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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY, EXECUTIVE)
DIRECTOR, ex rel. ROBIN BLOCK,)
)
Complainant,)
)
v.)
)
CHARLIE PARELLO dba PULSE)
PUBLICATIONS)
)
Respondent.)

ASCHR No. C-03-165
OAH No. 07-0665-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 Proposed Decision of May 29, 2009 is hereby ADOPTED by the Commission in its entirety.

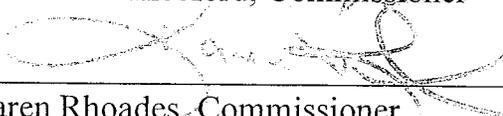
IT IS SO ORDERED.

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

DATED: November 24, 2009


Lester C. Lunceford, Commissioner

DATED: November 24, 2009


Karen Rhoades, Commissioner

DATED: November 24, 2009


Grace E. Merkes, Commissioner

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CERTIFICATE OF SERVICE

This is to certify that on November 25, 2009,
A copy of the foregoing was mailed
by first-class U.S. mail, postage prepaid, to:

Charlie Parello, Owner
Pulse Newspaper
P. O. Box 92896
Anchorage, AK 99509

Rebecca J. Pauli, Administrative Law Judge
Office of Administrative Hearings
State of Alaska
Department of Administration
550 W. 7th Avenue, Suite 1600
Anchorage, AK 99501

and hand-delivered to:

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


M. Anne Keene
Administrative Officer

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

Paula M. Haley, Executive Director,)
Alaska State Commission for Human)
Rights *ex rel.* ROBIN BLOCK,)
)
Complainant,)
)
v.)
)
CHARLIE PARELLO dba PULSE)
PUBLICATIONS,)
)
Respondent.)
_____)

OAH No. 07-0665-HRC
ASCHR No. C-03-165

RECOMMENDED DECISION

I. INTRODUCTION

This case grows out of an allegation of Robin Block that her employer, a small sole proprietorship operating an advertising newspaper, failed to accommodate a disability by providing her with an appropriate parking space. Ms. Block also alleges that her employer retaliated against her when she requested accommodation and filed a complaint about the lack of accommodation with the Alaska State Commission for Human Rights (ASCHR).

This recommendation concludes that the employer is not liable for failing to accommodate Ms. Block's disability because she did not request the accommodation she desired until just before that accommodation was in fact provided. However, it concludes that Pulse Publications impermissibly retaliated against Ms. Block for seeking an accommodation and for making a complaint to the ASCHR. It recommends that Pulse Publications be ordered to refrain from retaliatory conduct in the future and that it be required to pay damages in the principal amount of \$2,160.00, together with interest at 3.5 percent per annum.

II. GENERAL FACTUAL BACKGROUND

A. Procedural History

Robin Block filed a formal Complaint of Discrimination with the Alaska State Commission for Human Rights on June 17, 2003.¹ After an investigation that occupied about four and a half years, the Executive Director's representative determined on October 15, 2007, that substantial evidence supported the allegations. Conciliation was unsuccessful, and the matter was referred to this office for hearing the following month.

After a short period of discovery, Administrative Law Judge (ALJ) James Stanley conducted a hearing on March 18, 2008. Human Rights Attorney, Caitlin Shortell, under the direction of the Human Rights Advocate represented Ms. Block at the hearing; Mr. Parello represented himself. ALJ Stanley conducted an informal hearing, working with the self-represented respondent to ensure he could present his case and, at the same time, extending procedural latitude to the counsel for the complainant.²

Some months after the hearing, ALJ Stanley resigned from the Office of Administrative Hearings without completing a recommended decision. On February 12, 2009, the Chief Administrative Law Judge reassigned the case to the undersigned. This recommended decision has been prepared based on the digital recording of the hearing and the exhibits admitted at the hearing.³

B. Sequence of Events

Robin Block's right leg was amputated four inches above the knee in 1971 due to injuries suffered in a traffic accident.⁴ After working in a number of jobs, she began receiving social

¹ Exhibit A, p 3. Ms. Block had informally contacted the commission staff a few days previously. *Id.* at 1-2.

² Counsel was permitted an unusual procedural sequence in adopting Mr. Parello as a witness at the end of the case but not as part of rebuttal, as well as in the offering of certain exhibits. These accommodations ensured a complete record and did not prejudice the respondent.

In a more significant effort to ensure that the interests of justice would not be affected by errors or oversights, the Office of Administrative Hearings has *sua sponte* reformed the name of the captioned respondent to ensure that any orders or awards entered in the case would not, on account of an error by counsel, be entered against a nonexistent entity and thus be of no value. This adjustment is explained in the Notice of Intent to Change Caption (April 22, 2009).

³ The Office of Administrative Hearings regrets the delay of a year in completing a decision in this matter, and apologizes to the parties for that portion of the approximately six years it has taken to bring this matter to resolution.

⁴ Direct exam of Block.

security disability payments in 1995; after that time, she could not work more than a certain amount and still receive full benefits.⁵

In recent years, Ms. Block has been using a prosthesis.⁶ The prosthesis can be uncomfortable and she sometimes takes it off when working at a desk. She needs to have it on when walking, however. She does quite well when walking on level pavement and floors, but uneven ground, stairs, and ice can be treacherous. She has handicapped license plates.⁷

In about 2000, Ms. Block began doing irregular work for Charlie Parello's sole proprietorship, Pulse Publications. At first she generally worked in the warehouse stuffing flyers, although she may have done some office work as well in 2001.⁸ The warehouse work was difficult for her because it involved either picking up heavy bundles or asking others to do that for her.⁹ The work was quite infrequent, amounting to about one shift per month.¹⁰

In October of 2002, Ms. Block applied for a job in the Pulse Publications business office. She interviewed for the job with Mr. Parello. When she drove up to the office for the interview, she fell in the parking lot as she got out of her car. Mr. Parello, who was in the lot at the time, helped her up.¹¹

Ms. Block got the job. It entailed arranging sales calls and doing data entry a few hours a day, four days per week. The total weekly hours were about fifteen on average.¹² She did the work well and received raises in February and April of 2003.¹³ Her final pay rate was \$9.00 per hour.¹⁴

The location for this job was 7645 King Street in Anchorage, a U-shaped building located in an industrial park managed by PTP Management, Inc. Pulse Publications was a tenant in the building. The building had many tenants, with Pulse occupying only a small section. At the time of Ms. Block's employment, 7645 King Street had several handicapped parking spaces, but they were located inside the "U" of the building. The entrance to the Pulse office was on the

5 Direct and cross-exam of Block.

6 Direct exam of Block. The picture in Ex. 14 shows prostheses similar to the one she uses.

7 Direct exam of Block.

8 Direct and cross-exam of Block.

9 Direct exam of Block; direct testimony of Parello.

10 Direct exam of Block.

11 *Id.*

12 *Id.*; Ex. 10.

13 *See* Ex. 10.

14 *Id.* at 12-14.

outside of the “U,” and to reach it from these spaces one had to walk around the outside of the building, the equivalent of a city block. There was no sidewalk for this walk.¹⁵

Employees without any disability parked their cars on the street and walked to the Pulse office.¹⁶ Closer to the office, directly in front of the entrance, was paved parking with space for about three cars. None of them was designated for handicapped use at the time. These spaces were very often unusable because customers of the neighboring business—a marine electronics firm—would pull their boat trailers across the spaces.¹⁷ It did not concern Mr. Parelo that the boats were parked in front.¹⁸ To facilitate Ms. Block’s access to the office, he permitted her to park in front of a loading bay door, from which she could use a side door to the office.¹⁹ With this arrangement, it was necessary for her car to move whenever the loading bay door was needed for a delivery. This happened two or three times a week.²⁰ If Ms. Block moved the car herself, she might need to put on her prosthesis to go out and move it, and the process of putting on the prosthesis in front of others could be embarrassing since the prosthesis reaches to the groin area.²¹ Alternatively, Mr. Parelo or another employee could move her car, and this occurred with some frequency.²² Eventually—Ms. Block did not specify in her testimony when this occurred—Ms. Block decided to prohibit the practice of letting others move her car, because, among other things, it exposed her private belongings to others.²³ Another difficulty with the bay door parking was that Ms. Block could herself be blocked in by other vehicles on occasion.²⁴

Ms. Block asserted at the 2008 hearing that she specifically requested of Mr. Parelo—more than once—that he arrange a handicapped parking space in front of the building.²⁵ In so

¹⁵ ALJ exam and second redirect exam of Frances Marin (property manager). Alternatively, it was apparently possible to walk from these spaces to the Pulse office by going through the Pulse warehouse. This involved negotiating a steep flight of outdoor wooden stairs, which were treacherous for Ms. Block, particularly in winter. Direct exam of Block.

¹⁶ Ex. 6 at 3.

¹⁷ Direct exam of Block.

¹⁸ Ex. 6 at 3.

¹⁹ Direct and ALJ exam of Block; *see also* Ex. 2 at 2 (“where she normally parked”).

²⁰ Cross-exam of Block.

²¹ Direct exam of Block.

²² *E.g.*, Ex. 6 at 3.

²³ Direct exam of Block.

²⁴ *Id.*

²⁵ *Id.*

testifying, she did not put any time frame on the requests. Mr. Parello has consistently and firmly denied that she made any such request to him prior to June 11, 2003, a date of special significance that will be discussed below.²⁶ Significantly, the early documentation of Ms. Block's 2003 complaint to the Human Rights Commission, there is no indication that she alleged at that time, closer to the events in question, that she had made prior requests for a designated handicapped space.²⁷ In light of this evidence, I find that, most likely, Ms. Block's recollection in 2008 was incorrect and in fact she had not made a specific request for a designated space prior to June 11, 2003. On the other hand, Mr. Parello was aware that Ms. Block required special parking accommodation of some kind. The loading bay parking was the solution he devised for that need.²⁸

Early in the morning of June 11, 2003, Ms. Block was unable to park in front of the building because a boat was blocking the spaces.²⁹ She parked in front of the loading bay door.³⁰ Mr. Parello was not at work at the time.³¹ On her own initiative, she called PTP Management and requested that a handicapped space be designated in front of the building.³² PTP indicated they would take care of it.³³ When Mr. Parello arrived at work, she told him what she had done.³⁴ Mr. Parello became angry, asserted that she did not need the handicapped space, and told her not to contact PTP again.³⁵

Fearing that she would be fired over the matter, Ms. Block called the Human Rights Commission on June 12, 2003.³⁶ She made a complaint regarding her boss's unwillingness to support handicapped parking in front of the office.³⁷ She informed Mr. Parello on June 12 that she had contacted the commission.³⁸

²⁶ *E.g.*, cross-exam of Parello; Ex. 5 at 5, 6; Ex. 6 at 3.

²⁷ Ex. A at 1-8.

²⁸ Cross-exam of Parello.

²⁹ ALJ exam of Block upon recall.

³⁰ Ex. 6 at 3.

³¹ ALJ exam of Block upon recall.

³² *Id.*; direct exam of Block; cross-exam of Marin.

³³ Direct exam of Block.

³⁴ Direct exam of Block; ALJ exam of Block upon recall.

³⁵ Ex. 11 (record of second and third phone calls to PTP); direct exam of Marin; ALJ voir dire of Marin re Ex. 11 during cross-exam of Marin; ALJ exam of Block upon recall.

³⁶ Ex. 11; Ex. A at 1; direct exam of Block; ALJ exam of Block on recall.

³⁷ Ex. A at 1-2.

³⁸ Direct exam of Block; Ex. A at 3 (sworn complaint of June 17, 2003).

On June 13, 2003, Mr. Parello invited his three office workers (Ms. Block, Tiffany Tellef, and Ryan Katchatag) to lunch and told them he was laying them off, effective in one week.³⁹ He told Ms. Block that she could come in one day a month to stuff flyers—the job she had done before which was difficult for her to perform—but she did not accept. The following week, on June 17, Mr. Parello told Ms. Block he would pay her for the rest of the week and she could leave immediately.⁴⁰ This was the end of her employment at Pulse Publications.⁴¹

At the time of the June 13 meeting, Mr. Parello felt that Ryan Katchatag was not “working out” as an employee, and Katchatag was planning to leave the company anyway.⁴² As for Tiffany Tellef, although she was ostensibly laid off on June 13 she continued to work for Pulse for several more months, but with greatly reduced hours. Thus, while she had worked between 20 and 30 hours per week in the eight weeks preceding the layoff, her average over the course of July through October of 2003 was below two hours per week.⁴³ This residual work appears to have been primarily or entirely work in the warehouse rather than in the office.⁴⁴

Mr. Parello later explained that he ended the work of his office sales force for the following reason:

I looked at all the new advertising the office workers were bringing in comp[ared] to their salaries paid out. It was a losing situation.

With advertising slow, Ryan leaving, not doing well and planning to leave, Tiffany not wanting to pass out information, and me not wanting to go on sales calls, there was no reason for Robin to make appointments for someone anymore. I could take on the rest of her duties.⁴⁵

As he explained it, he had been thinking about this step “a while” before he took it.⁴⁶

³⁹ Direct exam of Block.

⁴⁰ *Id.* Mr. Parello appears to have honored the promise to pay through the end of the week. Ex. 10 at 14.

⁴¹ Direct exam of Block.

⁴² Direct testimony of Parello.

⁴³ Ex. 8. The pay period ending July 2, 2003 has been excluded from these figures. It would have encompassed the possible severance week of June 16-22, and the 35.5 hours recorded during the two-week pay period may be largely or entirely accounted for by the severance week.

⁴⁴ Since Ms. Block’s June 2003 complaint to ASCHR was not investigated by ASCHR staff until two years later, no contemporaneous investigation was made of what Ms. Tellef was doing for Pulse in her last four months there. The witness statements beginning in 2005 are essentially consistent in describing her work during this final period as warehouse work (*e.g.*, Ex. A at 13, Ex. 2, 3, 4, cross-exam of Parello). Consistent with this, ASCHR Investigator Nanette Gay concluded on October 15, 2007 that Tellef was employed for several more months “to do physical work.” Ex. B at 2.

⁴⁵ Ex. 2 at 2 (letter from Parello to investigator, June 28, 2005).

⁴⁶ Ex. A at 13.

Mr. Parello did not (and does not, to this day) believe Robin Block needed a handicapped parking space while she was working at Pulse,⁴⁷ and he did not request one for her from PTP Management.⁴⁸ Nonetheless, PTP striped in a handicapped space in front of the Pulse office very soon after Ms. Block's request (although apparently this was done after her employment ended). Pulse was charged nothing for the alteration.⁴⁹

After leaving the Pulse job, Robin Block looked for work until October 13, 2003, but she was unsuccessful.⁵⁰ The search consisted of applying for three or four jobs over the course of four months, and making thrice-weekly calls to Manpower, which had employed her in the past. There is no persuasive evidence that she sought work actively after October 13, and there is some evidence that she did not; I find that she discontinued active job-seeking on October 13 for at least the remainder of 2003.⁵¹ She essentially remained unemployed until February of 2005, when she obtained a good position with For the Kids Foundation, Inc.⁵² The job with the foundation replaced her income from Pulse until she stopped working altogether to attend to family obligations in September of 2005.

III. DISCUSSION

A. *Failure to accommodate disability*

The first count of the Amended Complaint alleges a violation of AS 18.80.220(a)(1), a provision of Alaska's Human Rights law, because Pulse failed to provide a reasonable accommodation for Ms. Block's physical limitations as required by that provision and the Americans with Disabilities Act of 1990 (ADA). The reasonable accommodation that allegedly was required, but not provided, was a designated disabled parking space in front of the Pulse office.⁵³

⁴⁷ Cross-exam of Parello.

⁴⁸ Direct exam of Marin.

⁴⁹ *Id.*

⁵⁰ Direct exam of Block.

⁵¹ Through use of a calendar on which she had logged her efforts, the complainant showed that she applied for various jobs and made calls to Manpower three times a week until October 13, 2003. The calendar is blank after that date, and when questioned by counsel as to whether she had continued the Manpower calls, she said "I don't know." The lack of entries on the calendar on which she had routinely been logging her job-finding efforts is some evidence that those efforts discontinued as of October 13, 2003. Ms. Block was asked no questions about job applications later than October 13, 2003.

⁵² Direct exam of Block.

⁵³ Amended Complaint at ¶¶ 15, 21, 22.

1. *Violation of the ADA is Unlawful Discrimination Under AS 18.80.220(a)(1)*

AS 18 18.220(a)(1) makes it unlawful to “discriminate against a person in . . . a privilege of employment . . . because of . . . physical . . . disability.” In this case, the complaint alleges that Pulse violated AS 18.80.220(a)(1) because it discriminated against Ms. Block by failing to comply with the provisions of the Americans With Disabilities Act (ADA). The Alaska Supreme Court has decided that violation of the ADA constitutes discrimination for purposes of AS 18.80.220.⁵⁴

2. *Ms. Block Did Require a Designated Space*

There is no dispute in this case that Ms. Block had a significant disability affecting her ability to walk safely from a parking space to the Pulse office. Mr. Parello recognized that she needed an accommodation and provided one, the accommodation being permission to park at the loading bay. However, evidence showed that this arrangement resulted in Ms. Block being obstructed from leaving her space at the end of her day, and that it also involved either having to move her car herself during some days—which was inconvenient and potentially embarrassing in light of her disability—or having others move her car for her. She came to find the latter unacceptable because she reasonably regarded the interior of her own vehicle as private. The evidence also showed that providing a regular, designated handicapped space in front of the office was extraordinarily easy; it could be arranged almost immediately by a single call to the property managers, who readily appreciated their obligation to provide it and charged nothing for the service. Under these circumstances, the designated space was a reasonable accommodation.⁵⁵

3. *Pulse Is Not Liable for Failing to Provide the Designated Space*

The general rule in ADA caselaw is that the complaining party must request a particular accommodation before an employer can become liable for failing to provide it. For example, in *Mole v. Buckhorn Rubber Products, Inc.*,⁵⁶ Ms. Mole did not request the accommodation she

⁵⁴ See *Moody-Herrera v. State, Department of Natural Resources*, 967 P.2d 79, 86-87 (Alaska 1998).

⁵⁵ In federal ADA caselaw, accommodations are not reasonable if they are not available or if they would impose an undue hardship on the employer. See *id.* at 88 & n. 42. In this case, the accommodation was clearly available and imposed essentially no hardship.

⁵⁶ 165 F.3d 1212 (8th Cir. 1999).

alleged should have been provided until the day of her termination. The Court of Appeals upheld summary judgment against Ms. Mole, observing:

Only Mole could accurately identify the need for accommodations specific to her job and workplace. Mole cannot “expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it.”⁵⁷

Likewise, in *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*,⁵⁸ another federal appellate court found a termination for absenteeism to be lawful where the plaintiff had never requested reasonable accommodation, despite repeated warnings about excessive absenteeism; the court observed that “the standard rule is that a plaintiff must normally request an accommodation before liability under the ADA attaches.”⁵⁹ The request needs to be “sufficiently direct and specific” to put the employer on notice of the needed step.⁶⁰

There are occasional exceptions to the general rule that ADA liability for failure to accommodate only attaches when the accommodation has been requested. This can be true where the disability (such as certain kinds of mental disabilities) prevents the employee from asking for the accommodation;⁶¹ that circumstance does not apply in this case. It can also be true where the employee’s need for the accommodation is obvious.⁶²

In this case, as discussed in Part II, I simply do not believe Ms. Block’s vague, recently-articulated claim that she requested a designated space prior to June 11, 2003. She made no such claim closer to the time of the events in question, when her memory would have been fresher. Instead, I have found that she first requested the space on June 11, 2003. The precise accommodation that she requested was installed promptly after she made the request. To be sure, it was not Mr. Parello who brought that prompt accommodation about, but nonetheless it is not possible to find that the accommodation was denied once it was requested.

Since Ms. Block did not request the designated space prior to June 11, the question becomes whether her need for it was so obvious that Pulse may be made liable for the lack of a designated space in the preceding weeks and months despite the lack of a request. In a general

⁵⁷ *Id.* at 1218 (quoting *Ferry v. Roosevelt Bank*, 883 F. Supp. 435, 441 (E.D. Mo. 1995).

⁵⁸ 201 F.3d 894 (7th Cir. 2000).

⁵⁹ *Id.* at 899 (the cited holding is an alternative holding, that is, one of two alternative bases for the result reached in the case).

⁶⁰ *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001) (quoting prior authority).

⁶¹ *See, e.g., id.* at 261 n.7.

⁶² *See id.*

sense, Ms. Block’s need for accommodation was indeed obvious; this is an employee whose difficulty in walking was graphically demonstrated for Mr. Parello on the very day she came to interview for the job in question, when she fell in the parking lot. However, Mr. Parello did provide an accommodation: he permitted Ms. Block to park at the loading bay, right next to the side door to the office. Ms. Block’s eventual view that this was not a satisfactory solution was reasonable, but the question for purposes of liability is whether the employer, not Ms. Block, should have come to that realization without any prompting from Ms. Block.

ADA caselaw recognizes that “both parties bear responsibility for determining what accommodation is necessary,” a joint process that “requires a great deal of communication.”⁶³ If communication has been imperfect, one must “look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary.”⁶⁴ In this case, there does seem to have been some communication that led to the initial accommodation—permission to park at the loading bay. There is no evidence that Mr. Parello closed off that communication or forbade Ms. Block from addressing the issue further. Instead, the evidence indicates that Ms. Block was able to communicate her needs—indeed, she did so on June 11. To the extent that she perceived a need for a designated parking space prior to that date, however, she did not “help the other party determine what specific accommodations are necessary.” In the absence of that help, the record does not create a convincing picture that the problems with the loading bay parking were so obvious or overwhelming that Mr. Parello should have picked up on them himself prior to June 11. In this context, one must bear in mind that Ms. Block was a part-time worker in a business with a number of employees, and that she worked in her position only a relatively short time.

Because Ms. Block, under the circumstances, needed to request a designated space before her employer became obligated to arrange for it, because she did not make the request until June 11, 2003, and because the space was installed promptly after she requested it, Pulse did not violate the ADA or the Alaska Human Rights law by failing to provide a designated parking space as a reasonable accommodation for Ms. Block’s disability.

⁶³ *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996).

⁶⁴ *Id.*

B. Retaliation

It is unlawful for an employer to discriminate based either on a person's filing of a complaint with the ASCHR or on a person's opposition to a practice forbidden under Alaska's human rights law.⁶⁵ Both of these types of retaliation were possible on the facts of this case: one could theorize that Ms. Block's discharge on June 13, 2003, was retaliation for her complaint to the ASCHR the day before, or that it was retaliation for her demand for additional reasonable accommodation, which she had made two days earlier. In this case, there is no direct evidence of either type of retaliation—that is, no witness or document directly attests to an improper, retaliatory motive for the discharge.

When, as here, there is no direct evidence of retaliatory intent, the courts apply a three-part burden shifting analysis. This test is known as the *McDonnell Douglas* test, named after the case in which it was first articulated.⁶⁶ Initially designed for other contexts, the *McDonnell Douglas* test has been adapted to the retaliation context as follows:⁶⁷

First, the complainant must establish (1) the complainant engaged in a protected activity; (2) the complainant suffered an adverse employment action, such as termination; and (3) there was a potential causal link between the protected activity and the employer's action.⁶⁸ The last element entails bringing forward evidence from which a reasonable trier of fact could conclude that the employer was aware of the prior protected activity, coupled with evidence (a showing of proximity in time between the protected activity and the adverse employment will suffice) from which causation could be inferred.⁶⁹

Once a *prima facie* case of retaliation is established, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for the employment action. To satisfy its burden, the employer "need only produce admissible evidence which would allow the trier of fact

⁶⁵ AS 18.80.220(a)(4).

⁶⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Alaska adopted the *McDonnell Douglas* test in *Brown v. Wood*, 575 P.2d 760, 770 (Alaska 1978).

⁶⁷ *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 918-19 (Alaska 1999); *Raad v. Alaska State Commission for Human Rights*, 86 P.3d 899, 905 (Alaska 2004).

⁶⁸ *Raad v. ASCHR*, 86 P.3d at 905.

⁶⁹ *Id.*; *VECO*, 970 P.2d at 919; *Raad v. Fairbanks North Star Borough Sch. Dist.*, 323 F.3d 1185, 1196-97 (9th Cir. 2003)(cited with approval in *Raad v. ASCHR*, 86 P.3d at 905 n.25).

rationality to conclude that the employment decision had not been motivated by [retaliatory] animus.”⁷⁰ The reason must be one that existed at the time the employment decision was made.⁷¹

If the employer meets this burden, the burden shifts back to the complainant to show that discriminatory reasons were a more likely motive for the employer’s action than the reason offered by the employer. This is ordinarily done by showing the employers’ reason or reasons to be pretextual.⁷² There are a number of ways to prove pretext.⁷³ In the absence of direct evidence, complainant could establish pretext by showing such internal “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action” that they are unworthy of credence.⁷⁴

A special situation, of particular importance to this case, is presented when the motives for the adverse employment action are a mix of proper and improper considerations. It is not necessary for the complainant to prove that the employer’s explanation was wholly pretextual—that is, that it played no role at all. Instead, the employee will prevail on a retaliation claim if the evidence as a whole indicates that the improper, retaliatory motive was “a motivating factor in the decision.”⁷⁵ In this mixed-motive situation, the employer may avoid liability by showing that “it would have made the same decision” even if it had not allowed the improper motive to play a role.⁷⁶

Let us now apply this framework to the present case. Ms. Block plainly made out a *prima facie* case. Regarding the first element—that the complainant engaged in a protected activity—Ms. Block did two protected things prior to her discharge: she raised the issue of a further accommodation with her employer,⁷⁷ and she made a complaint on the subject of accommodation to the ASCHR. Regarding the second element, the termination of her

⁷⁰ *Raad v. ASCHR*, 86 P.3d at 905 (quoting prior authority).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1250 (10th Cir. 2002); *see also Raad v. FNSBS*, 323 F.3d at 1194.

⁷⁵ *VECO*, 970 P.2d at 920.

⁷⁶ This principle was laid out in a federal Title VII case, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 & n.10 (1989), which was later discussed with approval as a guide for Alaska human rights cases by the Alaska Supreme Court in *VECO*, 970 P.2d at 920-21.

⁷⁷ This is a reference to her bringing her concern to Mr. Parello on the morning of June 11. It is not clear that the related, but separate, act of unilaterally calling PTP without consulting her boss beforehand was a protected activity.

employment qualifies as an adverse employment action. As to the third element, a potential causal link between the protected activity and the adverse action is established by extremely close temporal proximity: the discharge occurred just two days after she took her request for a designated space to her employer, and one day after she informed him that she had made a complaint to the ASCHR.

The burden then shifts to Pulse to “produce admissible evidence” of a legitimate, nonretaliatory motive for the discharge. Pulse has done this. Mr. Parello’s written explanation is admissible, and in that explanation he attributes the discharge to, in essence, a business decision that maintaining an office staff was not worth the money he was spending to do so. The burden then returns to complainant to show either that this explanation is entirely pretextual or that retaliation was at least “a motivating factor” in the discharge.

In this case, the evidence points to a mixed motive. The action Mr. Parello took on June 13 permanently ended the office-staff component of Pulse’s business. While the commission staff attempted to prove that Pulse promptly brought one of the employees, Tiffany Tellef, back to work to continue the tasks that had previously been assigned to Ms. Block, it failed in this effort: Mr. Parello was able to show that Ms. Tellef’s hours were cut back to a tiny fraction of their prior level, attributable entirely to work in the warehouse. Thus, there seems to have been some substance to Mr. Parello’s calculation that Pulse could function without the expense of an office staff. Mr. Parello genuinely ended that component of the business when he terminated Ms. Block. On the other hand, there is a remarkable correlation in timing: Ms. Block complained about the lack of a designated space on June 11, there is undisputed evidence that Mr. Parello was angry, and Ms. Block complained to the commission on June 12; the very next day, these events were followed by the discharge. This timing is enormously suggestive of a relationship between the events and her discharge. Mr. Parello never offered an explanation of why it was that particular day, right after the confrontation over parking, that he reached the decision to fundamentally reorient his business, something he had been contemplating for some time. Moreover, he had only recently had a more positive view of Ms. Block’s economic value to the business, having given her a raise two months earlier. It seems most likely that on June 11 or 12 Mr. Parello became fed up with Ms. Block for reasons related to her accommodation request, and he moved forward immediately with a plan he had up to then only been mulling

over. Thus, irritation related to her request or the ASCHR complaint, or both, was the catalyst the pushed him to act.⁷⁸

Notwithstanding that his mixed motives apparently included an impermissible retaliatory component, Mr. Parello could escape liability if he showed that he “would have made the same decision” without the improper motive.⁷⁹ He did not meet this burden. His vague testimony did not establish that business conditions compelled him to act at or near that particular time. Accordingly, he is liable for the retaliatory discharge of Robin Block.

C. Remedies

1. Damages--Principal

Alaska Human Rights law provides that “if the commission finds that a person against whom a complaint was filed has engaged in the discriminatory conduct alleged in the complaint, . . . [i]n a case involving discrimination in . . . employment, the commission may order any appropriate relief, including but not limited to, the hiring, reinstatement or upgrading of an employee with or without back pay...”⁸⁰ In an interpretive regulation, the Commission construed this statute to authorize, among other things, “any legal or equitable relief . . . which reasonably compensates the complainant”⁸¹

In this case, the Executive Director seeks back pay for Ms. Block from the date of her termination until she was employed at ARC of Anchorage in 2005. The general principal for back pay damages is that they should ordinarily be awarded where needed to put the claimant in the position he or she would have been but for discriminatory or retaliatory treatment.⁸² Nonetheless, victims of unlawful employment action are required to mitigate their damages by

⁷⁸ An additional candidate for a motive might be that Mr. Parello was angry that Ms. Block bypassed him and went to PTP directly. However, neither side has contended that this was a motive for the discharge.

⁷⁹ *Price Waterhouse*, 490 U.S. at 244-45

⁸⁰ AS 18.80.130(a). The version of AS 18.80.130(a) that applies to this case is the version in effect prior to amendments in 2006. *See* § 14, ch. 63 SLA 2006. The quoted language has not changed, however.

⁸¹ 6 AAC 30.480(b) [prior to 2007 amendment]. The earlier version of this regulation is quoted because it is the interpretation of the pre-2006 statute that is relevant to this case. The quoted language has not changed significantly, however.

⁸² *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). *Albemarle* interprets Title VII of the federal Civil Rights Act. Alaska’s Human Rights Law is modeled on that act, and federal cases interpreting it are considered helpful in interpreting the parallel Alaska law. *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860, 862-63 (Alaska 1978).

seeking and accepting alternative employment.⁸³ The issue of mitigation is generally viewed as an affirmative defense with the burden of proof falling on the employer; that is, the employee is assumed to have met this requirement unless the preponderance of the evidence shows otherwise. Classically, this requires proof that suitable work was available in the marketplace and that the employee did not make adequate efforts to secure it.⁸⁴ However, under the most common interpretation of the mitigation requirement, when the evidence shows that the employee “failed to pursue employment at all,” the employer does not also have to establish the availability of substantially comparable employment.”⁸⁵

Here, there is no evidence regarding the amount of comparable work available in the marketplace. Ms. Block made a showing that for a few months, until October 13, 2003, she sought other employment to some degree (the evidence suggests that she devoted no more than an hour or two a week to the effort). At that point, the evidence indicates that she discontinued her job hunting for some time. She may have resumed it in some fashion at some later date, because she did later obtain another job. At the same time, the longer the time after the June layoffs the more implausible it becomes that Pulse would have continued to employ office workers even if there had not been a confrontation over parking.

The statute gives the commission broad discretion to fashion an “any appropriate” remedy.⁸⁶ Under the circumstances, the fairest approach seems to be to compensate Ms. Block for lost income so long as she was making some effort to find alternative employment, but not after she stopped doing so. This accords with the mainstream approach to mitigation issues in employment rights cases: so long as the employee is making some effort to find work, the employer cannot escape liability based on failure to mitigate unless the employer shows that alternative employment was available in the marketplace. However, if the preponderance of the evidence shows the employee is not seeking work at all, the employee is deemed not to be mitigating damages even if there is no evidence about the availability of alternative work.⁸⁷

⁸³ See, e.g., *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir. 1998). In a statutory change that is too recent to be directly applicable to Ms. Block’s case, the Alaska Legislature has codified this longstanding principle into AS 18.80.130(a)(1) (“an order for back pay or front pay must be reduced by the amount the employee could have earned or could earn by making reasonably diligent efforts to obtain similar employment”). See §§ 6-8 and 14, ch. 63 SLA 2006.

⁸⁴ *Greenway*, 143 F.3d at 53.

⁸⁵ *Greenway*, 143 F.3d at 54.

⁸⁶ AS 18.80.130(a)(1) (the quoted language appears in both the pre- and post-2006 versions of the statute).

⁸⁷ See *Greenway*, *supra*.

The last week for which Ms. Block was paid was the week of June 16-22, 2003.⁸⁸ There were sixteen work weeks from the end of that week until Ms. Block stopped looking for work on October 13. Using her average hours per week (15) and her final pay rate (\$9.00), the lost wages are $16 \times (9 \times 15) = 16 \times 135 = \2160.00 .

2. Damages—Interest

At the time the complaint was filed in this case, the commission had general statutory authority to order interest on awards under the statute’s authorization to order “any appropriate relief.”⁸⁹ The commission had further addressed interest in a regulation, 6 AAC 30.480(b), which at that time provided for an interest rate of 10.5 percent per annum.⁹⁰ The Alaska Supreme Court reviewed this version of the regulation in *Pyramid Printing Co. v. ASCHR*,⁹¹ holding that in the economic climate prevailing in 2003 (a low-interest environment similar to today’s), the 10.5 percent rate was punitive and could not be imposed. The court remanded to the commission to choose “any reasonable rate,” but suggested that a rate calculation using the 12th Federal Reserve District discount rate plus an appropriate surcharge (that is, a calculation in keeping with AS 09.30.070(a)) would be reasonable.⁹² In late 2004, in a regulatory amendment that may not be strictly applicable to this case since it post-dates the complaint, the commission changed 6 AAC 30.480 to provide for interest at three percentage points above the 12th Federal Reserve District discount rate as found in AS 09.30.070(a).⁹³ In a statute that was expressly made inapplicable to complaints filed before September 13, 2006, the legislature, in effect, approved the commission’s choice of the AS 09.30.070(a) method.⁹⁴

To the extent that it has discretion to choose a rate methodology, the commission should choose the one it has selected as a matter of policy in its recent regulatory change, that is, the one set out in AS 09.30.070(a). That provision states that “the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points

⁸⁸ The undisputed testimony was that Mr. Parello paid Ms. Block for the full week after telling her on June 17 to take the rest of the week off, and this is borne out by Ex. 10, p. 14. In its illustrative damages calculation (found in the record at Ex. 15, an unadmitted exhibit used solely for argument), the staff seems to have overlooked this extra week of pay actually received when it calculated lost earnings in the second quarter of 2003.

⁸⁹ AS 18.80.130(a)(1) (pre-2006 version).

⁹⁰ Alaska Admin. Code, Reg. 91.

⁹¹ 153 P.3d 994, 1001-1002 (Alaska 2007).

⁹² *Id.* at n.31.

⁹³ *See id.* at n.21; Alaska Admin. Code, Reg. 172.

⁹⁴ §§ 6-8 and 14, ch. 63 SLA 2006, amending AS 18.80.130.

above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered” The discount rate in effect on January 2, 2009 was 0.5 percent making the applicable interest rate 3.5 percent for damages awarded in this case.⁹⁵

The starting date for interest calculated under AS 09.30.070(a) is ordinarily the date on which the defendant or respondent “received written notification that an injury has occurred and that a claim may be brought.”⁹⁶ In this case, the Executive Director has offered no evidence that Pulse received *written* notification of this claim until the Determination issued on October 15, 2007.⁹⁷ Interest should therefore be assessed from that date. Interest assessed in accordance with AS 09.30.070 is simple, not compound, interest.⁹⁸

Applying these concepts, the interest on the \$2160.00 in principle damages in this case has accrued since October 15, 2007 at \$75.60 per year, or 20.7 cents per day. The amount owing as of May 15, 2009 is \$2160.00 in principle and \$119.51 in interest, for a total as of that date of \$2,279.51.

3. *Other Relief*

The commission is required by statute to order the respondent to refrain from engaging in any discriminatory conduct he has been found to be engaged in.⁹⁹ Here, the respondent has been found to have discriminated against an employee based on her filing of a complaint with the ASCHR and her opposition to a practice forbidden under Alaska’s human rights law. The respondent must be ordered not to engage in such retaliation in the future.

The commission has discretion to order a wide range of other relief, including imposition of conditions on the respondent’s future business conduct. The only relief other than damages, interest, and an order to desist that the Executive Director has advocated in this case is an order that Mr. Parello receive training specific to disability discrimination and accommodation. However, no such order for training would be appropriate if the commission accepts the finding

⁹⁵ See <http://www.state.ak.us/courts/forms/adm-505.pdf>.

⁹⁶ AS 09.30.070(b). Note that the 2006 amendments to AS 18.80.130 made the whole of AS 09.30.070, including this provision, applicable to ASCHR orders. This should remove any doubt as to whether state policy is to apply interest from the date of written notice or from some earlier date.

⁹⁷ The Determination was offered by respondent and is found at Exhibit B. In seeking to determine the date of *written* notice to the respondent, the undersigned is somewhat handicapped by the limited written record the staff chose to submit at the hearing.

⁹⁸ See *Alyeska Pipeline Serv. Co. v. Anderson*, 669 P.2d 956, 956 (Alaska 1983).

⁹⁹ AS 18.80.130(a) (the requirement, with minor linguistic adjustments, appears in both the pre- and post-2006 versions of the statute).

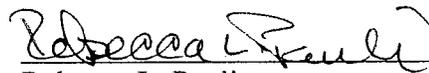
in this recommendation that Pulse did not discriminate based on disability and did not commit a failure-to-accommodate violation, but rather committed only a retaliation violation. It is unlikely that training programs exist to instruct employers in how not to retaliate against their employees.

The impression given by the testimony in this case is that Pulse Newspapers was, and to the extent that it still exists it remains, a very small business operating with a tiny payroll. It is likely that having to pay an award of over \$2000 will make a substantial impression on Mr. Parello and will act as a substantial deterrent against ever repeating the mistake of retaliating against an employee for requesting an accommodation or for making a complaint to the ASCHR.

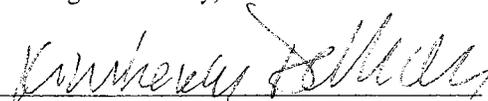
IV. RECOMMENDATION

Based on the reasoning and authorities set forth above, I recommend that the Alaska State Commission for Human Rights enter an order requiring respondent to pay Robin Block damages in the principal amount of \$2160.00, together with simple interest from October 15, 2007 at 3.5 percent per annum (\$2,279.51 as of May 15, 2009 plus 20.7 cents per day for each additional day the principal amount remains unpaid). I further recommend that respondent be ordered to refrain from retaliating against any employee for requesting an accommodation or for making a complaint to the Alaska State Commission for Human Rights.

DATED at Anchorage, Alaska this 29th day of May, 2009.


Rebecca L. Pauli
Administrative Law Judge

Certificate of Service: The Undersigned certifies that on the 29th day of May, 2009, a true and correct copy of this document was emailed and mailed by certified mail, return receipt requested, to the following: Caitlin Shortell, Human Rights Attorney; Charlie Parello.

By: 
Linda Schwass/Kimberly DeMoss

APPELLATE
COURT
DECISION
FOLLOWS

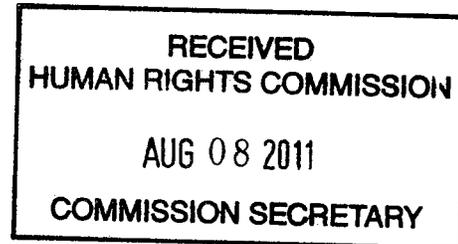
IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

CHARLIE PARELLO dba
PULSE PUBLICATIONS¹,
APPELLANT,

vs.

ALASKA STATE COMMISSION
FOR HUMAN RIGHTS,

APPELLEE.



Case No. 3AN-09-12728 CI

DECISION ON APPEAL

Robin Block (Block), contacted the Alaska State Commission for Human Rights (the Commission) complaining of discrimination on the basis of disability by her former employer, Charlie Parello (Parello), proprietor of Pulse Publications, on June 12, 2003. Her complaint set forth allegations that Parello failed to accommodate her disability and was later amended to include the allegation that he terminated her employment as retaliation for her complaint to the Commission. A hearing was held before Administrative Law Judge James T. Stanley (Judge Stanley) on March 18, 2008, pursuant to AS 18.80.120.

Judge Stanley resigned some time after he heard the case and Administrative Law judge Rebecca L. Pauli (Judge Pauli) crafted a Recommended Decision on May 29, 2009, based on the digital recording of the hearing and the

¹ The Office of Administrative Hearings *sua sponte* reformed the caption in this case to ensure that any orders or awards enter in the case would not be entered against a nonexistent entity and thus be of no value. A full explanation of this adjustment can be found in the Notice of Intent to Change Caption (April 22, 2009) at page 33 of the Record.

exhibits submitted at the hearing.² The Recommended Decision held that Parello was not liable for failing to accommodate Block on the basis of her disability but that he had fired her as retaliation for protected activity as defined under Alaska's anti-discrimination statute, AS 18.80.220.³ The Recommended Decision required Parello to pay damages of \$2,160.00 with interest at 3.5 percent per annum.⁴ Parello objected to the Recommended Decision and Judge Pauli addressed his objections and affirmed the Recommended Decision.⁵ The Commission adopted the Recommended Decision in its entirety on November 24, 2009.⁶

Parello now appeals the Commission's Final Order. Block does not appeal the portion of the Final Order denying her discrimination claim.

FACTS

Block lost her right leg four inches above her knee in a motorcycle crash in 1971.⁷ She has lived with a prosthesis since then and occasionally uses crutches.⁸ Block began working in the Pulse Publications office in October 2002.⁹ She had previously worked in the warehouse stuffing newspapers, but found it difficult due to her disability.¹⁰

² R. at 5.

³ R. at 15.

⁴ *Id.*

⁵ R. at 6-7.

⁶ R. at 1.

⁷ Administrative Hearing Transcript, March 18, 2008, 19 [hereinafter AHT].

⁸ AHT at 20-21.

⁹ AHT at 25.

¹⁰ *Id.*

Pulse Publications is run from an office building that houses multiple businesses.¹¹ Parking is available on all sides of the building, but there were no handicapped spaces painted while Block worked for Pulse Publications.¹² Block parked near the back entrance to her office near a loading dock so that she did not have to use a set of stairs she felt were dangerous due to her disability, and to avoid navigating the parking lot when it was icy during the winter months.¹³

Block testified that she requested the designation of a handicapped spot in late 2002 or early 2003, but Parelo denied her request.¹⁴ She noted that on one occasion another employee had parked in such a way that the loading dock was blocked and she was forced to drive home to use her phone to call Parelo and tell him she could not access the building.¹⁵ Block also testified that at times cars would double park behind her when she parked in front of the loading dock, blocking her in.¹⁶

On some occasions Block's car had to be moved to accommodate deliveries and other business involving the loading dock.¹⁷ Block explained that her prosthesis is at times uncomfortable and when she was sitting for long periods in the office she would remove it.¹⁸ In order to put the prosthesis back

¹¹ AHT at 29-30.

¹² AHT at 31.

¹³ AHT at 32-35.

¹⁴ AHT at 35 (Judge Pauli found Block's testimony claiming that she had complained about the parking situation prior to June 11, 2003, too vague to find Parelo liable for failing to accommodate Block's disability).

¹⁵ AHT at 35-36.

¹⁶ AHT at 37.

¹⁷ AHT at 37-38.

¹⁸ AHT at 36.

on Block had to pull up her skirt to her groin, something she was not comfortable doing in front of her coworkers.¹⁹ Thus, when Block's car had to be moved on short notice, Parello or other Pulse Publications employees would move Block's car.²⁰ Block testified that she became uncomfortable with other people operating her car and being in her car, and she again asked Parello for a handicapped parking spot.²¹ Block alleged that Parello again denied her request.²²

On June 11, 2003, Block arrived at work and could not park due to other parking lot occupants filling the spaces she normally used.²³ Parello had not yet arrived at work, and she contacted the property manager for the Pulse Publications building and requested a handicapped parking spot.²⁴ The management company assured Block that a spot would be painted for handicapped parking.²⁵ When Parello arrived at work Block informed him she had called the management company and that a spot would soon be painted for handicapped parking.²⁶ Block described Parello as not "real happy about it" and said she knew "things weren't going to be happy in the office."²⁷ Parello told Block she did not need a handicapped parking space and told Block not to contact the management company again.²⁸

¹⁹ AHT at 43.

²⁰ AHT at 38-39.

²¹ AHT at 39-40.

²² AHT at 38-39.

²³ AHT at 45-46.

²⁴ AHT at 45.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Comp. Ex. 11; Resp. Ex. A at 1.

Block also called the Commission and reported that her employer had been unwilling to provide her a handicapped parking spot.²⁹ She filed a complaint with the Commission and reported that the management company was willing to give her a parking spot, but she was concerned for her job.³⁰

The next day, on June 13, 2003, Parello informed Block and the two other office employees of Pulse Publications that business was slow and he no longer had a need for office personnel.³¹ He specifically noted that the money the sales staff was bringing in through advertising sales revenue was not enough to support the salaries he paid them.³² Without sales staff, he claimed he did not need Block acting as a secretary or salesperson anymore.³³ He said he would give them a week in case things turned around, and that they could still come into the warehouse to stuff papers once a month if they wanted to continue that work.³⁴ Parello testified that he had been thinking about making this change for “awhile” before he terminated the office staff.³⁵

Block returned to work the following week. On June 17, 2003, Parello informed Block that he would pay her for the rest of the week but she did not need to come in anymore.³⁶ Block sought work intermittently after being let go

²⁹ AHT at 45, 161.

³⁰ AHT at 45-46.

³¹ AHT at 47-48.

³² Comp. Ex. 2 at 2.

³³ AHT at 48.

³⁴ AHT at 47.

³⁵ Resp. Ex. A at 13.

³⁶ AHT at 49.

from Pulse Publications and eventually got a job with Big Brothers Big Sisters in February 2005.³⁷

STANDARD OF REVIEW

This court has jurisdiction over Parello's administrative appeal pursuant to AS 22.10.020(d). When reviewing the appeal, this court must determine whether the Commission's Final Order was supported by "substantial evidence."³⁸ Substantial evidence exists if, considering the record as a whole, the quantum of the evidence is substantial enough that a reasonable mind might accept the administrative agency's decision.³⁹ Accordingly,

[W]here the evidence is conflicting, the reviewing court will not reweigh the evidence and substitute its judgment for that of the trier of fact. Thus, the evidence should be reviewed in favor of the [Commission's] findings even though the reviewing court might have taken a contrary view of the facts.⁴⁰

Parello argues that this court should use an "independent judgment" or "substitution of judgment" standard to review the Commission's determinations. Parello relies on a Louisiana Court of Appeal case to support the position that because Judge Pauli issued the Recommended Decision in this case after reviewing a digital recording of the initial hearing with Judge Stanley, her determinations were not based on first-hand observations, and as such require a more stringent standard of review on appeal. The Louisiana Court of Appeal's holding in *Carpenter v. State of Louisiana*, is inapposite to Parello's case in that it

³⁷ AHT at 51.

³⁸ *State Comm'n for Human Rights v. Yellow Cab*, 611 P.2d 487, 493 (Alaska 1980).

³⁹ *Municipality of Anchorage Police and Fire Ret. Bd. v. Coffey*, 893 P.2d 722, 726 (Alaska 1975).

⁴⁰ *Yellow Cab*, 611 P.2d at 490.

relies on Louisiana statutes and addresses a factual scenario distinct from Parello's case.⁴¹

DISCUSSION

Parello raises four issues on appeal: 1) Did Parello terminate Block's employment from Pulse Publications?; 2) If so, when did Parello terminate Block's employment?; 3) Did Block engage in protected activity under the relevant statutes?; 4) If so, and if Block's employment was terminated by Parello, was the termination motivated in whole or in part by Parello's desire to retaliate against her due to the protected activity she engaged in?

Termination

Parello argues on appeal that the evidence presented to Judge Stanley and later reviewed by Judge Pauli indicated that Block was never terminated, and if she was, the date of termination was June 17, 2003, the last day she came to work at Pulse Publications.

Block testified that on June 13, 2003: "Charlie bought lunch for us, sat us down in the warehouse, and then laid-off the officer workers in front of Chuck and Mike."⁴² Block explained further in response to questioning:

Q: And so what did Mr. Parello say when he did this?

A: He said the newspaper business is slow. You know, basically he didn't have a need for us, the three of us, Ryan, Tiffany, and myself. He said I'll give you a week, if things turn around, and –

⁴¹ *Carpenter v. State of Louisiana*, 944 So.2d 604 (La.App. 2006) (even were Parello's case analogous to *Carpenter*, it is not apparent Parello's characterization of the law in that case is accurate).

⁴² AHT at 47.

and you can come – and once a month and work stuffing papers, you know, if you want to continue doing that.

Q: Okay. And at that point were you able to stuff papers?

A: No, I'd already told Charlie I can't manage the bundles. And then I'm having to have other employees pick them up for me, which isn't their job. You know, that's not their responsibility.⁴³

Parello testified that Block's employment in the office was terminated on June 13, 2003, but that she could have remained employed in the warehouse of Pulse Publications.⁴⁴ Judge Stanley used voir dire examination of Parello to clarify this point, resulting in the following exchange:

Q: I mean listening to your testimony, in your mind do you distinguish – I mean it almost sounds like, from your testimony, that you distinguished the office from being sort of one employment center, the warehouse being another employment center, and then you've got outside people and graphic people, and those are there. So that is it your testimony [sic] that when you laid-off the three people that worked in the office, Ryan, Tiffany, and Robin, on June 13th, that even though Tiffany continued to perform some services with the brochure on an on-call basis, she was still not working in the office?

A: She was not working physically in the office at all. And yes, I do – your earlier part, designate office, with the way I have it setup, office includes sales people, graphics, clerical."

Q: Okay. But for three people physically working in the office and so forth, your testimony is that you laid them off from the office duties that they were performing..."

A: Right.

Q: ...on June 13th? And that was...

A: Yeah.

Q: ...Ms. Block, Tiffany, and Ryan?

A: Yes.⁴⁵

Having heard both Parello and Block's testimony, Judge Pauli determined that when Parello took Block and the other office workers to lunch on June 13,

⁴³ AHT at 48.

⁴⁴ AHT at 164-165.

⁴⁵ AHT at 164-65.

he “told them he was laying them off, effective in one week.”⁴⁶ Although Judge Pauli understood that Block’s last day of employment with Pulse Publications was June 17, 2003, the testimony of both Block and Parello made it clear that she was discharged on June 13, 2003, with the understanding that the following week would be her last week at work.

On appeal, Parello attaches significance to his offer of warehouse work when he laid off the office staff. Judge Pauli did not attach the same significance to his offer due to Block’s testimony that she could not perform the warehouse jobs due to her disability. Moreover, Parello never objected to Judge Stanley’s description of the June 13, 2003, layoff and directly testified that the layoff occurred on June 13, 2003, multiple times during the hearing.⁴⁷ Thus, Judge Pauli’s determination that Block was discharged on June 13, 2003, was supported by substantial evidence.

Protected Activity

In order to find that Parello discharged Block in retaliation for Block’s complaint to the Commission, a determination must be made that Block’s complaint was a “protected activity” under AS 18.80.220(a)(4). AS 18.80.220(a)(4) provides:

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

⁴⁶ R. at 20.

⁴⁷ AHT at 165, 167-169.

It is well established law that an employee's reasonable attempts to seek redress for discrimination, perceived or actual, constitute protected activity.⁴⁸

Parello argues on appeal that Block's phone call to building management was not protected activity. Judge Pauli discussed in detail in her Recommended Decision which actions of Block qualified as "protected activity" for purposes of the statute. Judge Pauli noted that it is unclear whether Block's phone call to building management should be considered protected activity.⁴⁹ The relevant "protected activity" analysis in the Recommended Decision rested on Block's complaint to Parello the morning of June 11, 2003, after she had contacted the management company, as well as her complaint to the Commission. Thus, it is irrelevant whether Block's phone call to building management was "protected activity" under AS 18.80.220, as the Commission's determination did not rely on it as such.

Block's phone call to the Commission constituted a "protected activity" under AS 18.20.220(a)(4). She called the Commission to report that her employer refused to accommodate her disability and that her own actions to remedy the situation, i.e. calling the management company and raising the issue with Parello, had made her fearful that she would lose her job. This action was one avenue by which Block opposed what she believed to be a discriminatory practice, as well as the initiation of a complaint with the Commission. Likewise,

⁴⁸ See e.g. *McAlindin v. County of San Diego*, 192 F.3d 1226, 1238 (9th Cir. 1999); *Coons v. Sec'y of U.S. Dept. of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004).

⁴⁹ R. at 26 n. 77.

raising the issue with Parello was another avenue of opposing what Block believed to be discrimination in the workplace.

Retaliation

Alaska courts have generally adopted federal standards and modes of analysis for addressing discrimination claims under Alaska's anti-discrimination laws.⁵⁰ When determining whether an employer's behavior was retaliatory, Alaska law requires courts to engage in a burden-shifting analysis originally articulated by the United States Supreme Court in *McDonnell Douglas Corporation v. Green*.⁵¹ Under *McDonnell Douglas*, and in the context of Block's retaliatory termination claim, the employee must establish that she engaged in a protected activity, suffered an adverse employment action, and that there was a potential causal link between the protected activity and the employer's adverse employment action.⁵²

In order to show a potential causal link between an employee's protected activity and an employer's adverse employment action, evidence must be presented that would allow a reasonable trier of fact to conclude that the employer was aware of the protected activity, along with evidence from which causation could be inferred.

Once this *prima facie* case of retaliation is established, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for the employment

⁵⁰ *Smith v. Anchorage School District*, 240 P.3d 834, 839 (Alaska 2010).

⁵¹ 411 US 792 (1973).

⁵² *Raad v. Alaska State Commission for Human Rights*, 86 P.3d 899, 905 (Alaska 2004).

action. The employer need only produce “admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by [retaliatory] animus.”⁵³ The reason must be one that existed at the time the employment decision was made.⁵⁴

If the employer is successful in meeting this burden, the burden shifts again to the employee to show that the employer’s action was more likely motivated by a discriminatory reason. This is generally done by showing that the employer’s proffered reason was pretextual.⁵⁵ Pretext may be shown in a number of ways.⁵⁶ When direct evidence is not available, pretext may be established by showing “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action” that they are unworthy of credence.”⁵⁷

Moreover, an employment action may be deemed retaliatory even where the employer’s motives were a mixture of proper and improper considerations. In these cases, the employee need not show that the employer’s action was entirely pretextual. The employee can prevail on a retaliation claim if the evidence as a whole indicates the improper, retaliatory motive was “a motivating factor in the decision.”⁵⁸ In mixed-motive cases, the employer can avoid liability by showing

⁵³ *Raad v. ASCHR*, 86 P.3d at 905.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1250 (10th Cir. 2002); *see also Raad v. Fairbanks North Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003).

⁵⁸ *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 920 (Alaska 1999).

the same decision would have been made even if the improper motive had not played a role.⁵⁹

Judge Pauli determined that Block's complaint to Parello on June 11, 2003, about the parking situation, as well as her complaint to the Commission on June 12, 2003, were both protected activity under AS 18.80.220. Judge Pauli also held that the layoff of Block on June 13, 2003, was an adverse employment action. Judge Pauli found that although there was a mixed motive for Parello's actions, the extremely close temporal proximity of Block's complaints and her termination indicated a causal link.

Judge Pauli held that Parello provided some evidence of a legitimate, nonretaliatory motive for the termination. He gave vague testimony about the business decision to let his office staff go, although he could not provide a concrete answer as to why he chose to terminate Block only two days after she raised the issue of handicapped parking and one day after she contacted the Commission. Judge Pauli also found it relevant that Parello had given Block a raise only two months earlier, contradicting the notion that he could not afford to staff his office or did not believe the work they did was worthy of the compensation he provided.

Parello argues on appeal that Block was required to show direct evidence of an improper motive for termination to succeed on her retaliation claim. The Alaska Supreme Court has held as much, declining to follow the federal courts in

⁵⁹ *VECO*, 970 P.2d at 920-21.

eliminating the direct evidence requirement for mixed-motive cases.⁶⁰ The direct evidence requirement is somewhat confusing, as the court in *Smith* recognized – direct evidence is not an antonym for circumstantial evidence, but instead refers to the quantum of proof required.⁶¹ Most succinctly stated, “In order to show direct evidence the plaintiff must ‘at least offer either direct evidence of prohibited motivation or circumstantial evidence strong enough to be functionally equivalent to direct proof.’”⁶²

Judge Pauli found the temporal proximity between Block’s complaints to Parello and the Commission and her subsequent discharge so striking as to support a finding of retaliatory termination. Moreover, the timing of Parello’s decision to terminate Block seemed to contradict his previous decision to give Block a raise, only two months prior to her discharge. Judge Pauli also found Parello’s testimony explaining his decision to lay off his office staff unconvincing, noting that it was vague, and did not explain why the lay off was necessary at that time.

Significant in this case, proximity in time between the protected activity and the adverse employment action can suffice to show causation.⁶³ Parello cites a Ninth Circuit case, *Cozalter v. City of Salem*, for the proposition that “a specified time period cannot be a mechanically applied criterion,” when

⁶⁰ *Smith*, 240 P.3d at 840.

⁶¹ *Id.*

⁶² *Id.* (quoting *Mahan v. Arctic Catering, Inc.*, 133 P.3d 665, 662 (Alaska 2006)).

⁶³ *VECO*, 970 P.2d at 919 (Alaska 1999) (quoting *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 730-31 (9th Cir. 1986)); *Raad v. FNSBS*, 323 F.3d at 1196-97 (cited with approval in *Raad v. ASCHR*, 86 p.3d at 905 n. 25).

establishing causation.⁶⁴ Although Judge Pauli found the timing of Block's discharge "enormously suggestive" of a casual connection between Block's protected activity and her termination, there is no indication that she viewed the evidence "mechanically."

Judge Pauli viewed the extremely short time period in which all of the relevant activity occurred in this case, in context with Block's recent pay raise, which contradicted Parello's vague testimony indicating Pulse Publications could no longer support an office staff. Judge Pauli also considered Parello's inability to produce a specific business justification for the timing of Block's termination.

Judge Pauli recognized that Parello's case is one of mixed motives. Although Parello may have been considering reducing his staff, specifically his office staff, it appears from the whole of the evidence that Block's complaints regarding accommodations for her disability were the "catalyst" as Judge Pauli stated, for Parello's decision to terminate Block. As discussed above, Parello's retaliatory motive need only be a motivating factor in his decision to terminate Block to be considered unlawful; it need not be his entire justification for her discharge.

Parello's case illustrates the complexity facing the Commission as it determines the outcome of mixed-motive cases of discriminatory retaliation. This court, sitting as an intermediate court of appeal, may not reweigh the evidence to produce a different outcome in Parello's case. There is substantial evidence

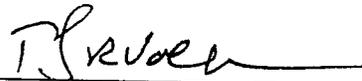
⁶⁴ 320 F.3d 968, 977-78 (9th Cir. 2003).

supporting Judge Pauli's Recommended Decision, which the Commission has adopted as its Final Order in this case.

CONCLUSION

For the foregoing reasons, the Commission's Final Order is AFFIRMED.

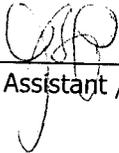
DATED: August 4th, 2011, at Anchorage, Alaska.



PHILIP R. VOLLAND
SUPERIOR COURT JUDGE

*I certify that on the 5 day of AUG-11
a copy of the above ~~was~~ distributed
to each of the following:*

J. Josephson | AGO Milks | ASCHR Shortell



Judicial Assistant / Clerk