

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

DEC 30 2013

ALASKA STATE COMMISSION FOR HUMAN RIGHTS, PAULA M. HALEY, EXECUTIVE DIRECTOR, ex rel. JANET WASS, Complainant, v. ACE DELIVERY & MOVING, INC. Respondent.

State of Alaska Office of Administrative Hearings ASCHR No. J-11-254 OAH No. 13-0143-HRC

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the administrative record, are in agreement with and adopt the Recommended Decision Revised After Objections of Administrative Law Judge Jeffrey A. Friedman dated September 10, 2013, and accordingly the complaint is dismissed.

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.

IT IS SO ORDERED.

DATED: December 27, 2013

Christa J. Bruce, Commissioner

DATED: December 27, 2013

Jason Hart, Commissioner

DATED: December 27, 2013

Grace E. Merkes, Commissioner

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

Paula M. Haley, Executive Director, Alaska)
State Commission for Human Rights *ex rel.*)
JANET WASS,)
)
Complainant,)
)
v.)
)
ACE DELIVERY & MOVING, INC.,)
)
Respondent.)

OAH No. 13-0143-HRC
ASCHR No. J-11-254

RECOMMENDED DECISION REVISED AFTER OBJECTIONS

I. Introduction

Janet Wass was hired by Ace Delivery & Moving, Inc. (Ace) as a temporary worker to perform data entry. She alleged that Ace’s owner made pejorative and hateful comments about Jews during a pre-employment phone conversation. She further alleged that after she was hired Ace’s owner made a pejorative comment about Arabs and Muslims, made a pejorative comment about Jews and concentration camps, and allowed a poster to be placed in the workplace that was demeaning to Mexicans.

Ms. Wass resigned on her third day of employment because she was unwilling to remain working for someone who would make these comments and allow that poster in the workplace. She filed a complaint with the Human Rights Commission which investigated the allegations and ultimately filed a one count accusation. The accusation alleged that Ace had “created a hostile working environment based on the owner’s severe or pervasive derogatory comments and postings regarding race, national origin, and religion” in violation of AS 18.20.220(a)(1). The accusation did not allege any other form of discrimination or allege constructive discharge.

A recommended decision was issued after the hearing. Pursuant to 6 AAC 30.470(d), the Executive Director filed her objections to that decision. The prior recommended decision has been reconsidered and revised based on those objections.

Although the recommended decision has been revised to address the objections, the Executive Director still has not met her burden of proving that Ms. Wass was discriminated

against in a term, condition, or privilege of employment based on Ms. Wass' race, national origin, or religion.

II. Facts

A. Background

Ms. Wass was looking for work during the fall of 2011. She learned that Ace had a job available, and she called and spoke with Ace's owner, Gaylord "Hank" Schaub.¹ After speaking with him, she sent him an e-mail with her resume.² Three days later, Mr. Schaub called her back to offer her a temporary data entry position and to arrange for her to start work.³ Ms. Wass did start work for Ace.

On her first day of work, Mr. Schaub allegedly made a comment about Arabs and Muslims. On her third day of work, he allegedly made a comment about Jews and concentration camps. These comments are discussed below.

Ms. Wass was also exposed to an offensive bulletin board poster. It is undisputed that there was a poster in the office that refers to Mexicans. This poster is shown in Exhibit N, and appears to be about the size of a half sheet of paper. It reads,

THE MEXICAN HURRICANE
A CATEGORY 5 HURRICANE hits Mexico
Two million Mexicans die and over a million are
injured. The country is totally ruined and the
government doesn't know where to start and is
asking for help to rebuild. The rest of the world is
in shock.
Canada is sending troopers to help the Mexican
army control the riots.
Saudi Arabia is sending oil.
Other Latin American countries are sending
supplies.
The European community is sending food and
money.
The United States, not to be outdone,
is sending two million Mexicans to replace the
dead ones.
God bless America!!!!^[4]

¹ Testimony of Ms. Wass; testimony of Mr. Schaub.

² Testimony of Ms. Wass; Exhibit F.

³ Testimony of Ms. Wass; testimony of Mr. Schaub.

⁴ Exhibit N (formatting as shown in original).

By the morning of her third day at work, Ms. Wass had had enough. Even though she needed the job, Ms. Wass went into Mr. Schaub's office and told him she was quitting because she could not work for a racist.⁵ Mr. Schaub responded by asking "Who put the burr under your saddle?"⁶

While Mr. Schaub denies making the offensive statements attributed to him by Ms. Wass, he admitted making ethnic jokes and allowing people to post "humorous" things like Exhibit N on the company bulletin board.⁷ He admitted that he is prejudiced against Koreans and likely would not hire one, and that he is more likely to ask "Poncho" whether he is an illegal alien than he is to verify the immigration status of a "honky."⁸

B. Pejorative Comments

Ms. Wass alleges that during her second pre-hire phone call with Mr. Schaub he started making multiple negative comments about Jews. She couldn't remember the specific statements, but testified that he was spewing hatred about Jewish people in general, and specifically about someone who was not paying him for work done. In an effort to get him to stop, she says she told him her ex-husband and daughter were both Jewish. She also testified she told him she could understand some of his feelings because in her experience the Jewish faith is a private club, and it was one she didn't belong to because she is not Jewish, and as a result she did not get child support from her ex-husband.

Mr. Schaub denies making any comments at all about Jews or the Jewish religion during the pre-employment phone conversation. He recalled that it was Ms. Wass who brought up Jews. Mr. Schaub testified that Ms. Wass was providing information about her background, and told him she was 63 years of age, she was ex-Peace Corps, she was divorced, and she had one daughter. According to Mr. Schaub, it was during this conversation that Ms. Wass volunteered that her "Son of a bitchen no good fucking Jewish millionaire ex-husband screwed her out of paying alimony or child support."⁹

On her first day of work, Ms. Wass was in Mr. Schaub's office and noticed a lot of things on his walls related to his service in the military.¹⁰ She made a comment about the Middle East,

⁵ Testimony of Ms. Wass.

⁶ Testimony of Mr. Schaub.

⁷ Testimony of Mr. Schaub.

⁸ *Id.* According to Mr. Schaub, "Poncho" is a term used to describe Mexicans, and "honky" refers to Caucasians who are less likely – according to Mr. Schaub – to be illegal aliens.

⁹ Exhibit 2; testimony of Mr. Schaub.

¹⁰ Testimony of Ms. Wass.

and Mr. Schaub allegedly stated that all Muslims and Arabs should be cut up and exterminated, but that would probably foul the atmosphere.¹¹

Mr. Schaub denies making any statement remotely similar to that.

Ms. Wass alleged that, on her third and final day of work, Mr. Schaub came into the office and stated that it was as “quiet as a concentration camp.” Ms. Wass said she responded that it was quiet because, like in a concentration camp, everyone was too afraid to speak. According to Ms. Wass, Mr. Schaub then said, “the only problem with concentration camps was they ended too soon.”¹² It was after this comment that Ms. Wass decided to quit.

Mr. Schaub denies making any statement remotely similar to this comment about concentration camps ending too soon.

III. Discussion

The Alaska Legislature has determined that

discrimination against an inhabitant of the state because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy, or parenthood is a matter of public concern and that this discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety, and general welfare of the state and its inhabitants.^[13]

It is the policy of the state to eliminate and prevent employment discrimination based on “race, religion, . . . [or] national origin[.]”¹⁴ To help eliminate and prevent employment discrimination, the legislature has made it unlawful for an employer to discriminate against a person in a “term, condition, or privilege” of employment because of the person’s race, religion or national origin.¹⁵

There are different ways in which an employer can discriminate against an employee in a term, condition, or privilege of employment. For example, an employer could assign less desirable job tasks to individuals of a particular religion, or an employer could provide less desirable offices to unmarried employees than the offices provided to married employees.

¹¹ *Id.*
¹² *Id.*
¹³ AS 18.80.200(a).
¹⁴ AS 18.80.200(b).
¹⁵ AS 18.80.220(a)(1).

Another way in which an employer can alter the terms, conditions, or privileges of employment, thereby unlawfully discriminating against an employee, is by creating a hostile work environment.¹⁶

An employee must establish two elements to hold an employer liable [under AS 18.80.220] for a hostile work environment: (1) the employee experienced “discriminatory behavior sufficiently severe or pervasive to alter the conditions of the victim’s employment,” and (2) the discriminatory conduct can be imputed to the employer.^[17]

To prevail, the Executive Director must establish both elements. The second element is easily met in this case. Mr. Schaub owns Ace,¹⁸ and it is his alleged conduct that is at issue. The first element, however, is lacking.

Alaska Statute 18.80.220(a) says that an employer may not discriminate against a person because of the person’s religion or national origin.¹⁹ Similarly, the Alaska Supreme Court held that to prevail in a hostile work environment claim, the discriminatory behavior must alter the conditions of the victim’s employment.²⁰ It is alleged that Mr. Schaub made comments about Arabs, Muslims, Jews, and Mexicans. Notably, absent from the accusation is an allegation that Ms. Wass is Arab, Muslim, Jewish, or Mexican, and her testimony established that she is not. To the extent Ace created a hostile work environment; the discrimination was not because of Ms. Wass’ religion or national origin.

The Executive Director also did not allege a hostile work environment for any other employee. The relevant allegations in accusation are that

10. Respondent’s owner made multiple pejorative comments about Jews, Arabs, Muslims, and hung a poster at the workplace that is pejorative to people of Mexican descent.

11. Respondent’s owner’s speech and conduct was unwelcome, offensive to a reasonable person, and offensive to complainant.

¹⁶ *French v. Jadon, Inc.*, 911 P.3d 20, 28 (Alaska 1996); *Dowler v. Kopf*, OAH No. 10-0264-HRC (Human Rights Commission 2011), page 11; *Phillips v. Tew’s Excavation*, OAH No. 09-0372-HRC (Human Rights Commission 2011), pages 20 – 21.

¹⁷ *Mills v. Hankla*, 297 P.3d 158, 168 (Alaska 2013) (citing *French v. Jadon*, 911 P.3d at 28; internal footnote omitted).

¹⁸ Testimony of Mr. Schaub.

¹⁹ AS 18.80.220(a). While there are other statutes listed in AS 18.80, and the accusation included an allegation of discrimination based on race, the evidence presented at the hearing was limited to comments and posters concerning religion and national origin.

²⁰ *Mills v. Hankla*, 297 P.3d at 168.

12. The conduct was so severe and pervasive that it altered the term and conditions of complainant's employment.^[21]

The complainant referred to in the accusation is Ms. Wass.²² The accusation does not allege that the terms and conditions of employment were altered for any other employee. Nor is there any allegation in the accusation that any other employee found Mr. Schaub's comments offensive.²³ The accusation did not put Ace on notice of the need to defend against anything other than the claim that the workplace was hostile as to Ms. Wass.²⁴ While the accusation could have been amended to refer to a hostile work environment as to other employees,²⁵ it was not amended. Ace may not be held liable for any violation of AS 18.80.220 that was not alleged in the accusation.

IV. Conclusion

Ms. Wass brought information to the Executive Director that suggested Ace was in violation of AS 18.80. Mr. Schaub stated during his testimony that he would do some things – such as not hire a Korean – that could be a violation of AS 18.80.220. The accusation in this matter, however, alleged a different type of violation. The Executive Director failed to prove that Ms. Wass was discriminated against because of her religion or national origin. Because this claim should be dismissed on this basis, there is no need to determine whether Mr. Schaub actually made all of the statements Ms. Wass says he made or whether, if he made them, the actions were sufficiently severe or pervasive to alter the terms and conditions of her employment.

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²¹ Accusation, page 2 (First Cause of Action).

²² The first sentence of the Executive Director's prehearing brief says "Respondent Ace Delivery & Moving, Inc. ("Ace") created a hostile work environment for Janet Wass when its owner, Gaylord Schaub, made highly offensive remarks about Jewish, Muslim, and Arab people in her presence."

²³ See *Mills v. Hankla*, 297 P.3d at 170 (term and conditions of employment not altered if employee does not subjectively believe the environment is abusive).

²⁴ See AS 44.62.360(1) (requirement that accusation place respondent on sufficient notice to prepare a defense). The requirements for an accusation set out in the Administrative Procedure Act apply to this hearing. AS 18.80.120(b).

²⁵ AS 18.80.120(c).

The Executive Director has not proven that the terms and conditions of Ms. Wass' employment were altered because of her religion or national origin. Therefore, the single count of discrimination alleged in the accusation should be dismissed.

DATED this 10th day of September, 2013.

Signed

Jeffrey A. Friedman

Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]