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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY, EXECUTIVE)
 DIRECTOR, ALASKA STATE)
 COMMISSION FOR HUMAN RIGHTS)
ex rel. MELISSA SCHASTEEN,)
 n/k/a, MELISSA PARRISH,)
)
 Complainant,) ASCHR No. J-09-138
) OAH No. 10-0264-HRC
 v.)
)
 A B & M ENTERPRISES, INC.,)
 d/b/a RUMRUNNER'S OLD)
 TOWNE BAR & GRILL,)
)
 Respondent.)
 _____)

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, are in agreement with the Recommended Decision of February 8, 2012 and find that Respondent ("Rumrunner's") violated AS 18.80.220(a)(1) by subjecting Melissa Parrish to a hostile work environment based on her sex, by constructively discharging her from employment, and by unlawfully retaliating against Ms. Parrish by depriving her of earned tips and permanently banning her from Respondent's establishment.

A. The Commission imposes the following remedies consistent with the Recommended Decision:

(1) Monetary relief is awarded to Melissa Parrish in the form of backpay and prejudgment interest set at the rate of 3.75% per annum. *See* 6 AAC 30.480(b) (calculation of interest should be based on an application of AS 09.30.070(a)). The backpay was appropriately calculated to begin on the date of Ms. Parrish's constructive discharge and run until she left the workforce in June 2009, reduced by the earnings she received from other employment during that period. The Recommended Decision properly calculated the backpay and prejudgment interest through the first day of hearing on November 14, 2011 to be \$4,531.07;

1 (2) The Commission orders the following equitable relief in an effort to
2 ensure that a hostile work environment or other illegal discrimination does not occur in
3 the future at Rumrunner's: (a) Rumrunner's shall adopt a policy of nondiscrimination
4 that includes a policy prohibiting discrimination against employees on the basis of sex
5 and prohibits retaliation for complaining about discrimination; this policy shall be
6 distributed to all employees; the policy must be acceptable to the Commission's
7 executive director; (b) Rumrunner's owners and management staff shall undergo six
8 hours of training in the provisions of the Human Rights Act that prohibit
9 discrimination and retaliation; the content of the training and the provider of the
10 training shall be approved by the Executive Director of the Commission before being
11 provided;

12 (3) The Commission adopts the Administrative Law Judge's order of
13 January 25, 2012 denying Rumrunner's motion for attorney's fees.

14 B. The Commission adopts the Administrative Law Judge's August 17,
15 2011 award of attorney's fees in the sum of \$6,200 against
16 Rumrunner's.

17 This attorney's fees order was issued against Rumrunner's pursuant to a
18 sanctions order dated July 20, 2011 that was issued based on Rumrunner's refusal to
19 comply with a discovery order. On October 26, 2011, the Executive Director filed a
20 Notice of Noncompliance with Sanctions Order and request for Commission
21 Enforcement relating to the attorney's fees order. The Commission in November 2011
22 issued an order providing Rumrunner's an opportunity to respond to the Executive
23 Director's notice and request but it did not file any response. The Administrative Law
24 Judge's order and award of attorney's fees against Rumrunner's in the sum of \$6,200
25 is adopted and incorporated into this Final Commission Order.

26 C. *The Commission amends the Recommended Decision as follows*
27 *subject to the parties' right to file objections to the amendment within*
28 *14 days of the date of this order:*

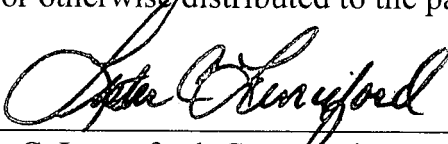
Post judgment interest at the rate of 3.75% is awarded on the sum of
\$4,531.07 awarded to Melissa Parrish. Alaska courts have held that post judgment
interest is appropriate because it is necessary to compensate the successful party for
lost use of money. *Ogard v. Ogard*, 808 P.2d 815, 817-18 (Alaska 1991); *Morris v.*
Morris, 724 P.2d 527, 529 (Alaska 1986). The rate of 3.75% is appropriate as it is the
rate recommended by the administrative law judge for the award of prejudgment
interest and it is the rate applicable pursuant to AS 09.30.070(a) in 2011 when the
Recommended Decision was issued. Because post judgment interest was not
expressly addressed in the Recommended Decision, the parties pursuant to 6 AAC

1 30.480 may file objections to this amendment to the Recommended Decision within
2 14 days of the date of this order.

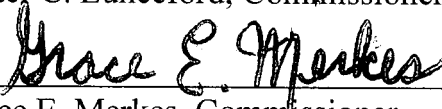
3
4 IT IS SO ORDERED.

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

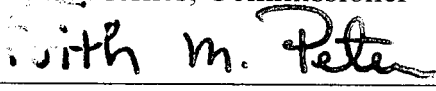
8 DATED: June 7, 2012


Lester C. Lunceford, Commissioner

10 DATED: June 7, 2012


Grace E. Merkes, Commissioner

12 DATED: June 7, 2012


Faith M. Peters, Commissioner

14 **CERTIFICATE OF SERVICE**

15 This is to certify that on June 7, 2012, a copy
16 of the foregoing was hand-delivered or mailed
17 by first-class U.S. mail, postage prepaid, to:

18 ✓ Stephen Koteff, Human Rights Advocate (hand-delivered)
19 Alaska State Commission for Human Rights
20 800 A Street, Suite 204
21 Anchorage, AK 99501


22 Kevin Anderson (U.S. Mail)
23 Anderson Law Group
24 645 G Street, PMB 570
25 Anchorage, AK 99501

Michael and Ellaina Shomer (U.S. Mail)
Rumrunner's Old Towne Bar & Grill
415 E Street
Anchorage, AK 99501

26 Thomas P. Owens III (U. S. Mail)
27 Burr, Pease & Kurtz
28 810 N Street, Suite 300
Anchorage, AK 99501

And that a courtesy copy was mailed, postage prepaid, to:

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


Margaret Taylor
Commission Secretary

FINAL ORDER – Page 3

Paula M. Haley, ex rel. Melissa Parrish v. A B & M Enterprises, Inc., d/b/a Rumrunner's Old Towne Bar and Grill, ASCHR No. E-09-006, OAH No. 11-0064-HRC

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.*)
MELISSA SCHASTEEN n/k/a)
MELISSA PARRISH,)
)
Complainant,)
)
v.)
)
A B & M ENTERPRISES, INC. d/b/a)
RUMRUNNER'S OLD TOWNE)
BAR & GRILL,)
)
Respondent.)

OAH No. 11-0064-HRC
ASCHR No. E-09-006

RECOMMENDED DECISION

I. INTRODUCTION

Melissa Parrish was employed as a bartender by Rumrunner's Old Towne Bar & Grill (Rumrunner's). In October of 2008, she informed Rumrunner's manager that she had been sexually assaulted by a co-worker at her home after work.¹ Rumrunner's continued to schedule that co-worker to work on the same nights that Ms. Parrish worked. She found his continued presence to be very disturbing and asked her boyfriend to be present in the bar when she worked in order to feel somewhat more comfortable. When Rumrunner's told her that her boyfriend could no longer be there, she resigned.

After investigation, the Executive Director, Paula M. Haley, issued an accusation alleging a hostile work environment, constructive discharge, and retaliation. Based on the evidence presented at the hearing, Rumrunner's did subject Ms. Parrish to a hostile work environment. In addition, Rumrunner's constructively discharged her, and then retaliated against her for complaining about the discriminatory practices.

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¹ Ms. Parrish's co-worker was never charged with any crime related to this incident. The terms "sexual assault" and "rape" are not used in this decision to denote any specific level of criminal conduct under Alaska law.

II. FACTS

A. Procedural History²

Rumrunner's answered the accusation on March 8, 2011. The parties participated in a case planning conference, and a scheduling order was entered setting a four day hearing to begin on August 8, 2011. This order provided for other prehearing deadlines for serving a preliminary witness list and discovery requests.

On May 6, 2011, the Executive Director filed a motion to compel discovery responses and also to compel a preliminary witness list that complied with the requirements of the scheduling order.³ Rumrunners did not file an opposition or other response to that motion, and an order was entered on May 20, 2011, granting the Executive Director's motion.

After several other discovery disputes arose, the Executive Director filed a second motion to compel on June 9, 2011. This motion was heard on an expedited basis, and the parties were given an opportunity to address the motion during a June 17, 2011 status conference.

Rumrunner's was ordered to provide updated discovery responses on or before June 28, 2011.

On June 28, Rumrunner's mailed a motion requesting an additional month to produce documents in response to the prior order. That motion was denied on July 1, 2011. On July 5, 2011, the Executive Director moved for sanctions for failing to comply with the prior discovery orders. Rumrunner's did not oppose or respond to this motion, and it was granted. As a sanction, Rumrunner's was precluded from calling any witnesses other than Michael Shomer and Ellaina Shomer,⁴ and precluded from introducing any documentary evidence not previously produced through discovery. This order also determined that the Executive Director was entitled to reasonable costs and attorney fees pursuant to 2 AAC 64.360(b).⁵

After another status conference on August 2, 2011, the hearing was rescheduled for November 14 – 17, 2011.

Rumrunner's filed a motion to compel production of Ms. Parrish's 2009 Income Tax return. The Executive Director's opposition described her efforts to obtain the requested information. She noted that Rumrunner's had previously been informed that Ms. Parrish did not

² Only the more significant procedural events are outlined here.

³ The scheduling order stated that the preliminary witness list must include a brief description of the subject on which each witness would testify. Rumrunner's preliminary list did not contain any description.

⁴ Mr. Shomer is Rumrunner's general manager and a part owner of the business. Ms. Shomer is Rumrunner's office manager.

⁵ This regulation permits the award of a party's reasonable expenses, including attorney fees, as a sanction for bad faith or for tactics used frivolously or solely to cause delay.

have those documents in her possession or control and described her efforts to obtain tax transcripts from the IRS. The tax transcripts were provided to Rumrunner's shortly after Rumrunner's filed its motion. Rumrunner's motion was denied as moot.

Rumrunner's did not file a timely exhibit list. On the first day of the hearing, Rumrunner's explained that it did not know what evidence it would wish to introduce until after the Executive Director completed taking depositions.⁶ In addition, Rumrunner's counsel explained that he had other matters he had to attend to in other cases. In an oral ruling, Rumrunner's was told that it could only introduce these exhibits to the extent Rumrunner's could show that the need for these exhibits became apparent because of testimony during the depositions. Rumrunner's was given permission to make this showing for any exhibit throughout the hearing. Rumrunner's never attempted to show why the need for any of these documents was not apparent earlier, and none of Rumrunner's exhibits were admitted.

The Executive Director did file a timely exhibit list. Exhibits 1, 2, 4, 5, 8, 9, 10, 11, 12, 15, pages 1 – 6 of 16, 19, 20, 20A, 21, and 23 were all admitted. The depositions of Mr. and Ms. Shomer were also admitted. Exhibit 3 was offered by the Executive Director, but was not admitted based on Rumrunner's objections. The Executive Director did not ask for the admission of any of the other exhibits on her exhibit list.

During the hearing, Rumrunner's was allowed to call additional witnesses to testify as to Ms. Parrish's reputation in the community for honesty.

B. Witness Testimony

Melissa Parrish. Ms. Parrish began working at Rumrunner's during the summer of 2008. At the time, her name was Melissa Schasteen.⁷ Ms. Parrish started as a server, and was later promoted to a bartender position. Although she had previously been a flight paramedic, she was changing careers. Working as a bartender allowed her to work nights while attending university classes during the day. She earned \$7.15 per hour, but also received tips, which varied between \$100 and \$300 a day.

Ms. Parrish worked the evening of October 24, 2008. She remained at Rumrunner's after her shift, and had two or three beers. Because she had been drinking, she did not want to drive.

⁶ Volume III of Mr. Shomer's deposition and volume II of Ms. Shomer's deposition are both dated November 8, 2011.

⁷ She married Robert Parrish after her employment at Rumrunner's terminated.

John Fuller, who worked security for Rumrunner's, offered to drive her home.⁸ Ms. Parrish and Mr. Fuller left Rumrunner's with Mr. Fuller driving Ms. Parrish's car. They stopped at the Kodiak Bar, which stays open later and does not serve alcohol. They only stayed about 15 minutes before driving to Ms. Parrish's home. When they arrived at her home, Mr. Fuller told her he could not find his car keys and asked to come inside to use her phone. Ms. Parrish assumed he would call someone to come pick him up.

By then, it was early in the morning of October 25. Once inside, it became apparent to Ms. Parrish that Mr. Fuller had been drinking, and she was upset about that because she had let him drive. Because he had been drinking and because it was so late, she suggested he sleep on the couch.

Ms. Parrish made Mr. Fuller a drink of orange juice and tequila. Mr. Fuller then began getting aggressive. He tried to sit close to her on the couch and tried to kiss her. When she resisted, he said something like "so you like it rough?" He hit her in the face and forced Ms. Parrish to engage in sexual intercourse. She was left with a bruise on her face, finger marks on her arms, bite marks on her breast, and bruises on her legs.

Afterwards, Mr. Fuller told her to drive him back to his car unless she wanted more of the same. She complied, and then returned to her home. She immediately called her boyfriend, Robert Parrish. Mr. Parrish was out of Alaska at the time.⁹ He called a family friend who was also a police officer. The officer came with his wife to Ms. Parrish's home, and then took her to the Sexual Assault Response Team (SART) Center for an examination.

Ms. Parrish was examined and photographed at the SART Center. The SART Center photographs show bruises on Ms. Parrish's face and bite marks on her breast.¹⁰ Ms. Parrish was then interviewed by Police Detective Bianca Cross. Det. Cross obtained a warrant, and proceeded to record a telephone conversation between Ms. Parrish and Mr. Fuller.

On October 26 (the following day), Ms. Parrish told Mr. Shomer that Mr. Fuller had raped and assaulted her. According to Ms. Parrish, Mr. Shomer said that Mr. Fuller would be fired immediately. On October 28, when she saw Mr. Shomer in person, she says she was told that Mr. Fuller had been suspended and would not be back to work. Ms. Parrish testified that she

⁸ Ms. Parrish testified that she didn't live too far away, and there were other people she could have called at that time of night for a ride home if Mr. Fuller had not offered her a ride.

⁹ He took the next flight home and arrived either late the night of the 25th or early the next morning.

¹⁰ Exhibit 20. A portion of this exhibit is marked 20A, and consists of photographs taken on October 31. Ms. Parrish had been asked to come back to the SART Center for additional photographs to show the evolving bruises.

also told Mr. Shomer that Mr. Fuller had a prior criminal conviction and that the nature of that conviction was similar to what Mr. Fuller had done to her.

On October 31, 2008, Ms. Parrish was working as a bartender when Mr. Fuller arrived at Rumrunner's to work. She had no prior warning that he would be there. She told Mr. Shomer she could not work with Mr. Fuller and wanted Mr. Shomer to make him leave. Mr. Shomer refused. Instead, he moved her to the back bar to keep Ms. Parrish and Mr. Fuller separated. This was not acceptable to her because Mr. Fuller's presence in the building upset her and because she made much less money at that location.

Mr. Fuller continued to be scheduled to work on weekends when Ms. Parrish was working. Ms. Parrish testified that when she was at the back bar, he would come to the doorway to that area and stand and stare at her. She felt intimidated and scared by his presence.

Since Mr. Fuller was present anyway, she asked to be returned to the main bar where she could earn the amount of money she previously earned. According to Ms. Parrish, Mr. Fuller's presence impacted her ability to do her job. She was constantly worried that something else would happen. His presence reminded her of the night of the assault and made her feel ashamed, teary, embarrassed, and victimized.

Ms. Parrish also testified as to what other employees said to her. Mr. Van Gilder, the security manager, stated to Ms. Parrish that he did not believe her and that Mr. Fuller had told him she "was not a good lay anyway." Mr. Shomer told her that he did not believe her allegations and that she should "get over it."

In order to help her feel safe, she asked Mr. Parrish to be at Rumrunner's during her shifts. He would sit near the bar and drink water, and occasionally order food. He did not interrupt her work.

Ms. Parrish's last night of work was Wednesday, November 26, 2008. This was the day before Thanksgiving. Mr. Fuller showed up to work later in her shift. Ms. Parrish called Mr. Parrish to come to the bar, which he did. The sequence of events from that point on are in dispute, but according to Ms. Parrish one of Rumrunner's managers – Mr. Luna – asked her to tell Mr. Parrish to leave. He did not give her a reason for this request. She told Mr. Luna that if Mr. Parrish left, she would be quitting at the end of her shift. She needed her job, but could not tolerate working with Mr. Fuller without Mr. Parrish being present.

Mr. Luna said something to Mr. and Ms. Shomer. The Shomers then came behind the bar and Ms. Shomer told her that she would need to leave immediately. Ms. Parrish tried to get her tips from that night. Ms. Shomer would not let her take her tips. Security personnel were called to escort Ms. Parrish outside. Mr. Shomer came outside and yelled at her and told her she could never come back.

Ms. Parrish's testimony was consistent and supported by other evidence in the record. As discussed below, two witnesses testified that she had a poor reputation for honesty. Despite that testimony from those two witnesses, Ms. Parrish's testimony about the facts of this case as summarized above is credible and found to be true.

Robert Parrish. Mr. Parrish testified that he and Ms. Parrish started dating in August of 2008. On a few occasions, he would meet friends at Rumrunner's and stay for a few hours, or he would stop by briefly to talk to Ms. Parrish. After the night Ms. Parrish was assaulted, he was present at Rumrunner's for Ms. Parrish's entire shift. He did this three or four times to be supportive and help her feel safe. Mr. Parrish also spoke with Mr. Shomer about Ms. Parrish and Mr. Fuller being scheduled for the same shifts. According to Mr. Parrish, Mr. Shomer told him he would change the schedules to prevent having them work at the same time.

Mr. Parrish was at Rumrunner's on the night of November 26. He testified that Mr. Shomer came in and yelled at Ms. Parrish. Ms. Parrish shouted back, but he could not hear what either one of them was saying because of the noise in the room. He saw Ms. Parrish reach for her tip jar and saw Mr. Shomer bat her arm away. Ms. Shomer then forced Ms. Parrish to leave the bar area.

At that point, Mr. Shomer came up to Mr. Parrish and told him to leave immediately. Mr. Shomer would not tell him why. A security employee came and escorted both Mr. Parrish and Ms. Parrish out of Rumrunner's. Mr. Shomer was cursing at them. Mr. Shomer told them they could not come back.

Mr. Parrish also testified that Ms. Parrish has a reputation of not telling the truth all the time. He and Ms. Parrish are currently involved in a child custody and child support dispute. Ms. Parrish has accused him of domestic violence, and he suspects she was responsible for burning the inside of his truck. Nothing about Mr. Parrish's testimony suggested that he was shading any of his testimony for or against Ms. Parrish. He appeared honest and forthright, and his testimony was credible.

Ellaina Shomer. Ms. Shomer is the office manager at Rumrunner's. She mostly works in the office, but occasionally supervises employees. Ms. Shomer is familiar with Rumrunner's records and identified many of the exhibits admitted during the hearing.

Ms. Shomer learned that Ms. Parrish had accused Mr. Fuller of raping her. She did not conduct any investigation to determine if the accusation had merit.

Ms. Shomer testified that Rumrunner's has a policy of not allowing employees to continue working once they state they intend to quit. Dissatisfied employees might violate the liquor laws to increase their tips, might give free drinks to friends, or might steal money. She also testified that it was Rumrunner's policy that a person who quits in the middle of a shift forfeits their tips.

Ms. Shomer was also asked about Rumrunner's policy of having relatives or friends at the bar during a bartender's shift. She said that they forbid this because there is a risk that the bartender will give away free drinks. Friends or relatives are asked to sit away from the bar so that they will be served by someone else.

Ms. Shomer was at Rumrunner's on Ms. Parrish's last day of work. She says she heard Ms. Parrish tell Mr. Parrish she intended to quit at the end of her shift. Ms. Shomer told Mr. Luna, and then approached Ms. Parrish and told her she should leave immediately. She told Ms. Parrish she could not have her tips. Once Mr. Parrish and Ms. Parrish were outside, she heard yelling and saw that Mr. Parrish and Ms. Parrish were causing a scene.

Michael Shomer. Mr. Shomer is Rumrunner's general manager and is responsible for scheduling employees. He also testified that Rumrunner's has a policy of not allowing friends of the bartender to sit at the bar. He said that Mr. Parrish had been in violation of this policy "continuously" for at least a month before the night Ms. Parrish was assaulted. After that night, according to Mr. Shomer, Mr. Parrish continued to be at the bar with Ms. Parrish for at least ten shifts in a row.

Mr. Shomer testified that he was present at Rumrunner's the night Ms. Parrish was assaulted. He claims he saw Ms. Parrish and Mr. Fuller flirting, dancing together, grabbing each other, and kissing in the bar after they got off work. He said they were together for a couple of hours before leaving around 1:30 a.m. He watched them go outside and says he told Ms. Parrish to take a cab. She told him she was okay to drive, and he said he saw her put Mr. Fuller in the

passenger seat before driving away. He also testified that Ms. Parrish told him she intended to “fuck the shit out of him,” referring to Mr. Fuller.

After learning that Ms. Parrish had accused Mr. Fuller of raping her, he told Fuller that he would be suspended. He testified that Mr. Fuller was suspended for two weeks and that Mr. Fuller worked three more shifts after that before quitting.

Mr. Shomer testified that he asked Det. Cross what he should do as an employer and was told that he could not fire Mr. Fuller because he had not been charged with a crime. Mr. Shomer says that he was told later in the week that no charges would be filed against Mr. Fuller. He then scheduled Mr. Fuller to work on Halloween.

Mr. Shomer testified that, after the alleged assault, management staff knew to keep Mr. Fuller and Ms. Parrish separated when scheduled to work at the same time. According to Mr. Shomer, Mr. Fuller was assigned work stations that were at a distance from where Ms. Parrish would be working. Mr. Shomer was adamant in his testimony that he suspended Mr. Fuller for two weeks and that after he was allowed to return to work Mr. Fuller only worked three shifts. Mr. Shomer also said that Mr. Fuller was allowed to return to work after he was told no charges would be filed, which Mr. Shomer says occurred within one or two weeks after the assault. Mr. Shomer was shown the payroll records for Mr. Fuller and Ms. Parrish, and was asked to state each date that they worked. As he was doing this, counsel for the Executive Director marked those dates on a calendar. A similar document has been re-created for this decision, and is marked as Attachment A.¹¹ For the months of October through December; each day that Ms. Parrish worked is marked with the letter “P.” Each day Mr. Fuller worked is marked with the letter “F.”

Mr. Shomer was also asked why Mr. Fuller was scheduled to work on Wednesday, November 26. Mr. Shomer testified that Mr. Fuller often worked on Wednesdays, but when shown a calendar and Mr. Fuller’s payroll records, he could not identify a prior Wednesday when Mr. Fuller had worked.

The extent of Mr. Shomer’s investigation into Ms. Parrish’s allegations was talking with the police. He says he talked to the police the next day, and then again a few days later when he was told no charges would be filed.

¹¹ This calendar is a summary of information contained in Exhibits 8 and 9.

Mr. Shomer also testified that one of the reasons Ms. Parrish had been banned from Rumrunner's was that she had been stealing from the bar by putting payments in her tip bucket instead of the cash register. He says he learned about this when her tips were counted after Ms. Parrish quit, and the amount in her tip bucket was far more than it should have been based on the cash register total.

Bianca Cross. Det. Cross works for the Anchorage Police Department in the Special Victims Unit. She was assigned to investigate Ms. Parrish's allegations. She was called in on October 25 at around 9:00 a.m., but it would have taken her some time to report to the SART Center. She saw the bruising on Ms. Parrish's face at that time, and testified that Exhibit 20 shows how Ms. Parrish looked on that date.

Det. Cross testified that she did not speak with Mr. Shomer until a week to two weeks after the rape. Mr. Shomer did not provide any information to her. He didn't tell her that Ms. Parrish had been flirting with Mr. Fuller or that she said she intended to "fuck the shit out of him." This information, if true, would have been important to her in conducting her investigation.

Det. Cross testified that she was not qualified to give employment advice and that she did not and would not have told Mr. Shomer he could not fire Mr. Fuller. She also said that she never told Mr. Shomer that charges would not be filed. She was not in a position to make such a statement. She did not complete her investigation until November 18. A few days after that, the case was transmitted to the District Attorney. It wasn't until sometime in January of 2009 that the District Attorney made the decision not to file charges.

During her investigation, Det. Cross did confirm with Mr. Fuller that he had been driving. She was also shown the pictures Mr. Van Gilder had taken of Mr. Fuller and did not see any marks on Mr. Fuller's neck.¹² Det. Cross testified that while she collected saliva samples from Mr. Parrish's mouth, no DNA testing was conducted.¹³ Det. Cross' testimony was credible and much of it was supported by the contemporaneous police report. The testimony summarized above is found to be true.

¹² Mr. and Ms. Shomer each claimed that Mr. Fuller had at least one hickey on his neck after the evening Mr. Fuller drove Ms. Parrish home.

¹³ Det. Cross referred to her report during her testimony, and it was marked as an exhibit prior to the hearing. The report was not offered into evidence.

Nathan Bucknell. Mr. Bucknell was previously married to Ms. Parrish and had had custody disputes with her. He testified that her reputation for honesty is not good.

Amber Thompson. Ms. Thompson testified that she worked as a bartender during the summer of 2008. She was fired when she called in to say she would be missing her shift because she had a flat tire. She was allowed to return as a customer after that, and was not told that if an employee is fired or quits, they are banned from Rumrunner's.

Ericka Axt. Ms. Axt worked for Rumrunner's for about four months in 2010. She quit in the middle of her shift and was allowed to keep the tips she had earned through that time.

C. Other Evidence

Exhibit 9 is a printout from Rumrunner's payroll records showing the dates Mr. Fuller worked.¹⁴ He generally worked Thursdays, Fridays, and Saturdays. This document shows Mr. Fuller continued to work his regular schedule through April 11, 2009.¹⁵

Exhibit 12 consists of documents from an Equal Employment Opportunity Commission complaint concerning Ms. Parrish's employment situation at Rumrunner's. This response does not allege that Ms. Parrish had been stealing money from the bar or that her tip bucket contained excess cash. There is no mention that Ms. Parrish was driving when she and Mr. Fuller left Rumrunner's, and there is no mention that Mr. Shomer heard Ms. Parrish say she was going to "fuck the shit out of him."

Exhibit 15 consists of documents concerning criminal charges filed against Mr. Fuller in 2004. These documents are relevant to show what Rumrunner's could have learned if it had conducted an investigation after Ms. Parrish stated she had been raped. Ms. Parrish told Mr. Shomer that Mr. Fuller had a prior criminal conviction. Ms. Shomer testified that she was familiar with conducting Court View¹⁶ searches to research job applicants. Had Rumrunner's researched Mr. Fuller, Rumrunner's could have learned that he had been charged with Assault in the Third Degree and Kidnapping and that he was later indicted by a grand jury for Kidnapping, Assault in the Third Degree, and Coercion. These charges were ultimately changed to one count of Coercion and one count of Interfering with a Report of a Crime Involving Domestic Violence.

¹⁴ Ms. Shomer verified that this document was accurate. She said that Mr. Fuller's name could not show up on that list for a day that he did not work, and that he did work if his name showed up on the list for that date. Ms. Shomer also testified that Exhibit 8, which shows Ms. Parrish's work schedule, was also accurate.

¹⁵ He may have missed one night of work on Thursday, October 30, but he had not worked every Thursday in the past, so it is not clear whether he would have been scheduled to work on that particular Thursday.

¹⁶ Court View provides internet access to information in Alaska trial court case files. It does not provide access to the actual documents in those files.

Mr. Fuller pleaded guilty to both of those charges. Rumrunner's could then have obtained relevant documents from the court file.

These court records are only allegations and there is no proof that the allegations are true. However, these records would have been useful in evaluating Ms. Parrish's allegations and Mr. Fuller's denial of those allegations had Rumrunner's conducted any investigation.

Exhibit 21 is an audio recording of Ms. Parrish's telephone conversation with Mr. Fuller on October 25, 2008.¹⁷ Although Mr. Fuller's statements were not under oath, evidence that is not admissible in superior court may still be admitted and weighed if "reasonable persons are accustomed to rely [on such evidence] in the conduct of their serious affairs."¹⁸ Such evidence may be used to "supplement or explain" direct evidence, but may not be used alone to support a factual finding if the evidence would not be admissible in a civil action.¹⁹

During this recorded conversation, Mr. Fuller attempted to justify his conduct from the night before. He had no reason to lie about who was driving or to minimize anything that might suggest that the sexual conduct was consensual. This recording is useful as a supplement to Ms. Parrish's testimony.

In this recording, Mr. Fuller acknowledges that he and Ms. Parrish had sexual intercourse that night. He states that when she initially resisted and told him they shouldn't do this now, he thought she was just playing hard to get. He does confirm that she had said no "from the start." Mr. Fuller did not say that they had been flirting and dancing together that night, something he likely would have said if it had occurred since he was trying to explain during this conversation why he believed the sexual intercourse was consensual. He said he had no recollection of her trying to push him away. He did recall that he was the one driving that night. He said he was very drunk that night, and was surprised to hear Ms. Parrish say she was not drunk.

Just as important as Mr. Fuller's actual statements was Ms. Parrish's reaction to the recording. She was crying, and obviously very upset to hear this again, three years after the event. Her body language and emotional response suggests that her prior testimony about the assault was not fabricated or exaggerated. Her reaction also confirms that it would have been very difficult for her to continue working in the same building as Mr. Fuller.

¹⁷ Ms. Parrish listened to this recording during the hearing and testified that it was an accurate recording of the telephone conversation she had with Mr. Fuller.

¹⁸ 6 AAC 30.460(a).

¹⁹ AS 44.62.460(d).

D. Findings on Disputed Facts

Based on the weight of the evidence, Ms. Parrish was sexually assaulted by Mr. Fuller during the early hours of October 25, 2008. Mr. Fuller struck her face, bit her breast, and forced her to have sexual intercourse with him. Even if she had initially been flirting with Mr. Fuller at Rumrunner's, a person is allowed to flirt without being forced to have sex. However, it is more likely true that she had not been flirting earlier.

None of Mr. Shomer's testimony in this matter is reliable. He was evasive in his answers, and frequently confused his present knowledge with what he knew at the time. For example, he testified that one of the reasons he allowed Mr. Fuller to return to work was that the only DNA evidence found by the police was from Mr. Parrish. He said, however, that he learned that by reading the police report which he says he only saw for the first time at the hearing.²⁰ Mr. Shomer could not have based a decision in 2008 on something he did not read until 2011. He later tried to explain that a police officer must have told him that only Mr. Parrish's DNA was found on Ms. Parrish, but that is not credible since Mr. Parrish was not in Alaska at the time Ms. Parrish was examined, no DNA testing was actually conducted as part of the investigation, and that is not the sort of information the police would likely disclose during an investigation.

Much of Mr. Shomer's testimony is also contradicted by the other evidence in this case. He testified that Mr. Van Gilder watched Ms. Parrish and Mr. Fuller leave, with Ms. Parrish driving and that Mr. Van Gilder heard Ms. Parrish say she was going to have sex with Mr. Fuller. Mr. Van Gilder's statement submitted to the EEOC makes no mention of personally observing any of this and he told Det. Cross that he had not seen anything that night. As discussed above, Mr. Shomer was adamant about Mr. Fuller being suspended and only working three shifts before leaving his employment at Rumrunner's. He stated that Mr. Fuller lost work both before and after Halloween. Mr. Shomer's testimony is not even close to what actually occurred according to Rumrunner's own pay records.²¹

Mr. Shomer testified about what he learned from his conversations with the police, and that he only allowed Mr. Fuller to return to work after being told no charges would be pressed.

²⁰ Mr. Shomer was wrong about what the report says. The police report shows that saliva was collected directly from Mr. Parrish. The report did not say anything about what was found when evidence was collected from Ms. Parrish, and Det. Cross testified that no DNA testing was done.

²¹ Mr. Shomer also testified that Mr. Fuller regularly worked Wednesdays, to explain why he worked November 26, Ms. Parrish's last day of work. In fact, Rumrunner's records show that he had not previously worked a Wednesday, and only occasionally worked a Wednesday after that.

Det. Cross testified that she talked to Mr. Shomer once by telephone about one week to two weeks after the assault. She never told him that Mr. Fuller would not be charged with a crime. Her investigation was not even completed until several weeks after Mr. Fuller returned to work.

Mr. Shomer's testimony about how often Mr. Parrish would sit in the bar during Ms. Parrish's shifts was contradicted by Mr. Parrish. In addition, Mr. Shomer claimed that Mr. Parrish had been in violation of this rule for at least a month before the rape. If true, Mr. Shomer would have simply fired Ms. Parrish before the night she was assaulted.

The weight of the evidence also shows that it was extremely uncomfortable for Ms. Parrish to have to continue to work at Rumrunner's at the same time Mr. Fuller was working and that she informed Mr. Shomer of this fact. Mr. Shomer did nothing to change Mr. Fuller's work schedule so that they would work at different times. Mr. Shomer did offer Ms. Parrish the opportunity to work in the back bar where she would earn less money, but Mr. Fuller would still be working at Rumrunner's at the same time. Although two people testified that Ms. Parrish does not have a good reputation for honesty, her testimony about the central facts in this case was credible. Most of her testimony was corroborated by other witnesses or evidence. She was consistent in her testimony, and was not evasive in her answers.

Based on the evidence in this case, Mr. Shomer knew that the reason Mr. Parrish was at Rumrunner's during Ms. Parrish's shifts was that it made her feel safer to have him around when she had to work with Mr. Fuller. It was reasonable for Ms. Parrish to resign when she was told Mr. Parrish would no longer be allowed to be present.

III. DISCUSSION

A. Hostile Work Environment

Discrimination based on sex is against the public policy of the State of Alaska.²² An employer may not discriminate in the terms, conditions, or privileges of employment because of a person's sex.²³ Discriminatory behavior that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and to create a discriminatory hostile work environment violates AS 18.80.220."²⁴ To establish that a hostile work environment exists, the complainant

²² AS 18.80.200.

²³ AS 18.80.220(a)(1).

²⁴ *French v. Jadon*, 911 P.2d 20, 28 (Alaska 1996).

must show that a reasonable person would find it hostile or abusive, and that the victim subjectively views the work environment as abusive.²⁵

There is no claim here that Rumrunner's is in any way responsible for Mr. Fuller's actions during the morning of October 25th. Instead, the claim in this matter is that Rumrunner's response after learning about Ms. Parrish's allegation created a hostile work environment. Specifically, a hostile work environment was created because Rumrunner's allowed Mr. Fuller's continued presence in the workplace. Ms. Parrish's testimony that she found his presence to be abusive was credible. She testified that his presence reminded her of the night of the rape, and made her feel fearful, ashamed, teary, embarrassed, and victimized. And it cannot be seriously disputed that it is objectively hostile or abusive for an employee to have to work in the same establishment as one's assailant.

The Alaska Supreme Court looks to federal discrimination law for guidance in interpreting AS 18.80.²⁶ In *Little v. Windermere Relocation, Inc.*,²⁷ the Ninth Circuit held that an employer's reaction to a rape could create a hostile work environment. A significant difference in *Little* was that the rape occurred during a work related activity.²⁸ Those portions of the decision focused on the employer's reaction to the rape are instructive, however.

The *Little* court noted that rape "is unquestionably among the most severe forms of sexual harassment."²⁹ The court noted that Windermere's actions after the rape "reinforced rather than remediated the harassment."³⁰ And viewing the facts in the light most favorable to the plaintiff,

Windermere's failure to take immediate and effective correction action allowed the effects of the rape to permeate Little's work environment and alter it irrevocably.^[31]

In this case, Ms. Parrish was subjected to severe sexual harassment outside of work by a co-worker.³² When that co-worker was allowed to return to the workplace, his presence irrevocably altered Rumrunner's to that of a hostile work environment.

²⁵ *French*, 911 p.2d at 28 – 29.

²⁶ *Moody-Herrera v State*, 967 P.2d 79, 83 (Alaska 1998).

²⁷ 301 F.3d 958 (9th Cir. 2002).

²⁸ The rape occurred at a meeting with a business client. *Little*, 301 F.3d at 967.

²⁹ *Little*, 301 F.3d at 967.

³⁰ *Id.*

³¹ *Id.*

³² Non-work related conduct can create a hostile environment at the workplace. In *Fuller v. City of Oakland*, 47 F.3d 1522, 1525 – 26 (9th Cir. 1995), the plaintiff's co-worker engaged in harassing conduct outside of the

Rumrunner's did present evidence to show that Ms. Parrish had no reason to be afraid of Mr. Fuller. According to Rumrunner's, he generally worked at a distance from her, frequently at locations where she would not even be able to see him, and it would have been very unlikely that he could have rushed across the room to physically attack her. That evidence misses the mark, however. Mr. Fuller had struck Ms. Parrish in the face, bit her breast, and sexually assaulted her. He then threatened to do it again if she refused to drive him to his car. His mere presence would be extremely disturbing even though there may have been no possible way for him to physically touch her.

In addition, the reaction by some of Rumrunner's managers and employees increased the discomfort of the work environment. Rumrunner's security manager, Mr. Van Gilder, told her he thought she was lying about Mr. Fuller. Mr. Shomer also told her he did not believe her and that she should get over it. She felt other employees were taking sides against her as well, and were not supportive of her. These additional facts standing alone might not be sufficient to establish the existence of a hostile work environment, but they do add to the overall hostility of the Rumrunner's environment.

The Executive Director has established that Ms. Parrish was subjected to a hostile work environment when Mr. Fuller was allowed to work the same shifts she was working, and that this hostility was because of sex as required by AS 18.80.220(a)(1).

Once Ms. Parrish reported the rape to Mr. Shomer and informed him that she did not want to work with Mr. Fuller, Rumrunner's had an obligation to take action to remedy the situation.³³ Rumrunner's was obligated to take some action that would end the hostile work environment,³⁴ and some action is necessary even if the improper conduct has already ended.³⁵ Where the offending conduct is sufficiently severe, employers may have to transfer or terminate the offending employee.

[I]n some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working

workplace. This non-work conduct was sufficient to create a hostile work environment. *Fuller*, 47 F.3d at 1527 – 28.

³³ *Ellison v Brady*, 924 F.2d 872, 881 (9th Cir. 1991) (Employers are liable for failing to remedy a hostile work environment once management knows or reasonably should know of the problem).

³⁴ *Ellison*, 924 F.2d at 882 (Employers must take actions that would both end the harassment and deter potential harassers from engaging in illegal conduct).

³⁵ *Fuller*, 47 F.3d at 1529 (Even if the harassment has ended voluntarily, the employer must take some action to deter future potential harassment).

environment. . . . [E]mployers may even have to remove employees from the workplace if their mere presence would render the working environment hostile.³⁶

Given the extreme nature of Mr. Fuller's conduct, his mere presence created a hostile work environment. Rumrunner's was obligated to take action to correct that situation. This obligation consists of two parts. First, the immediate steps to address the situation while it investigated whether the complaint is justified and, second, any permanent remedial steps taken after its investigation.³⁷

Rumrunner's argued that it took appropriate action by suspending Mr. Fuller until learning that no criminal charges would be filed. That might have been an appropriate response, if that had been Rumrunner's actual response. Mr. Fuller was not suspended. He was at work on October 31, 2008, and worked his regular schedule through April of 2009. The police investigation was not completed until November 18, 2008, and no decision was made about whether to file criminal charges until January of 2009, more than a month after Ms. Parrish left Rumrunner's. There is no credible evidence that anyone from the police department ever told anyone at Rumrunner's that no charges would be filed.

Rumrunner's also argued that Mr. Fuller was kept separated from Ms. Parrish when they worked at the same time. The evidence for this, however, comes primarily from Mr. Shomer, who was not a credible witness. Equally important, however, is that this would not be an adequate response under the circumstances of this case. Mr. Fuller's mere presence in the work place was sufficient to create a hostile work environment even if Ms. Parrish and Mr. Fuller were physically separated.

Rumrunner's did have options besides firing Mr. Fuller. Other employees apparently did not object to working with him, so Rumrunner's could have changed his schedule to work on days when Ms. Parrish did not work.³⁸ Rumrunner's could have conducted its own investigation. Had it performed an adequate investigation and determined that Ms. Parrish's allegations were not credible, Rumrunner's would not have to take any employment action against Mr. Fuller.

When an employer is told of improper conduct at its workplace, the employer can lawfully ask: is the accusation true? When the resulting employer's investigation (not tied to the government) produces contradictory accounts of significant historical events, the employer can lawfully make a choice between the

³⁶ *Ellison*, 924 F.2d at 883.

³⁷ *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001).

³⁸ Had other employees felt his presence abusive, this might not have been an appropriate remedy.

conflicting versions – that is, to accept one as true and to reject one as fictitious – at least, as long as the choice is an honest choice.^[39]

The one thing that Rumrunner’s could not do is ignore the situation and do nothing.⁴⁰

Rumrunner’s ignored the fact that Ms. Parrish was being scheduled to work on the same shifts as Mr. Fuller. It took no action to determine whether her accusation was true, and did nothing to change Mr. Fuller’s schedule so she would not have to work with him. Rumrunner’s violated AS 18.80.220(a)(1) when it ignored the hostile work environment created by Mr. Fuller’s presence.

B. Constructive Discharge

Ms. Parrish’s last night at work was November 26, 2008. There is no dispute that it was Ms. Parrish’s decision to end her employment on that date. Ms. Parrish claims that she was forced to make that decision, and was therefore constructively discharged, because Rumrunner’s would no longer allow Mr. Parrish to be present during her shifts. Constructive discharge occurs when an employer has made working conditions so intolerable that a reasonable person in the employee’s position would have felt compelled to resign.⁴¹ It is not necessary to prove that the employer had the specific intent of causing the employee to quit.⁴²

A reasonable person would find working with a person who had sexually assaulted him or her to be intolerable and would feel compelled to resign. Once it became clear that Mr. Fuller would not be suspended and would be working with her on the same shift every week, it would not have been unreasonable for Ms. Parrish to have felt compelled to resign. Ms. Parrish was able to keep working, however, with the support of Mr. Parrish’s presence. Once Rumrunner’s removed that support, the working conditions became intolerable to her. Ms. Parrish has established that she was constructively discharged.

C. Retaliation

Alaska law prohibits retaliation by an employer for opposing illegal discrimination.⁴³ An employee alleging retaliation can claim that the employer’s asserted reason for the employment action was 1) a pretext for a discriminatory motive; 2) that there was a mixture of proper and improper motives for the action; or 3) both.⁴⁴ In a pretext case such as this one, the employee

³⁹ *EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000).

⁴⁰ *Fuller*, 47 F.3d at 1529 (Employer that fails to take any appropriate remedial steps is not shielded from liability); *Little*, 301 F.3d at 968 (same).

⁴¹ *Charles v. Interior Regional Housing Authority*, 55 P.3d 57, 60 (Alaska 2002).

⁴² *Id.*

⁴³ AS 18.80.220(a)(4).

⁴⁴ *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 660 (Alaska 2006).

must first make a *prima facie* case that she was involved in a protected activity, that an adverse employment action was taken against her, and that there is a causal link between the two.⁴⁵ At that point, the employer must produce admissible evidence to show a legitimate, non-retaliatory reason for the adverse employment action.⁴⁶ Finally, if the employer has offered evidence to rebut the *prima facie* case, the burden shifts back to the employee to show that the employer's explanation is a pretext.⁴⁷

The Executive Director established a *prima facie* case at the hearing. Ms. Parrish had complained that she did not want Mr. Fuller to work on the same shifts she was working. Because Mr. Fuller's presence created a hostile work environment, this complaint was opposition to illegal discrimination. When she was no longer able to tolerate the hostile environment, she quit. This action also constitutes opposition to illegal discrimination.

In response to her announcement that she was quitting, Rumrunner's took three adverse employment actions. It told her she could not continue working to the end of her shift, refused to let her take her tips, and banned her from Rumrunner's forever. There is no dispute that her decision to quit was the cause of Rumrunner's decision to take these three actions.

In opposing this *prima facie* case, Rumrunner's advanced non-retaliatory reasons for its actions. Ms. Shomer testified that Rumrunner's has a policy of not letting bartenders complete their shifts once they indicate they intend to quit. There is the potential that disgruntled employees might violate the liquor laws, give away free drinks, or even steal from their employer. This is a legitimate reason for not allowing Ms. Parrish to continue working after she announced she was quitting at the end of her shift. Accordingly, the burden shifts back to the Executive Director to show that this reason was pretextual. There was insufficient evidence at the hearing to meet that burden. Accordingly, it is not more likely true than not true that Rumrunner's illegally retaliated against Ms. Parrish by not allowing her to complete her shift when she announced she was quitting.

The analysis is different for the other two adverse actions. Rumrunner's claimed to have policies that employees who quit during their shift could not keep their earned tips and that employees who quit or are fired would be banned from the premises. Rumrunner's did not suggest any reason for either policy. Ericka Axt testified that, contrary to the first alleged policy,

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

she had quit mid shift and been allowed to keep her tips. Amber Thompson testified that, contrary to the second alleged policy, she had been fired and had not been banned from Rumrunner's at all.

The evidence from both Mr. and Ms. Shomer about the policy of banning former employees was inconsistent, and Ms. Shomer acknowledged that the "strict policy" of banning all employees who quit or are fired for 60 days was a "general rule of thumb." Ms. Parrish was banned for "eternity,"⁴⁸ instead of for a shorter time period consistent with the general rule of thumb.

At best, both of these so-called policies are merely employment related actions that Rumrunner's takes only when it wants to. Rumrunner's has not met its burden of showing a legitimate, non-retaliatory reason for taking either of these actions in this case. Based on Rumrunner's failure to rebut the *prima facie* case, it is more likely true than not true that Rumrunner's illegally retaliated against Ms. Parrish when it deprived her of her earned tips and permanently banned her from the establishment.

D. Remedy

When there is a finding that a person has engaged in a discriminatory practice, the Commission is required to order the person to refrain from that practice.⁴⁹ In addition, the Commission has the discretion to order additional appropriate relief including an award of lost income, requiring training of the employer and its employees, and the posting of signs.⁵⁰

Decisions by the Commission should be consistent with prior court decisions, prior Commission decisions, Commission guidelines, and policy statements.⁵¹ Thus, to the extent the Commission has discretion to adopt remedies in this case, those remedies should be consistent with what the Commission has adopted in similar prior cases.⁵²

One major purpose of statutes prohibiting discrimination is to make whole those who have suffered from unlawful discrimination.⁵³ To accomplish that purpose, back pay should be awarded unless denial of back pay would not frustrate the purpose of eradicating discrimination

⁴⁸ Testimony of Ms. Shomer.

⁴⁹ AS 18.80.130(a).

⁵⁰ AS 18.80.130(a)(1).

⁵¹ 6 AAC 30.910(a).

⁵² Neither party has cited to other decisions, guidelines, or policy statements concerning how the Commission has exercised its discretion in the past regarding the imposition of remedies.

⁵³ *Thorne v. City of El Segundo*, 802 F.2d 1131, 1133 (9th Cir. 1986).

and making the victim whole.⁵⁴ In most situations, back pay is calculated from the date of the discriminatory act through the date of final judgment.⁵⁵ Front pay is also an available remedy, but only when reinstatement is impossible or inappropriate because of the antagonism between the parties.⁵⁶

*Dowler v. Kopf*⁵⁷ was a hostile work environment case. Ms. Dowler was constructively discharged, and the Commission found that back pay and prejudgment interest was an appropriate make whole remedy. Likewise, in *Flakes v. Alaska Sales and Service*,⁵⁸ back pay was awarded as a remedy based on a finding that Mr. Flakes had been denied a promotion because of his race.

In this case, as in *Dowler*, Ms. Parrish was constructively discharged because of a hostile work environment. Back pay is only sought through June of 2009, when Ms. Parrish left the workforce because of her pregnancy, and the subsequent birth of her child. She is entitled to an award of her lost wages, reduced by any amount she earned in mitigation. In addition, she should be allowed to recover the tips she earned on her last night of employment.

Ms. Parrish's income for approximately one month – October 24, 2008 through November 26, 2008 – can be used to estimate her lost earnings.⁵⁹ At some point prior to this time period, she was working as a server and would have earned different amounts. Because the exact date she changed from server to bartender is in dispute, this time period is the best available evidence of what she would have earned if she had remained employed.

Ms. Parrish's earnings consisted of hourly wages, cash tips, and credit card tips. The payroll records show her wages and credit card tips,⁶⁰ but do not show how much she received in cash tips. That amount can be estimated because, on average, earned tips will be a percentage of the amount sold, which is also reported in the payroll records.⁶¹

During that one month period, Ms. Parrish earned \$636.23 in wages. She had credit card sales during that time of \$5,862.83. Credit card tips are reported as totaling \$1,093.79, but Ms.

⁵⁴ *Thorne*, 802 F.2d at 1133 – 1134.

⁵⁵ *Thorne*, 802 F.2d at 1136.

⁵⁶ *Thorne*, 802 F.2d at 1137.

⁵⁷ OAH No. 10-0264-HRC (Human Rights Commission 2011).

⁵⁸ OAH No. 07-0190-HRC (Human Rights Commission 2009).

⁵⁹ October 24 is included because Ms. Parrish would have worked on October 27, but ended up taking that day off to recover from the assault. Rumrunner's is not liable for lost wages for that day, but including one extra day of work, October 24, is necessary in order to get a full month's worth of shifts.

⁶⁰ Exhibit 8 contains these amounts for each day worked.

⁶¹ Exhibit 8.

Shomer testified that this only shows those tips paid for by credit card. Approximately 25% of the time, a customer who pays by credit card will pay the tip in cash.⁶² In other words, the tips paid by credit card are three-fourths of the total tips received on credit card sales; the remaining tips are paid in cash. Since that cash tip is not reported in the payroll records, an estimate of the total tips received on credit card sales can be made by dividing the reported tips by three-fourths, or 0.75. Accordingly, a reasonable estimate of Ms. Parrish's tips on credit card sales is \$1,458.39.⁶³

Her estimated tips from credit card sales are 25% of the total credit card sales.⁶⁴ It can be reasonably assumed that she also received additional cash tips of 25% of her cash sales. Ms. Parrish's cash sales during this time period totaled \$5,491.95. Assuming she would have also received, on average, 25% in tips, she would have earned \$1,372.99 in tips on cash sales.⁶⁵ Her total income for this one month period was \$3,467.61.⁶⁶ Her lost income from December 2008 through June of 2009 was seven times this amount, or \$24,273.25.

In addition, Ms. Parrish is owed \$244.14 in tips from her last night of work. On that last night, she had credit card sales of \$992.22 and cash sales of \$738.22. She would have earned \$184.56 in tips on her cash sales.⁶⁷ She also would have earned an additional \$59.58 in cash tips on credit card sales.⁶⁸ The best estimate of the amount of cash in Ms. Parrish's tip jar on her last night of work was \$244.14.

Ms. Parrish's total lost income was \$24,517.39. During this same time period, Ms. Parrish earned \$20,440.00 in mitigation.⁶⁹ Her net loss, therefore, is \$4,077.39. Interest on that amount at 3.75%⁷⁰ from November 26, 2008 through the first day of the hearing, November 14, 2011, is \$453.68.⁷¹

In addition, Rumrunner's should be required to adopt a policy of nondiscrimination that includes a policy prohibiting discrimination against employees on the basis of sex and prohibits

⁶² Testimony of Ms. Shomer.

⁶³ \$1,093.79 divided by 0.75.

⁶⁴ \$1,458.39 divided by \$5,862.83.

⁶⁵ \$5,491.95 times 0.25.

⁶⁶ Her hourly wages plus tips on credit card sales (paid by credit card and in cash) plus tips on cash sales.

⁶⁷ \$738.22 times 0.25.

⁶⁸ She had reported credit card tips of \$178.75 for that night. This would represent three-fourths of the total tips on credit card sales, so dividing that amount by three results in the remaining one-fourth that was paid in cash.

⁶⁹ Exhibit 4.

⁷⁰ The interest rate is established by AS 18.80130(f) and AS 09.30.070.

⁷¹ Simple interest on \$4,077.39 for 1,083 days.

retaliation for complaining about discrimination, and should be required to disseminate this policy to all employees. The adopted policy must be acceptable to the Commission's Executive Director.⁷²


Finally, all of Rumrunner's owners and management staff should be required to undergo six hours of training in those provisions of the Human Rights Act that prohibit discrimination and retaliation. The content and provider of that training must be approved by the Executive Director before being provided.

IV. RECOMMENDATION

Rumrunner's violated the Alaska Human Rights Act. Because it constructively discharged Ms. Parrish, she is entitled to back pay with prejudgment interest in the total amount of \$4,531.07. In addition, Rumrunner's should be ordered to: refrain from discriminating in the future; adopt and disseminate a policy prohibiting discrimination; and obtain six hours of training for its owners and managers in the provisions of the Alaska Human Rights Act that prohibit discrimination and retaliation.

It is further recommended that the order of January 25, 2012 denying Rumrunner's motion for attorney fees be adopted.

DATED this 8th day of February, 2012.



Jeffrey A. Friedman
Administrative Law Judge

⁷² Exhibit 11 contains Rumrunner's current policy. The Executive Director may approve this policy for dissemination, or may require a more comprehensive policy.