

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS  
ON REFERRAL TO THE OFFICE OF ADMINISTRATIVE HEARINGS

ALASKA STATE COMMISSION )  
FOR HUMAN RIGHTS, PAULA M. )  
HALEY, EXECUTIVE DIRECTOR, )  
ex rel. DENNIS PHILLIPS, )  
Complainant, )  
v. )  
TEW'S EXCAVATION, INC., )  
Respondent. )

ASCHR No. J-08-004  
OAH No. 09-0372-HRC

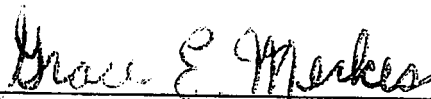
FINAL ORDER

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 Recommended Decision dated May 27, 2011 is hereby ADOPTED by the Commission in its entirety. Accordingly, the complaint of ASCHR, Paula M. Haley *ex rel.* Dennis Phillips against Tew's Excavation, Inc. for sex discrimination in violation of AS 18.80.220(a)(1) is DISMISSED.

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.

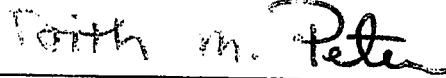
DATED: November 9, 2011

  
Grace E. Merkes, Commissioner

DATED: November 9, 2011

  
Mark-S. Fish, Commissioner

DATED: November 9, 2011

  
Faith M. Peters, Commissioner

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This is to certify that on November 9, 2011,  
A copy of the foregoing was mailed  
by first-class U.S. mail, postage prepaid, to:

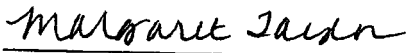
Jason Bergevin, Esq.  
Law Offices of Royce & Brain  
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and hand-delivered to:

Lauri Owen, Human Rights Attorney  
Alaska State Commission for Human Rights  
800 A Street, Suite 204  
Anchorage, AK 99501-3669

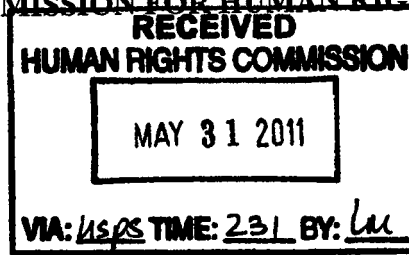
with a courtesy copy to:

Terry L. Thurbon, Chief Administrative Law Judge  
Office of Administrative Hearings  
P. O. Box 110231  
Juneau, AK 99811-0231

  
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Margaret Taylor  
Commission Secretary

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

Paula M. Haley ex rel. DENNIS PHILLIPS, )  
)  
Complainant, )  
)  
v. )  
)  
TEW'S EXCAVATION, INC., )  
)  
Respondent. )  
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OAH No. 09-0372-HRC  
ASCHR No. J-08-004

**RECOMMENDED DECISION**

**I. INTRODUCTION**

This decision recommends dismissal of a discrimination complaint filed by Dennis Phillips with the Alaska State Commission for Human Rights. Based on Mr. Phillips' complaint, the commission's enforcement staff issued an accusation alleging hostile-work-environment sexual harassment resulting in the constructive discharge of Mr. Phillips from his employment with respondent Tew's Excavation, Inc.<sup>1</sup> The testimony and other evidence did not establish that much of the course language, gestures, groping and offensive remarks Mr. Phillips complained of actually occurred. The subset proven to have occurred was not pervasive or severe enough to create a hostile work environment under the applicable test, which requires a showing that the environment was both objectively and subjectively hostile—that a reasonable person would have felt compelled to leave the employment situation, and that the specific complainant felt compelled to leave, because of the environment.

The evidence did show that Mr. Phillips' supervisor (a co-owner of the business) used profanity and gestures that Mr. Phillips could have found subjectively offensive. It also showed that the supervisor likely did this more freely in the presence of men than women, thereby suggesting that male employees were exposed to higher levels of potentially offensive language and gestures than were female employees. The evidence, however, did not support Mr. Phillips' claim that the supervisor's remarks and gestures were an invitation to engage in sexual relations

<sup>1</sup> July 10, 2009 Accusation at ¶¶ 4-6 & 8-9.

or serious (rather than joking) accusations that Mr. Phillips himself engaged in inappropriate sexual behavior.

Instead, the evidence established only that the work environment at the mechanic's shop where Mr. Phillips and a mostly-male crew interacted was marked by the use of profanity and gestures, and some bantering, all of which was crude and perhaps insensitive but not objectively so offensive as to create a hostile work environment within the meaning of the human rights laws. Moreover, the evidence did not establish that the profanity-laced environment of the shop or the supervisor's conduct caused Mr. Phillips to quit his job. Constructive discharge was not proven. The complaint, therefore, should be dismissed in accordance with AS 18.80.130(c).

## II. FACTS

### A. *Procedural Facts*

On July 10, 2009, the Human Rights Commission staff issued an accusation alleging sexual harassment of Dennis Phillips by Clayton "Mokie" Tew, one of the owners of Tew's Excavation, while Mr. Phillips worked for the company.<sup>2</sup> The accusation asserted that the alleged sexual harassment created a hostile work environment and led to the constructive discharge of Mr. Phillips when he resigned his employment position in October 2007.<sup>3</sup> The accusation requested a combination of relief, including back pay consisting of wages and benefits for Mr. Phillips.<sup>4</sup> When attempts to reach an agreement to eliminate the alleged discrimination failed, the executive director of the commission referred the matter to hearing.<sup>5</sup>

Tew's Excavation filed an answer denying the allegations of sexual harassment, hostile work environment and constructive discharge.<sup>6</sup> The answer requested dismissal and declarations that the company did not violate AS 18.80 and that "Mr. Phillips resigned of his own volition and not because of any alleged intolerable working conditions."<sup>7</sup>

An evidentiary hearing was conducted over a three-day period spanning December 9-11, 2009. The respondent was represented by counsel, and the respondent's owner-representatives

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<sup>2</sup> July 10, 2009 Accusation at ¶¶ 2 & 4-7.

<sup>3</sup> *Id.* at ¶¶ 8 & 9.

<sup>4</sup> *Id.* at pp. 3-4.

<sup>5</sup> See July 10, 2009 Referral of Complaint to Hearing (stating that the matter is referred pursuant to AS 18.80.120, which permits referral for hearing only after an agreement to remedy the alleged discriminatory practice cannot be reached through conference, conciliation and persuasion under AS 18.80.110).

<sup>6</sup> July 31, 2009 Answer to Accusation at ¶¶ 2 & 4-10.

<sup>7</sup> *Id.* at p. 2.

were present throughout the hearing, as was Mr. Phillips, except that he left prior to closing arguments. Eight witnesses testified; seven appeared in person and one appeared by telephone. Complainant's exhibits 1 and 3-8, and Respondent's exhibits 1-4 and 6-7, were admitted into evidence; Complainant's exhibit 2 and Respondent's exhibit 5 were withdrawn.

A recommended decision was issued on April 11, 2011. The complainant filed objections on May 4. The respondent was permitted to file a written response, which it did on May 12. Oral argument on the objections was heard May 17. Pursuant to 6 AAC 30.470(d), on May 24, a written ruling on the objections was issued, denying reconsideration of the recommendations but ordering revisions to clarify the recommended decision on a few points.<sup>8</sup> This document is that revised recommended decision and constitutes the Recommended Decision to be presented to the panel of commissioners charged with taking final action in this case.

### **B. Background**

Tew's Excavation, Inc., is owned by Mr. Tew and his wife, Roberta Tew, who owns the majority interest and serves as president.<sup>9</sup> In 2007, the company operated a shop located in Big Lake where mechanical work was performed on heavy equipment used in construction and road maintenance.<sup>10</sup> Mr. Phillips began working for Tew's Excavation as a mechanic on April 30, 2007.<sup>11</sup> He earned \$18 per hour for five eight-hour shifts per week.<sup>12</sup> He left his employment with Tew's on October 17, 2007, giving no reason for quitting.<sup>13</sup>

After quitting his job with Tew's Excavation, Mr. Phillips drew unemployment benefits while he searched for another job.<sup>14</sup> In June of 2008, he was offered a job paying \$18 to \$20 per hour at a gravel pit, but he declined the offer, ostensibly because the supervisor looked like Mr.

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<sup>8</sup> May 24, 2011 Ruling on Complainant's Objections to Recommended Decision at pp. 5-6.

<sup>9</sup> December 10, 2009 Testimony of Clayton Tew (C. Tew Dec. 10 Test.); December 10, 2009 Testimony of Roberta Tew (R. Tew Dec. 10 Test.); December 11, 2009 Testimony of Roberta Tew (R. Tew Dec. 11 Test) (confirming that she owns 51% of the business and Mr. Tew owns 49%).

<sup>10</sup> C. Tew Dec. 10 Test.

<sup>11</sup> October 23, 2007 Alaska Department of Labor and Workforce Development Voluntary Leaving Statement—Employer (HRC Exh. 3) at p. 1. Mr. Phillips estimated his start of employment with Tew's Excavation as sometime in May 2007. December 9, 2009 Testimony of Dennis Phillips (Phillips Dec. 9 Test.). The Voluntary Leaving Statement completed by his former employer, with access to personnel records, is a more reliable source for the start date, and it is corroborated by a time card (Tew Exh. 3) showing April 30 work by Mr. Phillips.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; R. Tew Dec. 10 Test. (explaining that she and Mr. Phillips engaged in friendly small talk when he picked up his final paycheck and that he did not give a reason for quitting); Phillips Dec. 9 Test. (admitting on cross examination that he did not tell anyone why he was quitting).

<sup>14</sup> Phillips Dec. 9 Test.

Tew.<sup>15</sup> Mr. Phillips suffered health problems in December 2008 and January 2009 that prevented him from working two weeks in each of those months.<sup>16</sup> In the summer of 2009, he took a job paying \$15 per hour with a different gravel pit, where he was able to work full time for awhile but was down to eleven hours per week at the time of the hearing.<sup>17</sup>

### C. *Work Environment at the Big Lake Shop*

The Tew's Excavation Big Lake shop is one of several locations at which the Tews operate businesses. Mr. Tew makes the rounds of all the locations, but because the Big Lake shop is adjacent to the company's office, he stops there more frequently. During the five-and-a-half months Mr. Phillips worked there, Mr. Tew was at the shop on a daily basis for at least 15 minutes at a time and sometimes as much as an hour, giving out work assignments and supervising work.<sup>18</sup>

The work crew associated with the shop was mostly male.<sup>19</sup> Some employees worked as heavy equipment operators and truck drivers, coming and going from the shop periodically. Mr. Phillips was often on his own, or working in the shop with just one other mechanic, while at other times drivers and equipment operators would congregate with the mechanics on break, or while waiting for a repair or stopping in to pick up equipment.

#### 1. Course Language and Gestures

Profanity was commonplace at the Tew's Excavation Big Lake shop when Mr. Phillips worked there.<sup>20</sup> Mr. Phillips used profanity and told dirty jokes himself.<sup>21</sup> Variations of the verb "fuck" were prevalent. Mr. Tew acknowledged using expressions such as "are you fucking me" or "you're fucking me" to communicate to his employees that they were letting him down in their work performance. He said that when employees were standing around, not working or

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<sup>15</sup> *Id.*; December 11, 2009 Testimony of Dennis Phillips (Phillips Dec. 11 Test.).

<sup>16</sup> Phillips Dec. 9 Test.

<sup>17</sup> *Id.*

<sup>18</sup> C. Tew Dec. 10 Test. (indicating that he was at the shop with Mr. Phillips, giving him tasks, for 20 minutes sometimes and for as much as an hour at other times); Phillips Dec. 9 Test. (stating that he interacted with Mr. Tew concerning work assignments about 15-30 minutes each day).

<sup>19</sup> C. Tew Dec. 10 Test.

<sup>20</sup> C. Tew Dec. 10 Test.; December 11, 2009 Testimony of Danny Owen (Owen Test.); December 11, 2009 Testimony of Corbin McManus (McManus Test.).

<sup>21</sup> Owen Test. (stating he had heard Mr. Phillips use profanity and tell dirty jokes); McManus Test. (responding "oh yeah" to questions about whether he had ever heard Mr. Phillips tell dirty jokes and use profanity around the shop).

smoking, he would say things like “dude you’re fucking me here; we need to get this job done; let’s go.”<sup>22</sup>

Mr. Tew further illustrated with the example of asking employees to move a computer and, upon discovering that the wires had been cut rather than disconnected, he would say something like “dude, what the fuck; you’re fucking me on this, man, I gotta buy all these new wires.”<sup>23</sup> When questioned about use of such language with Mr. Phillips, Mr. Tew recounted the story of an incident similar to the computer illustration. He said that he had tasked Mr. Phillips with removing an engine and found that in removing it, Mr. Phillips had “hacked out” the wiring and hoses, instead of disconnecting them. Mr. Tew said that this was an occasion on which he would have said something like the above examples.

Mr. Phillips’ testimony bears this out, except that he did not attribute such remarks exclusively to reactions to work performance, and he said they were more frequent than Mr. Tew and other witnesses did. Specifically, Mr. Phillips testified that after he had been on the job about a month and a half, the atmosphere in the shop changed and Mr. Tew began making rude comments. Mr. Phillips used the following example: “He [Tew] would put his hands on the table, bend over and say, you’re fucking me; ram it home.”<sup>24</sup> When asked how this made him feel, Mr. Phillips replied: “pissed off.”<sup>25</sup> Later in his testimony regarding the pig incident (discussed below), Mr. Phillips spoke of having called Mr. Tew a “sick bastard.”<sup>26</sup>

Mr. Phillips testified that Mr. Tew frequently bent over and said “ram it home” to him and other employees.<sup>27</sup> Other testimony, including Mr. Tew’s, supports a finding that the phrase “ram it home” is sometimes part of the crude banter that occurs in a shop work environment and elsewhere, and was used occasionally at the Big Lake shop.<sup>28</sup> Other than Mr. Phillips, only one employee freely attributed use of the phrase to Mr. Tew. On direct examination, that employee said that he had seen Mr. Tew bend over, and say “ram it home,” “a couple of times.”<sup>29</sup> On cross-examination, he explained that this is a joke, and that it is like saying “go get screwed,” which

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<sup>22</sup> C. Tew Dec. 10 Test.

<sup>23</sup> *Id.*

<sup>24</sup> Phillips Dec. 9 Test.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (December 9, 2009 a.m. recording at 42.18).

<sup>27</sup> *Id.* (estimating that this happened to him 30 to 40 times and to others a similar number of times during his five and a half months of employment with Tew’s Excavation).

<sup>28</sup> C. Tew Dec. 10 Test.; Owen Test.; McManus Test. (stating that he may have heard the phrase used once, jokingly, at work, and heard it frequently at high school parties).

<sup>29</sup> December 9, 2009 Testimony of David Bernier (Bernier Test.).

does not literally mean to go get screwed.<sup>30</sup> He added that Mr. Tew would make the comment if someone was goofing off and it was like saying “maybe I should just bend over and get screwed because I’m not getting any work out of them.”<sup>31</sup> Another employee reluctantly admitted having seen Mr. Tew use this gesture and phrase one time.<sup>32</sup>

Mr. Tew denied bending over in front of Mr. Phillips or other employees and saying “ram it home.”<sup>33</sup> Because the combination of the bending gesture and the phrase can be used to convey a message similar to the course phrases Mr. Tew admitted to using—for instance, to convey that the speaker believes the person spoken to is messing up in a way that hurts the speaker—it would be consistent with his other behavior for Mr. Tew to have used this gesture and phrase, and to have done so in Mr. Phillips’ presence. More likely than not, however, Mr. Tew’s use of this gesture and phrase was either a crude and sarcastic way of communicating displeasure or a form of banter, not an invitation to engage in sexual relations.<sup>34</sup>

Mr. Phillips testified that on one occasion, in the presence of another employee, he approached Mr. Tew after finishing one job and asked what his next job would be, and that Mr. Tew grabbed his (Tew’s own) crotch and said “this is your next job.”<sup>35</sup> When asked what he said to Mr. Tew in response, Mr. Phillips laughed nervously and answered that he had said something like “don’t talk to me about it; I don’t want to do that; talk to your number one guy Corbin, here.”<sup>36</sup> He added that Corbin McManus then said something like “I’ve never tried anything like that” and that Mr. Tew replied, “I’m glad you’re keeping it open.” Mr. Tew denied that the incident occurred. Corbin McManus also denied it.<sup>37</sup> Mr. Phillips’ attested in the complainant’s discovery responses that this occurred in September of 2007, the month before he quit.<sup>38</sup> At the

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> McManus Test. (admitting to having seen Mr. Tew use the gesture and phrase “maybe” once jokingly (“nothing serious”), upon being reminded of a prior inconsistent statement after initially denying that he had ever seen Mr. Tew do this).

<sup>33</sup> C. Tew Dec. 10 Test.

<sup>34</sup> Mr. Phillips testified that he believed this was an invitation for sex. He was not credible on that point. Mr. Tew and the other employees who testified about having heard the phrase used all said that they did not consider it to be an invitation for sex in the contexts in which they heard it (e.g., workplace, high school parties). C. Tew Dec. 10 Test.; Owen Test.; McManus Test. (saying that he had heard the “ram it home” phrase used in a joking manner “all the time” at high school parties); Bernier Test. (indicating he has heard the “ram it home” phrase used in other work places, as well as on TV).

<sup>35</sup> Phillips Dec. 9 Test (December 9, 2009 a.m. recording at 39:40).

<sup>36</sup> *Id.*

<sup>37</sup> December 11, 2009 Testimony of Corbin McManus (McManus Test.).

<sup>38</sup> Tew’s Exh. 7 at p. 7 (response to Interrogatory No. 6).



hearing, he testified that it had occurred at least a month earlier—in July or August. The complainant’s attorney said that perhaps she had erred in preparing the discovery response. More likely than not, if this exchange in fact occurred, it was in the nature of bantering, not a serious (as opposed to joking) invitation to perform oral sex, which occurred two months or more before Mr. Phillips quit.

Mr. Tew admitted that the atmosphere in the shop changed in the presence of women, stating that the course language used in the shop “quiets down” when women are around.<sup>39</sup> More likely than not, men working at the shop during Mr. Phillips’ period of employment would have been exposed to more profanity, crude gestures and bantering than the lone woman employee would have experienced.<sup>40</sup>

## 2. Groping

Mr. Phillips testified that on one occasion, while walking with Mr. Tew and two other employees (Robby Brown and possibly Dan Owen), Mr. Tew grabbed Mr. Phillips’ chest as if he were “coping a feel.”<sup>41</sup> Mr. Tew denied that the incident occurred, stating that he absolutely did not remember ever grabbing Mr. Phillips’ chest.<sup>42</sup> When questioned about whether he had witnessed such an incident, Mr. Brown could not recall having done so.<sup>43</sup> Neither Mr. Phillips nor Mr. Tew was more credible than the other about this alleged incident. The complainant, therefore, failed to prove by a preponderance of the evidence that such an incident occurred.

## 3. Accusations of Inappropriate Sexual Behavior

Mr. Phillips testified to three incidents—two in September and one in October 2007—in which Mr. Tew accused him of inappropriate sexual behavior: having sexual relations with an animal (a pig and a dog), and with a coworker while on the job. Mr. Tew denied that these incidents occurred.<sup>44</sup>

**The Pig Incident.** According to Mr. Phillips, the first incident occurred in mid-to-late September. He testified that “three weeks to a month before I quit, he [Tew] accused me of

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<sup>39</sup> Phillips Dec. 9 Test.

<sup>40</sup> Jo McManus, a grader operator, was Tew’s Excavation’s only female employee in 2007. HRC Exh. 4, p. 27. Though she was listed as a potential witness and a subpoena was drawn by the complainant to require her attendance at the hearing, she was not called to testify. Nonetheless, it is reasonable to infer from Mr. Tew’s admission that the language used around the shop would have been cleaner when Ms. McManus was present.

<sup>41</sup> Phillips Dec. 9 Test.

<sup>42</sup> C. Tew Dec. 10 Test.

<sup>43</sup> December 11, 2009 Testimony of Robby Brown (Brown Test.).

<sup>44</sup> C. Tew Dec. 10 Test.

screwing my pig; I told him I've got a pig in and I'm going to have piglets" and that this happened in the presence of four or five people.<sup>45</sup> When asked how he responded, Mr. Phillips testified, I "told him he's a sick bastard and walked away."<sup>46</sup> All of the other witnesses asked during the hearing about the alleged pig incident denied witnessing it.

In response to the question by the human rights investigator, "[w]hat do you remember about Mr. Tew's interactions with Mr. Phillips," David Bernier reportedly replied, "[h]e asked him if he was fucking his pig ...."<sup>47</sup> At the hearing, while testifying under oath, Mr. Bernier denied hearing Mr. Tew make such a remark.<sup>48</sup> Mr. Bernier was not working for Tew's Excavation in September 2007.<sup>49</sup> When he spoke with the investigator, more likely than not, Mr. Bernier was repeating what he had been told by someone else about the alleged pig incident.

Mr. Phillips' own testimony calls into question whether the incident could have occurred as he described. He explained that the gestation period for a pig is about four months and said that the piglets were born in the spring of 2008.<sup>50</sup> The pig would not yet have been pregnant in September 2007, when he allegedly told Mr. Tew and the others that he was "going to have piglets." He might have made such a statement in anticipation of the pig becoming pregnant, for example, if the people who were providing the boar had already agreed to do so, but his account of events was unclear on this point.<sup>51</sup>

Mr. Phillips' account of the pig incident is unreliable; Mr. Bernier's statement to the investigator does not corroborate it with first-hand knowledge; the other employees denied witnessing it; and Mr. Tew denies it. The complainant, therefore, failed to prove by a preponderance of the evidence that such an incident occurred.

**The Dog Incident.** According to Mr. Phillips, a couple of weeks after the alleged pig incident, his dog had puppies. He testified that when he told the people around the shop about the puppies, Mr. Tew "accused me of screwing my dog."<sup>52</sup> When asked how he (Phillips) responded,

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<sup>45</sup> Phillips Dec. 9 Test. (December 9, 2009 a.m. recording at 41:35).

<sup>46</sup> *Id.* at 42:18.

<sup>47</sup> HRC Exh. 1 at p. 2 (Record of Interview).

<sup>48</sup> Bernier Test.

<sup>49</sup> R. Tew Dec. 10 Test (establishing that Bernier stopped working for Tew's in July 2007 and was not rehired again until July 2009).

<sup>50</sup> December 11, 2009 Testimony of Dennis Phillips (Phillips Dec. 11 Test.).

<sup>51</sup> *Id.* (explaining, two years after the event, that the people from the Harley shop "gave him the boar" but not indicating when he learned they would do so relative to his announcement that piglets would be available).

<sup>52</sup> Phillips Dec. 9 Test (December 9, 2009 a.m. recording at approximately 42:48).

he said “I told him that was sick and they looked more like him.”<sup>53</sup> Asked if his response was a joke, Mr. Phillips said it was a sarcastic remark.<sup>54</sup>

Mr. Tew denied that the incident occurred, but he admitted to sometimes using an expression like “screwing the pooch and selling the pups” to indicate when someone is taking unfair advantage.<sup>55</sup> None of the employees asked about this at the hearing could remember or would admit to witnessing such an incident, though Mr. Bernier reportedly told the investigator that Mr. Tew asked Mr. Phillips “if he was fucking his ... dog.”<sup>56</sup> Mr. Bernier did not work at Tew’s in the late-September/early-October 2007 period, when this incident would have occurred.

Mr. Phillips’ retort that the puppies looked more like Mr. Tew, coupled with Mr. Tew’s resort to the screws-the-pooch expression as a possible explanation, makes it quite plausible that the incident occurred, despite Mr. Tew’s denial and the lack of corroboration from other witnesses. The bantering reflected in telling someone that the puppies look more like him is consistent with Mr. Phillips not hesitating to call Mr. Tew (his supervisor) a “sick bastard” without apparent fear of retribution, or to tell the supervisor “to talk to [his] number one guy Corbin” about performing oral sex. More likely than not, the dog incident occurred, but it was bantering in which Mr. Phillips joined, not an accusation that he engaged in sexual relations with a dog.

**The New Co-worker Incident.** Mr. Phillips testified that in October 2007, Mr. Tew accused him of “screwing the new worker” by coming into the shop and asking, “what are you guys doing over there ... fucking?”<sup>57</sup> Mr. Tew denied that this occurred. The new co-worker (whose name Mr. Phillips could not recall) was not called as a witness. Neither Mr. Phillips nor Mr. Tew was more credible than the other about this alleged incident. The complainant, therefore, failed to prove by a preponderance of the evidence that such an incident occurred.

#### 4. Complaining about Conduct

Mr. Phillips testified that he complained about Mr. Tew’s conduct about once a week, by telling Mr. Tew to “knock it off” or that he “didn’t appreciate it.”<sup>58</sup> Mr. Phillips also said that he complained to Ms. Tew twice: once, when they were discussing her concerns about Mr. Tew’s

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> C. Tew Dec. 10 Test.

<sup>56</sup> HRC Exh. 1 at p. 2 (Record of Interview).

<sup>57</sup> Phillips Dec. 9 Test. (December 9, 2009 a.m. recording at 51:40).

<sup>58</sup> *Id.*

spending habits and he (Phillips) brought up Mr. Tew's language; and again, after he quit the job, when he went to pick up his final paycheck.<sup>59</sup>

Ms. Tew denied that Mr. Phillips ever complained to her about Mr. Tew.<sup>60</sup> Regarding the final paycheck meeting, Mr. Phillips testified that after Ms. Tew handed him the check, he said something like "did you know Mokie asked me for a blow job."<sup>61</sup> When asked what her response had been, Mr. Phillips said she did not respond because he had turned and walked away. Ms. Tew's recollection was different: she said they engaged in small talk and that Mr. Phillips said absolutely nothing about a "blow job."<sup>62</sup> Mr. Phillips was not as credible on this subject as Ms. Tew, for the reasons explained in subpart D.1 & 4 below.

More likely than not, therefore, Mr. Phillips' complaints about Mr. Tew's conduct were limited to him saying things like "knock it off" to Mr. Tew in immediate reaction to remarks or gestures. Such reaction might just as easily have been perceived as bantering than as sincere complaints.

#### 5. Reason for Resignation

Mr. Phillips testified that the final straw that caused him to quit his job was the alleged incident in which Mr. Tew "accused me of screwing the new worker" and that he quit because this made him angry, but he did not want to do anything that might cause him to go to jail.<sup>63</sup> He gave his employer no reason for quitting when he left on October 17, 2007, or when he picked up his check from Ms. Tew later. He was able to begin drawing unemployment about a week after he told the unemployment office that he had been sexually harassed while working at Tew's.<sup>64</sup> He testified that he did not contact the Human Rights Commission until about a month and a half after he quit, but the commission's documents suggest that he may have contacted the commission two days after quitting.<sup>65</sup>

Shortly before leaving his employment, Mr. Phillips told one of his co-workers that he did not want to work during the winter, and wanted instead to draw unemployment, but Mr. Tew

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<sup>59</sup> *Id.*; Phillips Dec. 11 Test. (December 9, 2009 a.m. recording at 1:23:40).

<sup>60</sup> R. Tew Dec. 10 Test.

<sup>61</sup> Phillips Dec. 9 Test.

<sup>62</sup> R. Tew Dec. 10 Test.

<sup>63</sup> Phillips Dec. 9 Test.

<sup>64</sup> *Id.*; Phillips Dec. 11 Test.

<sup>65</sup> HRC Exh. 6—the Post Charge Counseling form—is dated "10/19/2007." HRC Exh. 5—a memorandum on a telephone inquiry—is dated "11/19/2007" but the content indicates that the telephone contact between Mr. Phillips and the commission employee was made while Phillips was "waiting ... at work to hand in my keys and pick up my paycheck."

would not lay him off.<sup>66</sup> “He mentioned going to Hawaii or someplace warm a couple of times” to another co-worker.<sup>67</sup> According to the first co-worker, Mr. Phillips also said he was going to “sue for sexual harassment,” but the co-worker thought Mr. Phillips was just kidding.<sup>68</sup>

Mr. Phillips denied that he told co-workers he wanted the winter off.<sup>69</sup> He said that the only time he had wanted to go to Hawaii was when he vacationed there in 1988 or 1989.<sup>70</sup> When asked whether it was his practice to take winters off and related questions, Mr. Phillips explained that he has done a lot of seasonal work, and that layoffs were typical in the winter.<sup>71</sup> He added that when he is laid off, his unemployment benefits usually start in about two weeks.

Mr. Phillips was not entirely credible in his testimony about the reasons for his resignation and his plans for the winter, as illustrated in subpart D.4 below. The first co-worker’s testimony about Mr. Phillips’ announced desire to take the winter off and draw unemployment was credible. It is at least equally likely that Mr. Phillips quit the job so that he could have the winter off than that he quit because of the profanity, crude gestures and bantering. The complainant, therefore, has not proven by a preponderance of the evidence that the work environment caused Mr. Phillips to quit.

#### ***D. Reliability of Testimony***<sup>72</sup>

All witnesses testified under oath. All witnesses, except the investigator, had a motive to be untruthful or to favor a particular party if the true facts were not favorable: the Tews and Mr. Phillips had corresponding financial motives related to potential liability for or receipt of a monetary award;<sup>73</sup> the employees and former employee had the prospect of continued or future work. A motive to be untruthful can be attributed to any party or involved witness in any case. Such a motive does not necessarily render the testimony suspect, especially when the witness has

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<sup>66</sup> Owen Test. (December 11, 2009 a.m.2 recording at 10:57).

<sup>67</sup> McManus Test.

<sup>68</sup> Owen Test. (December 11, 2009 a.m.2 recording at 11:05).

<sup>69</sup> Phillips Dec. 9 Test. (stating, in answer to a question about whether he explained to his co-workers why he was quitting, “no” and that he “just up and quit”).

<sup>70</sup> Phillips Dec. 11 Test.

<sup>71</sup> *Id.*

<sup>72</sup> Findings on reliability of testimony are included for the benefit of the commission panel taking final action on this recommended decision. Including such findings is consistent with 6 AAC 30.470(c), which states:

When demeanor, inconsistency, or personal credibility is a basis for the recommendations, the administrative law judge or hearing examiner shall specifically note these observations in the recommendations.

In addition to observing the witnesses closely during the hearing, and noting observations at that time, the administrative law judge reviewed the audio recordings of testimony while writing the recommended decision.

<sup>73</sup> The complainant’s “Back Pay Damages Statement” calculated a potential award of \$62,734.74.

taken an oath to tell the truth, subject to the penalties for perjury. In this case, financial motive has not been a significant factor in determining which testimony to believe.<sup>74</sup>

The more important factors have been consistency, memory capability and demeanor of the individual witnesses. Whether a witness' testimony is unreliable because of poor memory, wishful thinking or outright lies makes little difference to the fact finding. Unreliable testimony not corroborated by other evidence is insufficient proof, but a witness is not wholly unreliable just because some testimony is dubious or even false.<sup>75</sup> The observations below concerning demeanor, memory and consistency of the eight witnesses influenced fact finding and the determinations on whether the complainant satisfied the burden of proof.

#### 1. The Respondent's Representatives

**Clayton Tew.** Mr. Tew's testimony was not completely credible on all facts to which he testified. His testimony appeared to be rehearsed, as shown by his overt attempts to support the theme that workers in a shop environment use crude language, but he knows better than to use such language in other environments. For instance, when asked by his attorney what profanity, in his experience, was commonly used in shops, he hesitated to answer, indicating that repeating such words in the office environment of the hearing would not be appropriate. When instructed to answer the question, Mr. Tew let loose with a string of nine curse words/phrases, seemingly relieved to be able to get them out, and then expressed regret that his wife (who was sitting in the gallery) had to hear that language.<sup>76</sup>

When answering routine, non-controversial questions such as how the business operated, Mr. Tew responded simply and quickly; the answers appeared utterly uncontrived. When answering some of the questions about specific incidents alleged to show sexual harassment, however, he had a tendency to pause and look away, as if trying to think through how his answer might affect his defense or trying to remember a planned answer. This hesitation, coupled with the rehearsed appearance of some of his answers, left the distinct impression that though he

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<sup>74</sup> The complainant's argument that the financial interests of the Tews and the employee/former employee-witnesses made their hearing testimony unreliable, and that Mr. Bernier's statements to the investigator should be considered reliable corroboration of Mr. Phillips' testimony (because Bernier was not working at Tew's when interviewed) was considered but dismissed for the reasons detailed below on Mr. Bernier's and Mr. Phillips' credibility.

<sup>75</sup> See Alaska Civil Pattern Jury Instructions at § 1.07 (explaining that a fact finder need not disregard all of a witness' testimony just because some is false or suspect).

<sup>76</sup> C. Tew Dec. 10 Test. (December 10, 2009 a.m. recording at 24:45).

admitted to using profanity, he was minimizing the degree to which he used course language and gestures in the shop.

In his hearing and deposition testimony, Mr. Tew made wisecracks suggesting either nervousness or a disposition to engage in bantering, or perhaps both.<sup>77</sup> This undermined the credibility of his denials that the dog incident occurred and that he used the bend-and-ram-it-home gesture and phrase.

Mr. Tew was asked about an encounter he and Mr. Phillips had at a gas station after Phillips had filed the complaint with the Human Rights Commission. The encounter is not relevant to the allegations at issue here, but the differences in the two accounts were revealing as to credibility. The two accounts differed as to who arrived first, which truck Mr. Tew was driving, who instigated the contact, and what (if anything) was said, by whom and to whom.<sup>78</sup> Both accounts could not have been true. They were at odds, not just in the details, but also as to who instigated the contact and whether name calling was involved.

When he began giving his account, Mr. Tew's posture changed. Initially, he seemed exasperated. Then he got into telling his version and, as it unfolded, he included details that seemed contrived—as if he were supplying details to make a tale dredged from a hazy memory more believable.

**Roberta Tew.**<sup>79</sup> Ms. Tew's answers were short and to the point. She answered the questions directly, without evading. Her answers sounded matter-of-fact. She was soft-spoken on the routine questions, but spoke firmly, and with a bit more volume, when answering “never” and “absolutely not” to questions about her observations of conduct alleged to show harassment.

Ms. Tew explained that she had a good memory of Mr. Phillips picking up his last check because they generally used direct deposit but when checks were necessary, Mr. Tew normally handed them out, so it was unusual for someone to come to the office for a check. She was sitting in the gallery when Mr. Phillips testified about picking up the check and asking her if she

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<sup>77</sup> For instance, during his deposition, when the complainant's attorney reminded him of the need to answer audibly, so the court reporter could take down the testimony, Mr. Tew responded

I thought you were saying something about her hearing because she's like older or something like that. You can't be doing that kind of stuff.

HRC Exh. 4, p. 4. At the hearing, when Mr. Tew was first called as a witness and his attorney misspoke by addressing him as “Mr. Phillips,” Mr. Tew said “you can have him again,” suggesting that Mr. Phillips should testify again instead of Mr. Tew. C. Tew Dec. 10 Test. (Dec. 10, 2009 a.m. recording at 20:28).

<sup>78</sup> Compare C. Tew Dec. 11 Test. with Phillips Dec. 11 Test.

<sup>79</sup> The facts and observations concerning Ms. Tew's credibility and reliability as a witness are based on her testimony on three days, December 9-11, 2009.

knew Mr. Tew had asked him for a “blow job.” Her visible reaction, though subtle, suggested that she was appalled and surprised that Mr. Phillips would say this when her recollection was that they had simply engaged in small talk.

## 2. The Investigator

**Triptaa Surve.**<sup>80</sup> Nothing about Ms. Surve’s testimony called into doubt her reliability as a witness, except that she necessarily had to refresh her recollection using documents, and a key document—the Bernier Record of Interview—was itself somewhat unreliable. An audio recording was not made of the interview with Mr. Bernier. Ms. Surve testified that this is the normal practice, and that the investigators instead are trained to make a record of the interview by typing answers as close to verbatim as possible. The document bears a “Today’s Date” about two and one-half weeks earlier than the “Date of Interview.” Ms. Surve explained that she wrote most of the question bullets (●) on the earlier date and then inserted the answer bullets (○) during the 16 minute telephone interview, adding follow-up question bullets as such questions came up.

The document contains obvious typographical errors (e.g., “her verbal abuse” in an answer about why Mr. Phillips quit his job). It also shows eleven answer bullets under the question, “How long worked,” only the first of which is responsive. The other ten answers speak to name calling, verbal abuse, profanity, bad moods, why employees quit their jobs, and other non-responsive subjects. Without the benefit of knowing the follow-up questions that prompted the answers and having a true verbatim record of the responses, the document is of limited value for impeachment purposes and is not reliable to prove facts.<sup>81</sup>

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<sup>80</sup> The facts and observations concerning Ms. Surve’s credibility and reliability as a witness are based on her December 9, 2011 testimony and the Bernier Record of Interview (HRC Exh. 1).

<sup>81</sup> The Bernier Record of Interview (HRC Exh. 1) was admitted into evidence over respondent’s hearsay objection. Prior statements are admissible because they are not considered hearsay when used for certain purposes, including impeachment (challenging credibility) of the person who made the prior statements when he or she becomes a witness. *See* Alaska R. Evid. 801(a)(1). Statements the investigator’s document attributed to Mr. Bernier were taken into account in assessing his credibility insofar as the questioning of him about the document revealed that he had made such statements. However, because the document was not prepared by Mr. Bernier himself and is not a verbatim record of things he said, the statements it attributes to him were given no weight as proof of fact or as corroboration for other witnesses’ testimony unless the statements were adopted by Mr. Bernier when he testified under oath at the hearing. *See also* May 24, 2011 Ruling on Complainant’s Objections to Recommended Decision at pp. 2-3 & 4 (explaining why statements attributed to Mr. Bernier by the investigator’s report do not provide reliable evidence to prove facts and did not corroborate Mr. Phillips’ testimony on key points of contention).



### 3. The Employees

**David Bernier.**<sup>82</sup> Mr. Bernier stopped working at Tew's Excavation in July 2007 and did not start working there again until July 2009.<sup>83</sup> He did not work there in September 2007, when the pig and dog incidents allegedly occurred. According to his testimony, taken under oath, he left due to lack of work.

The investigator interviewed Mr. Bernier on March 4, 2009, nearly two years after he left his employment with Tew's Excavation. In his sworn testimony at the hearing, Mr. Bernier denied much of what the Record of Interview attributed to him as answers. He made it clear, almost from the moment he sat down, that he did not want to testify, and that he believed the commission staff had assured him he would not have to do so. He appeared nervous, skittish even, as if he might bolt from the room at any moment. He seemed defensive and angry in giving answers. For instance, when ask about the bullet answer using the phrase "her verbal abuse," he did not immediately realize the "her" was a typographical error and became very agitated and angry sounding at the suggestion that he had said Roberta Tew was verbally abusive.

Mr. Bernier explained that he does not like people, does not do well with them and just wanted to be left alone. He angrily admitted that he had previously said he was fearful of losing his job. He said that he had left telephone messages for the commission staff saying, "leave me alone" and "keep me out of this." Though this suggests that he was a very uncooperative witness, eventually he relaxed a little and gave answers that were less hostile, including several that seemed quite candid.

Because Mr. Bernier denied, under oath, much of what the Record of Interview attributed to him and the document itself suffered from the reliability concerns described above, very little weight has been given to the statements it attributes to him.<sup>84</sup> Because he was a very reluctant, initially uncooperative witness, relatively little weight has been given to most of his testimony. Only the testimony taken under oath that appeared credible based on his demeanor or the content's consistency with other evidence has been given significant weight.

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<sup>82</sup> Unless otherwise indicated, the facts and observations concerning Mr. Bernier's credibility and reliability as a witness are based on his December 9, 2011 testimony and the Bernier Record of Interview (HRC Exh. 1).

<sup>83</sup> R. Tew Dec. 10 Test.

<sup>84</sup> See note 78 above and accompanying discussion for more on the weight given to the Record of Interview.

**Robby Brown.**<sup>85</sup> Mr. Brown appeared to be somewhat uncomfortable testifying. His answers were short, and sometimes curt, but he added qualifiers (e.g., “not that I’ve seen”) when he deemed necessary. His posture suggested that he was engaged and attentive. His manner of addressing the attorneys was respectful, and not at all hostile. Nothing in his demeanor or voice suggested he was testifying untruthfully.

Generally, he was in the shop getting ready to go out on road maintenance or other jobs for only 30 minutes or so in the morning. He did not have the opportunity to observe what went on in the shop throughout the workday.

**Corbin McManus.**<sup>86</sup> Mr. McManus was clearly quite uncomfortable at the hearing, but he listened attentively to the explanation about the oath and penalties for perjury, and he looked grave when taking the oath. He did not try to evade answering difficult questions, though he did equivocate on the question about whether he had seen Mr. Tew use the bend-and-ram-it-home gesture and phrase, reluctantly admitting he had only after being reminded of his prior out-of-hearing statement about this. His answers were responsive and deliberate. His voice was level and the inflections suggested candor and matter-of-factness, especially the narrative answers. For instance, when testifying that Mr. Phillips had mentioned going to Hawaii or someplace warm a couple of times for the winter of 2007, Mr. McManus’ answer seemed matter-of-fact, natural and not in the least contrived. It was credible.

#### 4. The Former Employees

**Danny Owen.**<sup>87</sup> Mr. Owen worked for Tew’s Excavation for two-and-a-half to three years. At the time of the hearing, he no longer worked there; instead, he had a full-time job as a truck driver working for an Arizona-based company. He speculated that at some point in the future, if he returned to Alaska, he might again work for Tew’s as a driver.

Mr. Owen testified by telephone. His voice was level. His answers were responsive and generally unguarded. He supplied context and qualifiers without prompting, and self-corrected an answer when he realized he had misspoken about his work history. His testimony did not sound rehearsed. He showed no hesitation to answer, except when the questions were unclear, or

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<sup>85</sup> The facts and observations concerning Mr. Brown’s credibility and reliability as a witness are based on his December 11, 2009 testimony.

<sup>86</sup> The facts and observations concerning Mr. McManus’ credibility and reliability as a witness are based on his December 11, 2009 testimony.

<sup>87</sup> The facts and observations concerning Mr. Owen’s credibility and reliability as a witness are based on his December 11, 2009 testimony.

when he and the questioner had spoken over one another. He sought clarification when appropriate, with no apparent intent to evade questions. He volunteered information and explanations, and what he volunteered was not necessarily more favorable to his former employer than to the complainant. For instance, when asked about the dog and pig incidents, he initially responded that he did not remember hearing Mr. Tew make such remarks to Mr. Phillips, and then he volunteered that someone had told him about something of this kind occurring.

**Dennis Phillips.**<sup>88</sup> Mr. Phillips' testimony generally sounded natural, unrehearsed and very matter-of-fact. He admitted that he is not good with names and dates, because they are not important to him—particularly dates. But it was apparent that his memory is quite good regarding things that are important to him. For instance, though he could not recall who specifically was around the shop when he announced the puppies' birth, he was readily able to answer a series of questions about the puppies—how many were born (8 live; 1 stillborn); where he sold them (Fred Meyers); and how much he charged (\$100 each). Also, he could still recall, more than 20 years after taking a vacation to Hawaii, concerns that affected his travel plans (planetary alignment posing an earthquake/tsunami risk) for the vacation. And his recollection of the details about the gas station encounter with Mr. Tew appeared to be quite good.<sup>89</sup>

On questions requiring a narrative response, Mr. Phillips' answers were not always coherent, and the follow-up questions sometimes fell short of clearing up the fuzziness of the answers. As a result, on some points it was difficult to tell whether Mr. Phillips' answers were consistent with other evidence, including his own prior statements. He tried to be forthcoming, volunteering corrections when he realized that earlier testimony had been inaccurate or inconsistent with pre-hearing accounts he had given to the commission staff. For instance, he corrected his earlier testimony about where Mr. McManus had been positioned during the alleged crotch-grabbing incident. Regarding the inconsistency between the discovery response and his testimony about the timing of this alleged incident (September versus July or August), he was adamant that the latter was correct. He did not hesitate to set the record straight, even though

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<sup>88</sup> Unless otherwise indicated, the facts and observations concerning Mr. Phillips' credibility and reliability as a witness are based on his December 9 & 11, 2009 testimony.

<sup>89</sup> Mr. Phillips testified that Mr. Tew had not been driving Tew's own, pink truck (as Tew had testified), but had been driving Tew's son's truck, and he backed this up by explaining that the gas station did not sell diesel at the time and Tew's pink truck uses diesel.

doing so weakened his argument that Mr. Tew's conduct drove him to quit in October, and also suggested that he had not been truthful when verifying the discovery responses.

Mr. Phillips' posture, head and eye positions, and tone of voice generally suggested that he was answering questions truthfully. There were exceptions.

When Mr. Phillips gave his account of picking up his final paycheck and testified that he asked Ms. Tew if she knew her husband had asked him for a "blow job," Mr. Phillips' posture and eye position changed noticeably, as did the inflection in his voice. He leaned away, looked down and to the side, shifted in the chair, and then in a louder tone than he normally used, he spoke about the "blow job" remark, and then settled back into his regular posture, brought his eyes up and presented a picture of someone self-satisfied. These demeanor observations, coupled with Roberta Tew's credibility in her account of the meeting, suggest that Mr. Phillips fabricated the story about what he said to Ms. Tew.

Occasionally, Mr. Phillips resorted to a sort of evasion technique people sometimes use to avoid answering a question directly, because doing so truthfully would hurt their position. Two examples stood out:

(1) on cross examination, when asked a question about whether Mr. Tew's use of the phrase "you're fucking me" frequently occurred when he (Phillips) was working too slowly or messing around on the job, he evaded the direct question about frequency by answering that if he had been working too slowly, Mr. Tew would and should have fired him;

(2) when asked questions about taking the winters off from work, instead of answering directly, he evaded in two ways—by generalizing about the reasons he had been off winters (seasonal jobs and layoffs), instead of saying whether he chose to take winters off, and by asking (not answering) why would he, or anyone, take winters off when more money can be earned working than on unemployment.

Even though the tone of Mr. Phillips' voice mostly was level and his answers usually sounded sincere and matter-of-fact, a remarkable change in his voice occurred when answering pointed questions about whether he believed Mr. Tew was asking him to engage in anal sex when he made remarks like "you're fucking me." When Mr. Phillips said "yes," his voice took on a lilting and slightly defensive tone.<sup>90</sup> He continued to sound defensive, and his voice lilted

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<sup>90</sup> Phillips Dec. 9 Test. (December 9, 2009 a.m. recording at 1:02:38).

upward, when asked follow-up questions such as whether this could be a form of speech meaning you are goofing around (to which he said “no”).

Throughout his testimony, taken on two days, Mr. Phillips presented as a person genuinely, subjectively offended by some of the language and gestures used at the shop, especially that suggesting male-on-male sexual contact or inappropriate sexual behavior (such as having sex with a co-worker while on the job, or with animals). But his testimony that he believed Mr. Tew to be asking for anal sex or a “blow job” with the language used and bantering that went on was not credible in the least. It was not credible based on his demeanor; it was not credible in light of his participation in the bantering and use of profanity.

### III. DISCUSSION

Under Alaska’s human rights statutes, it is unlawful for an employer “to discriminate against a person ... in a term, condition, or privilege of employment because of the person’s ... sex ....”<sup>91</sup> If sex discrimination alleged in an accusation is proven by a preponderance of the evidence at a hearing, the commission must order the person proven to have engaged in the discriminatory practice to refrain from engaging in the practice and also may order other appropriate relief.<sup>92</sup> In contrast,

[i]f the commission finds that a person charged in an accusation has not engaged in the discriminatory practice alleged in the accusation [e.g., if the evidence is inadequate to support findings and conclusions required to prove discrimination], it shall issue and cause to be served on the complainant an order dismissing the complaint.<sup>[93]</sup>

The commission’s executive director, acting in a prosecutorial role as the nominal complainant, “has the burden of proving the allegations of the accusation.”<sup>94</sup>

The allegations, in sum, are that Mr. Tew created a hostile work environment through pervasive and severe sexual harassment of Mr. Phillips, which forced Mr. Phillips to resign, all

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<sup>91</sup> AS 18.80.220(a)(1).

<sup>92</sup> AS 18.80.120(d)(requiring that “each element of an accusation ... be proven by a preponderance of the evidence); AS 18.80.130(a)(1)(requiring an order “to refrain from engaging in the discriminatory practice” and authorizing an order to take affirmative corrective action, including in the employment context training, personnel record changes, front and back pay, among others); *also* 6 AAC 30.480(b)(describing the broad remedial authority of the commission as permitting the commission “to order any legal or equitable relief that is reasonably calculated to prevent future violations of a similar nature or that reasonably compensates the complainant ...).

<sup>93</sup> AS 18.80.130(c).

<sup>94</sup> 6 AAC 30.440(a).

in violation of AS 18.80.220(a)(1).<sup>95</sup> How pervasive or severe words and conduct must be to create a hostile work environment are not matters directly addressed by Alaska’s human rights statutes or regulations. “The commission considers instructive, but not binding, relevant federal case law, statutes, regulations, and guidelines if they do not limit the commission’s obligation to construe AS 18.80 liberally.”<sup>96</sup> In applying the state human rights statutes, Alaska’s courts look to relevant federal authorities as well, but they recognize the imperative to liberally construe AS 18.80.<sup>97</sup> Alaska’s courts consider federal precedents when deciding hostile work environment complaints.<sup>98</sup> The legal conclusions below regarding the hostile work environment and constructive discharge allegations, therefore, depend in part on standards developed through federal case law.

#### **A. Sexual Harassment Creating Hostile Work Environment**

Sexually offensive or abusive conduct that “unreasonably interferes with work performance can alter a condition of employment” such that it creates a “hostile work environment[.]”<sup>99</sup> To be actionable, however, sexual harassment must be severe enough or pervasive enough “to create an objectively hostile or abusive work environment ...” and the work environment must be subjectively perceived by the victim as abusive.<sup>100</sup> Whether the work environment is objectively hostile is “judged from the perspective of a reasonable person in the [complainant’s] position, considering ‘all the circumstances.’”<sup>101</sup> As to Mr. Phillips’ complaint, therefore, two questions must be answered:

- (1) was the work environment at the Tew’s Excavation Big Lake shop different for men than women;

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<sup>95</sup> July 10, 2009 Accusation at 2 (¶¶ 4-5 & 8-9).

<sup>96</sup> 6 AAC 30.910(b).

<sup>97</sup> *E.g., Alaska State Commission for Human Rights v. Yellow Cab*, 611 P.2d 487, 490 (Alaska 1980) (adopting four-part test from U.S. Supreme Court decision on Title VII of the Civil Rights Act); *Thomas v. Anchorage Telephone Utility*, 741 P.2d 618, 622 (Alaska 1987) (relying on federal authorities when addressing disparate impact under AS 18.80.220); *Wondzell v. Alaska Wood Products, Inc.*, 601 P.2d 584, 585 (Alaska 1979) (stating that AS 18.80.220 “is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination”).

<sup>98</sup> *State, Dep’t of Natural Resources v. Peterson*, 236 P.3d 355, 363-364 (Alaska 2010).

<sup>99</sup> *French v. Jadon, Inc.*, 911 P.2d 20, 28 (Alaska 1996), quoting *Ellison v. Brady*, 924 F.2d 872, 875 (9<sup>th</sup> Cir. 1991).

<sup>100</sup> *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1537 (10<sup>th</sup> Cir. 1995), quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *French*, 911 P.2d at 30 (confirming that the work environment must be both objectively and subjectively hostile for a violation of AS 18.80.220(a) to exist).

<sup>101</sup> *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998), quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. at 23.

- (2) if so, was it objectively hostile to a reasonable person, considering all the circumstances, and subjectively hostile to Mr. Phillips?

These questions must be answered based on the facts proven, not on mere allegations or speculation.

The evidence established that the shop's environment during the five and one-half months Mr. Phillips worked there was marked by frequent use of profanity, especially the verb "fuck" in phrases such as "you're fucking me," often by the supervisor (Mr. Tew), used as an expression of annoyance or disappointment with work performance. In a variation on this expression, Mr. Tew used the bend-and-ram-it-home gesture and phrase on at least "a couple of occasions" and likely more, though the frequency was not firmly established.<sup>102</sup> Some bantering occurred; one instance of bantering included joking about whether Mr. Tew or Mr. Phillips might have fathered a litter of puppies. The language was cleaner when the lone woman employee was present. None of the proven language or gestures amounted to a serious invitation to engage in sexual relations.

By his own admission, Mr. Tew established that men and women employees were required to endure different levels of potentially offensive language and gestures during Mr. Phillips' time working at the shop. An employer cannot cause or allow an environment more hostile to one gender than the other to persist without running afoul of the laws against sex discrimination.<sup>103</sup> The central question, therefore, is whether Mr. Tew's conduct, and the profanity-laced atmosphere he allowed to persist at the Big Lake shop when only male employees were present, was objectively hostile.

Common sense, and an appropriate sensitivity to social context, will enable [the decisionmaker (the commission panel)] to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the [complainant's] position would find severely hostile or abusive.<sup>104]</sup>

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<sup>102</sup> Mr. Bernier confirmed that he witnessed Mr. Tew doing this a couple of times. Mr. Phillips' estimate was much higher—30 to 40 times directed at him and a similar number of times at other employees. Mr. Tew denied it altogether but was not credible. Mr. McManus reluctantly admitted to witnessing one instance. Since Mr. Bernier's employment overlapped with Mr. Phillips' by about two months (Bernier Test.), more likely than not, Mr. Tew used the gesture and phrase more times during the five and one-half months Mr. Phillips worked for Tew's than just the "couple of times" Mr. Bernier was able to confirm and the one time Mr. McManus admitted to seeing.

<sup>103</sup> *Oncale*, 523 U.S. at 79-80 (explaining that though the federal laws against sexual harassment may have been intended primarily to address male-on-female harassment, same-sex sex discrimination—for instance, male-on-male sexual harassment which affects the terms or conditions of employment—is prohibited as well).

<sup>104</sup> *Id.* at 82.

In some social contexts, profanity is the norm and is not considered offensive in the workplace. For instance, in one hostile work environment case, the federal court hearing the appeal observed that in construction work “profanity and vulgarity are not perceived as hostile or abusive.”<sup>105</sup> In that case, the complaining party “contributed to the use of crude language on the job site ....”<sup>106</sup> The same is true here; Mr. Phillips used profanity around the shop. He admitted calling Mr. Tew a “sick bastard.” Co-worker witnesses confirmed that he used profanity and told dirty jokes. They also testified that the kind of language used around the Big Lake shop was essentially the same as they had heard in other shops in Alaska and in the lower 48 states.<sup>107</sup>

Considering “all the circumstances,” as one must when determining whether the work environment is objectively hostile, necessarily requires considering the nature of the workplace and job. As the United States Supreme Court has said:

The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.<sup>[108]</sup>

Taking into account the nature of the workplace (e.g., construction site versus office; bar versus ice cream parlor; college campus versus nursery school) and of the job (public greeter versus warehouse stocker) is an inescapable part of analyzing whether a reasonable person would find the environment hostile. The surrounding circumstances encompass the nature of the workplace and job—for instance, the stress level in a hospital emergency room as compared to in an optometrist’s waiting room. The nature of the workplace and job bears upon expectations, for instance, about whether profane language and vulgar gestures might be used, and tasteless jokes might be told, and upon the extent to which such language and jokes will be tolerated by the hypothetical reasonable person. Workplace and job-driven relationships affect how the reasonable person perceives conduct. For instance, the bond between a group of firefighters, soldiers or athletes, working closely together under stressful or competitive circumstances, may make acceptable hugging, back slapping, fanny patting and towel flicking that would be

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<sup>105</sup> *Gross*, 53 F.3d at 1537.

<sup>106</sup> *Id.* at 1537-1538.

<sup>107</sup> Brown Test. (profanity in the three shops where he has worked in Alaska); McManus Test. (environment no different than at the Northern Dame shop); Owen Test. (profanity in Alaska and lower 48 states shops where he has been).

<sup>108</sup> *Oncale*, 523 U.S. at 81-82 (observing that “a professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—



offensive to the hypothetical reasonable person working as an accountant or window washer, or even as a mechanic at Tew's Excavation.

Recognition that the circumstances, expectations and relationships affecting how a reasonable person will perceive and react to conduct and language can vary with the nature of the workplace and job does not create a separate, less protective "classist" standard for "blue-collar" workers, as complainant asserts.<sup>109</sup> The simple acknowledgment that societal tolerance for profanity, obscene gestures and bantering encroaches into the workplace and affects the perception and reaction of the hypothetical reasonable person does not change the legal test being applied or the result dictated under that test when applied to the facts proven. The test applied in this case is the same: the work environment must be proven to have been objectively and subjectively hostile.

Importantly, the hostile work environment determination must be based on what was proven, not merely alleged. This is illustrated by a case relied on by complainant: *Williams v. General Motors Corp.*<sup>110</sup> Ms. Williams alleged that "she was subjected to sexual harassment in the form of a hostile working environment," citing 15 acts or types of behavior by coworkers and a supervisor.<sup>111</sup> As with Mr. Phillips' case, the allegations included frequent use of the verb "fuck." Summary judgment was granted in favor of the employer because the trial court found "that the incidents of alleged sexual harassment, while offensive, were not so severe or pervasive as to constitute a hostile work environment..."<sup>112</sup>

Ms. Williams appealed. The appellate court reversed, remanding the case for a trial, concluding that Ms. Williams had raised "a genuine issue of material fact as to whether she was subjected to 'severe or pervasive' conduct constituting a hostile work environment..."<sup>113</sup> Ms. Williams had a two-day trial; she lost.<sup>114</sup> Lesson learned: a litany of allegations is not proof that a hostile work environment existed; the allegations must be proven with reliable evidence.

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even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office").

<sup>109</sup> May 4, 2011 Complainant's Objections to Recommended Decision at pp. 4-6; also May 17, 2011 Recording of Oral Argument.

<sup>110</sup> 187 F.3d 553 (Sixth Cir. 1999).

<sup>111</sup> *Id.* at 559.

<sup>112</sup> *Id.* at 560.

<sup>113</sup> *Id.* at 561.

<sup>114</sup> *Williams v. General Motors Corp.*, 18 Fed.Appx. 342, 344 (Sixth Cir. 2001) (describing two-day trial and result in opinion from second appeal—this one seeking a new trial, which was denied).

Mr. Phillips' complaint has not been disposed of through summary adjudication; an evidentiary hearing spanning three days was held. Mr. Phillips' complaint garnered the trial-like opportunity the *Williams* case teaches is necessary when fact disputes exist regarding hostile work environment allegations. But the evidence fell short of proving everything alleged. If all the allegations had been proven, this would be a very different case—and might have merited a different result. A reasonable expectation for all workplaces is to be free from unwanted, inappropriate sexual contact (such as groping), demands for sex, and serious accusations of deviant sexual behavior (such as bestiality). When such things are not proven, and the proof reduces down to lots of profanity, some crude gestures and a little bantering usual for the type of workplace, and in keeping with the workers' expectations about what is acceptable, common sense indicates that the proven conduct and language would not be so offensive to a reasonable person as to constitute a hostile work environment. That Mr. Phillips joined in the bantering (said the puppies looked like Mr. Tew) and used profanity himself reinforces this conclusion, and undermines the assertion that he found it all subjectively offensive.

Certainly, the offense Mr. Phillips took to some of the alleged conduct and language was quite credible. Examples from cases finding a hostile or abusive work environment suggest that the combination of language, gestures, groping, invitations for sex and accusations of inappropriate sexual behavior alleged by Mr. Phillips, if proven, could have been found pervasive enough to create a hostile work environment. For instance, in one case an objectively abusive work environment was found based on crudely demeaning references, unwelcomed touching, pantomiming oral sex and similar behavior by supervising life guards directed at subordinates.<sup>115</sup>

Because only a smaller subset of potentially offensive language and gestures was proven in Mr. Phillips' case, however, the same conclusion does not follow here. No groping, requests for a "blow job," or invitations to engage in anal sex were proven, and the exchange about who fathered the puppies was bantering, not a serious accusation that Mr. Phillips had sex with his dog. What remained—liberal use of profanity, sometimes coupled with a crude gesture, and one instance of sex-oriented bantering—does not rise to the level of pervasiveness or severity necessary to declare the work environment to have been hostile to men generally, or to Mr.

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<sup>115</sup> See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 782-783 (1998).

Phillips on account of his gender, simply because the supervisor and crew cleaned up their language when women were around.

In sum, the evidence was insufficient to establish that an objectively hostile work environment was created by the profanity, gestures and bantering at the Big Lake shop when Mr. Phillips worked there. Moreover, considering that he participated in the profanity and bantering, it is questionable whether Mr. Phillips himself genuinely took offense. Common sense suggests that one does not use language and join in bantering one finds offensive. Thus, proof that the environment was subjectively hostile to Mr. Phillips stopped short of the preponderance of the evidence mark.

### ***B. Constructive Discharge***

Even if the evidence of an objectively and subjectively hostile work environment had been stronger, Mr. Phillips would have been eligible for a monetary award only if the work environment drove him to quit his job with Tew's Excavation. The complaint alleges constructive discharge due to a hostile work environment. Constructive discharge occurs when an employer causes or allows the working conditions to become "so intolerable that 'a reasonable person in the employee's position would have felt compelled to resign'."<sup>116</sup> It follows that if the evidence shows that something besides the work environment motivated the employee to resign, constructive discharge has not been proven.

For the same reasons that an objectively hostile work environment was not proven, the evidence is insufficient to show that the work conditions at the Big Lake shop were so intolerable that a reasonable person in Mr. Phillips' position would have felt compelled to resign. The profanity, gestures and bantering proven were not so pervasive or severe as to cause a reasonable person to "just up and quit" without discussing the concerns with the supervisor/owner or majority owner, or at least lining up another job.

The evidence called into question Mr. Phillips' assertion that the work environment caused him to quit. The following points make it equally likely that Mr. Phillips quit so he would not have to work during the winter:

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<sup>116</sup> *Pyramid Printing Co. v. Alaska State Comm'n for Human Rights*, 153 P.3d 994, 999 (Alaska 2007) quoting *Cameron v. Beard*, 864 P.2d 538, 547 (Alaska 1994).

- Credible testimony that Mr. Phillips told one co-worker that he wanted to take the winter off and draw his unemployment, and that he mentioned going someplace warm, like Hawaii, a couple of times;
- Mr. Phillips' evasive answers to questions about his past pattern of having winters off from work;
- Mr. Phillips' decision to quit suddenly, without notice, on October 17, 2007, and without efforts to find another job first;
- Mr. Phillips' failure to complain about the work environment, other than by telling Mr. Tew to "knock it off" and words to that effect, before quitting, and his apparent fabrication of an after-the-fact complaint to Roberta Tew in the form of asking her about the supposed "blow job" request. (Though complaining to the business owner is not always a prerequisite for a sexual harassment claim, failure to do so in this case undermines the credibility of Mr. Phillips' assertion that he wanted to keep working and would have, rather than give up wages for unemployment, but for the shop environment.)

The complainant must prove the constructive discharge claim by a preponderance of the evidence. Because it is equally likely Mr. Phillips quit as a means of taking the winter off than in reaction to an intolerable work environment, the complainant has failed to meet that burden of proof. The truth may be that the profanity-laced environment of the shop was one factor, or even the only factor, in Mr. Phillips' subjective decision to quit. The proof, however, fell short of establishing this, or establishing that a reasonable person in Mr. Phillips' position would have quit because of the work environment. The constructive discharge claim fails.

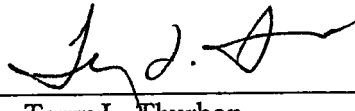
#### IV. CONCLUSION

The witness testimony established that course language and crude gestures were used at the Tew's Excavation Big Lake shop during Mr. Phillips' employment there. The testimony and exhibits, however, failed to prove by a preponderance of the evidence that the work environment was objectively and subjectively hostile, or that the environment caused Mr. Phillips to quit his job with Tew's Excavation.

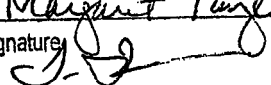
However ill-advised it may be for a business owner/supervisor to use course language and crude gestures to communicate with employees about their work performance, or in attempts to be humorous, the human rights law does not make unlawful the use of such poor judgment

when the proof is insufficient to show that this created an objectively hostile work environment. Because the evidence was insufficient to prove hostile work environment resulting in constructive discharge, it is unnecessary to reach questions of remedial measures and monetary awards. Accordingly, Mr. Phillips' complaint should be dismissed.

DATED this 27<sup>th</sup> day of May, 2011.

By:   
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Terry L. Thurbon  
Chief Administrative Law Judge

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals;

Lauri Owen ASCHR for complainant  
Jason Bergewin / Taylor McMurran  
Royce + Brian for 100's Excavation  
Margaret Taylor, Exec. Sec., ASCHR  
Signature:  Date: 5/27/11