42] including more broadly than relevant federal law.[43] The ADA provides the minimal standards used to determine questions of disability based on discrimination in access to facilities and services in public accommodations under federal laws. The substantive standards of the ADA will therefore be applied in deciding questions of discrimination in public accommodation under AS 18.80.230(a)(1).

3. The Record Establishes a Violation of the ADA

ACE's admissions and the motion for default judgment and supporting affidavit establish that ACE previously occupied premises that did not provide a wheelchair-accessible bathroom, and that its current business premises have a wheelchair-accessible bathroom on the first floor, but lack a wheelchair-accessible bathroom on the second floor, where ACE's offices are located. The admissions also establish that at its prior location, ACE attempted to accommodate Mr. Hubbard's disability by shortening classroom sessions and by offering instruction in Mr.

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37 *See also*, Motion for Default Judgment at 6 ("[AS 18.80.230] makes it unlawful...to discriminate on a number of bases including physical and mental disability.").

38 *Cf.* McDaniel v. Cory, 631 P.2d 82 (Alaska 1981) (affirming commission decision finding discrimination in public accommodation on the basis of race and sex); Cole v. State Farm Insurance Company, 128 P.3d 171, 177 note 20 (Alaska 2006) ("Alaska's Human Rights Act makes it unlawful...to discriminate on a number of bases, including on the basis of marital status. AS 18.80.230.") [*dictum*].

39 *See* Moody-Herrera v. State, Department of Natural Resources, 967 P.2d 79 (Alaska 1998).

40 *See* Gilbert v. Sperbeck, 126 P.3d 1057, 1061 ("Gilbert's complaint...alleged that Dr. Sperbeck violated Alaska law prohibiting discrimination on the basis of disability." [quoting AS 18.80.230(a) but noting "we have not had occasion to decide the question whether AS 18.80.230(a) imposes [a duty of reasonable accommodation] on public accommodation.").

41 AS 18.80.200(b).

42 *See, e.g.*, Moody-Herrera v. State, Department of Natural Resources, 967 P.2d 79, 86 (Alaska 1998); Thomas v. Anchorage Telephone Utility, 741 P.2d 618, 629 (Alaska 1987); Hotel, Motel, Construction Camp Employees and Bartenders Union Local 879 v. Thomas, 551 P.2d 942, 947 (Alaska 1976).

43 6 AAC 30.910(a); *see* Wondzell v. Alaska Wood Products, Inc., 601 P.2d 584, 585 (Alaska 1979).

Hubbard's hotel room, but that neither attempt was successful: the two hour sessions remained too long, and Mr. Elkins' computer was not equipped to provide wireless Internet access.

The executive director's motion is premised on the view that the lack of a wheelchair-accessible bathroom is dispositive.[44] However, the lack of wheelchair-accessible bathroom facilities does not in itself establish a violation of the ADA, and modification of existing facilities to meet the accessibility requirements of the ADA is not always required. 42 U.S.C. §12182(b)(2)(A) states that unlawful discrimination includes:

> (iv) a failure to remove architectural barriers...in existing facilities..., where such removal is readily achievable; and
> (v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

Thus, under the ADA, a public accommodation must remove an architectural barrier if removal is readily achievable, and otherwise must make its services available through alternative methods if those methods are readily achievable.[45] For purposes of the ADA:

> [t]he term 'readily achievable' means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include –
> (A) The nature and cost of the action needed under this chapter;
> (B) The overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
> (C) The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number type and location of its facilities; and
> (D) The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the

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[44] *See* Motion for Default Judgment at 9 ("ACE...discriminated against Mr. Hubbard...by failing to provide bathrooms accessible to persons who use wheelchairs for mobility in its business premises."). The motion references 42 U.S.C §§12101-120117 and 12201-12213 as the applicable provisions of the ADA. Motion at 5. In fact, the applicable provisions for public accommodations are at 42 U.S.C. §§12181-12189 (Subchapter III).

[45] *See also* 42 U.S.C. §12182(2)(b)(A)(ii):

> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations[.]

This requirement for "reasonable modifications" applies to the programmatic aspects of a business's operations. Apart from the lack of wheelchair-accessible bathrooms, an "architectural barrier" within the meaning of subsection (iii), there is no indication that ACE's programs were not equally available to disabled persons. Thus, subsection (ii) does not apply.

> geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.[46]

The Department of Justice has adopted regulations implementing the ADA. The department has defined the term "public accommodation" for purposes of the ADA as including "[a] nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education."[47] The department has specifically identified widening doors, installation of grab bars, rearranging toilet partitions, and raising toilet seats as steps that may be taken to remove architectural barriers (without stating that such steps are always "readily achievable").[48] Necessary measures to provide access to toilet facilities are listed as the third priority for public accommodations, behind parking and entry improvements and the areas of public service.[49] Furthermore, the regulations also provide that in general the rules applicable to public accommodations do not apply to a "[p]rivate entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional or trade purposes."[50] Rather, for those entities, the applicable ADA requirements are limited to those set forth in 28 C.F.R. §36.309, which states in part that such an entity:

> (a) ... [S]hall offer...examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals...
> (c) ...(4) Courses must be administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements must be made. Alternative accessible arrangements may include, for example, provision of an examination at an individual's home with a proctor if accessible facilities or equipment are unavailable.
> (5) Alternative accessible arrangements may include, for example, provision of the course through videotape, cassettes, or prepared notes. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

As these relevant provisions make clear, the precise extent of ACE's obligations under the ADA may reasonably be disputed. Whether or not modification of the second floor bathroom at 2511 Sentry Drive to make it fully ADA-compliant, or even wheelchair-accessible, is readily achievable has not been established, either by ACE's admissions or by evidence in the record. Admissions on file establish that ACE obtained information regarding the cost of modification of

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46 42 U.S.C. §12181(9). *See also*, 28 C.F.R. §36.104.
47 28 C.F.R. §36.104.
48 28 C.F.R. §36.304(b)(8), (12), (13), (15).
49 28 C.F.R. §36.304(c).
50 28 C.F.R. §36.102(a)(3), (d).

the bathrooms at its former premises, but there is no information as to the cost and feasibility of any specific modifications or ACE's landlord's willingness or ability to make them at either location.[51]

Despite the lack of any evidence regarding whether modification of the bathrooms is readily achievable, summary adjudication in the complainant's favor on that issue is appropriate, if the respondent has the initial burden of coming forward with evidence as to the cost and feasibility of any specific modifications. Federal courts that have considered this question have split.[52] Notwithstanding that the ultimate burden of proof lies with the complainant, there are several reasons why it may be appropriate to place the burden of coming forward with evidence on this particular issue on the respondent. First, that modification of the premises is not readily achievable is in the nature of an affirmative defense, and the party advancing an affirmative defense generally carries the burden of proof on that issue. Second, typically the respondent will be in a better position than the complainant to obtain information regarding the feasibility any specific modifications. Third, to place the burden of coming forward with evidence on the complainant could adversely affect the ability of private parties to enforce their rights in civil proceedings.[53] Fourth, the reasoning of the federal case in favor of that position is more persuasive than those to the contrary.[54]

In light of these considerations, it is appropriate to place the burden of coming forward with evidence on the respondent, with regard to the issue of whether modification is readily achievable, while leaving the ultimate burden of proof on that issue with the complainant. Placing the burden of coming forward with evidence on the respondent means that in this case, the evidence supports summary adjudication in favor of the complainant on the issue of whether modification is readily achievable.

More fundamentally, violation of the ADA has been shown, without regard to whether modification of the bathrooms is readily achievable. Even if modification is not feasible, ACE has an obligation under the ADA, and as set forth in 28 C.F.R. §36.309, to ensure that the

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51 Requests for Admission No. 26.

52 *Compare*, Molski v. Foley Estates Vineyard and Winery, 531 F.3d 1043, 1048 (9th Cir. 2008), *with* Roberts v. Royal Atlantic Corporation, 542 F.3d 363, 372 (2d Cir. 2008); Colorado Cross Disability Coalition v. Hermanson Family Limited, 264 F.3d 999, 1002 (10th Cir. 2001).

53 Molski v. Foley Estates Vineyard and Winery, *supra*, 531 F.3d at 1048-1049.

54 In particular, one of the federal cases placing the burden of coming forward with evidence on the complainant places so light a burden as to make the requirement practically meaningless. *See* Roberts v. Royal Atlantic Corporation, *supra*, 542 F.3d 270, *citing* Borkowski v. Valley Central School District, 63 F.3d 131, 137-

premises in which it offers its classes are wheelchair accessible, whether those premises are the location used for its courses in general, or a specific location selected for a particular disabled person. As to the latter requirement, ACE has effectively the same obligation as an employer under AS 18.80.220: to make reasonable accommodation to a wheelchair-disabled person, even if it cannot modify the premises to make them ADA-compliant. Offering courses in a classroom on the second floor of building that does not have an elevator and whose second floor bathroom is not wheelchair-accessible is plainly insufficient. ACE's attempts to accommodate Mr. Hubbard by offering shorter classroom periods and by offering classes at his hotel room were likewise insufficient: two-hour classes were still too long, and Mr. Elkins' computer did not provide wireless Internet service. ACE may be required to provide courses to persons in wheelchairs in locations that are wheelchair accessible and that have wheelchair accessible bathrooms, whether it does so by moving to a new location or by making arrangements to provide courses to those particular individuals in a different location. ACE did not undertake reasonable efforts to accommodate Mr. Hubbard, and it plainly did not ensure that the courses it offered were accessible to him. Violation of the ADA, and hence discrimination on the basis of physical disability and unlawful conduct under AS 18.80.230(a)(1), are established as a matter of law.

C. Remedy

AS 18.80.130 provides:

> (a) ...[I]f the commission finds that the person charged in an accusation has engaged in the discriminatory practice alleged in the accusation, it shall order the person to refrain from engaging in the discriminatory practice. The order must include findings of fact and may order the person to take affirmative action to correct the discriminatory practice. ...
> (b) The order may require a report on the manner of compliance.

The executive director requests entry of a decision and order as follows:

> (1) finding that ACE violated AS 18.80.230(a)(1) and Title III of the Americans with Disabilities Act of 1990 by failing to provide restrooms in its place of business accessible to Lester Hubbard and other persons using wheelchairs for mobility;
> (2) ordering ACE to adopt and disseminate a policy of nondiscrimination under the Alaska Human Rights Law that includes, but is not limited to, a policy prohibiting discrimination because of disability within 90 days of the order;

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138 (2nd Cir. 1995) (plaintiff must articulate a plausible proposal for barrier removal whose costs do not facially clearly exceed its benefits). .

(3) ordering ACE to make any necessary modifications to its current business premises to provide restrooms for both sexes that are accessible to persons who use wheelchairs within 90 days of the order; and
(4) ordering ACE to provide objective, verifiable evidence that its current place of business has restrooms for both sexes that are accessible to persons who use wheelchairs for mobility within 90 days of the order.[55]

AS 18.80.130(a) does not provide the commission authority to award compensatory or punitive monetary damages to complainants in a case of public accommodation discrimination.[56] Nor does AS 18.80.130(a) provide for civil penalties. However, it specifically requires the commission to order the respondent to refrain from the discriminatory conduct and also provides express authority to order the respondent to take affirmative action to correct the practice.

The executive director's proposed order is problematic, however. It would require ACE to modify the bathrooms at its current location to make them wheelchair-accessible. As noted above, and as staff's prior discussions with Mr. Elkins suggest, there is no evidence regarding the cost or feasibility of any specific modifications. The record in its current status does not support entry of an order directing Mr. Elkins to modify the bathrooms at his leased premises to make them fully ADA-compliant; it does not support entry of an order directing him to make any specific modification. The firm can satisfy its obligations under the ADA by relocating to new premises that are ADA-compliant, rather than modifying its existing premise. In the absence of evidence regarding the feasibility of a specific modification, and because relocation is a possibility, the order for modification should not be mandatory. To ensure that any alternative arrangements are satisfactory and have been adhered to, the order should allow consideration of a specific proposal for alternative arrangements, and provide for monitoring the respondent for a lengthy period of time to ensure continuing compliance.

IV. Conclusion

The requests for admissions are admitted and, coupled with the undisputed evidence in the record, are sufficient to establish a violation of AS 18.80.230(a)(1) as alleged in the complaint. Treating the motion for default judgment as a motion for summary adjudication, judgment may be rendered based on the admissions and undisputed evidence in the record.[57]

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55 Motion for Default Judgment at 14.

56 McDaniel v. Cory, 831 P.2d 82 (Alaska 1981).

57 *See, e.g.*, Smith v. State, 790 P.2d 1352, 1353 (Alaska 1990); Haley ex rel. Webb, *et al.*, OAH No. 06-0491-HRC, ASCHR No. C-04-146 (December 37, 2007). This case is not subject to the Administrative Procedure Act, and therefore it is not necessary to consider whether the matters that have been deemed admitted may be considered in the default context. *See* AS 44.62.390(c), -.530.

Accordingly, the commission should enter summary adjudication against the respondent and issue an order directing ACE to cease its discriminatory practices and to provide its services at a location that is wheelchair-accessible and has wheelchair-accessible bathrooms, either by modifying its existing premises, moving to a new location, or making alternative arrangements for disabled persons. A draft proposed order, including provisions for continuing monitoring, is attached for the commission's consideration.

DATED June 29, 2009.

Andrew M. Hemenway
Administrative Law Judge