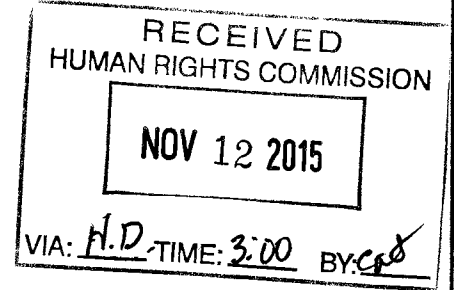


BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION )  
FOR HUMAN RIGHTS, PAULA M. )  
HALEY, EXECUTIVE DIRECTOR, )  
*ex rel.* ASHLEY M. LAHAIE, )  
Complainant, )  
v. )  
SUBWAY OF ALASKA, INC., )  
Respondent. )

ASCHR No. J-10-260  
OAH No. 14-0510-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 July 16, 2015 is hereby ADOPTED by the Commission in its entirety. Accordingly, the complaint of Ashley M. Lahaie against Subway of Alaska, Inc. for a hostile work environment and retaliation discrimination in violation of AS 18.80.220 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 10, 2015

*Grace E. Merkes*  
\_\_\_\_\_  
Grace E. Merkes, Commissioner

DATED: November 10, 2015

*Christa Bruce*  
\_\_\_\_\_  
Christa Bruce, Commissioner

DATED: November 10, 2015

*Jason B. Hart*  
\_\_\_\_\_  
Jason B. Hart, Commissioner

Hearing Unit

Calendared  
Scanned 11/12/15

ALASKA STATE COMMISSION FOR HUMAN RIGHTS  
800 A Street, Suite 204  
Anchorage, Alaska 99501-3669  
(907) 276-7474 FAX (907) 278-8588

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

Paula M. Haley, Executive Director, Alaska )  
State Commission for Human Rights *ex rel.* )  
ASHLEY M. LAHAIE, )  
 )  
Complainant, )  
 )  
v. )  
 )  
SUBWAY OF ALASKA, INC., )  
 )  
Respondent. )

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OAH No. 14-0510-HRC  
ASCHR No. J-10-260

**RECOMMENDED DECISION**

**I. INTRODUCTION**

On September 1, 2010, Ashley Lahaie was sexually harassed by Terrill Daye, a co-worker at Subway of Alaska. Ms. Lahaie reported the incident the following day and did not work with Mr. Daye again. Ms. Lahaie filed a complaint against Subway with the Alaska State Commission for Human Rights (ASCHR).

The evidence presented at the hearing did not establish that Subway subjected Ms. Lahaie to a hostile work environment or retaliated against her for opposing the allegedly discriminatory practices. This decision therefore recommends dismissal of the discrimination complaint filed by Ms. Lahaie against Subway.

**II. FACTS**

**A. Harassment, Reporting, and Subway's Response**

Ashley Lahaie was employed as a sandwich artist for Subway of Alaska from November 9, 2009, through September 15, 2010. In August 2010, Subway offered Ms. Lahaie management track training, which she accepted.<sup>1</sup> Ms. Lahaie was available to work at more than one Subway store in the Anchorage area. In early September 2010, Ms. Lahaie had been training for several weeks with Raymond Madrid, the store manager, at the Bailey's store. On September 1, 2010, Ms. Lahaie worked at the Dimond Center Mall Subway store. Although the Dimond Center

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<sup>1</sup> Employees remain sandwich artists and are not promoted until completion of training.

store was not Ms. Lahaie's home store, she agreed to fill in for an unavailable employee there on September 1-2, 2010. Near closing time, Terrill Daye, another worker at the Dimond Center store, approached Ms. Lahaie, who was in the back of the store washing dishes, and told her to hurry up and finish so that he, his brother, and Ms. Lahaie could go have sex. Mr. Daye's brother was in the front of the store. Ms. Lahaie was very offended and did not respond. Mr. Daye returned to Ms. Lahaie again and told her in a sexual manner to come out front and "earn her tips." Ms. Lahaie asked Mr. Daye to clarify his remarks, but he did not respond. Mr. Daye approached Ms. Lahaie a third time, slapping her buttocks as he walked by.

Fearing for her safety, Ms. Lahaie quickly finished work, left the store, and went to her car. Mr. Daye followed her to her vehicle. Ms. Lahaie told him to leave her alone and drove off, as Mr. Daye put his hand on her car door. Ms. Lahaie was eighteen years old at the time; Mr. Daye was a 38-year-old married man.

The following day, Ms. Lahaie returned to work her scheduled shift at the Dimond Center store. She approached the store and saw Mr. Daye working. Not wishing to work or interact with Mr. Daye, Ms. Lahaie contacted and met with Dimond Center store manager, Cindy Perfect. Ms. Lahaie reported the sexual harassment incident to Ms. Perfect. Whether Ms. Lahaie informed Ms. Perfect that Mr. Daye had followed her to the car is in dispute. Ms. Lahaie believes she did. Ms. Perfect and her supervisor, Regional Director Shannon Wyatt, both testified that Ms. Lahaie reported only what occurred in the store.

Ms. Lahaie was visibly upset while describing the incident. Ms. Perfect wanted to immediately fire Mr. Daye. Ms. Perfect phoned Ms. Wyatt to report the incident. Ms. Wyatt informed Ms. Perfect that she could not immediately terminate Ms. Daye. Instead, Ms. Wyatt would follow up and investigate. Ms. Wyatt spoke to Ms. Perfect and Ms. Lahaie on the phone. Ann Lahaie, Ashley Lahaie's mother, arrived sometime during their discussion and learned of the prior evening's incident.

Ms. Wyatt and Ms. Perfect wanted to ensure that Ms. Lahaie was kept away from Mr. Daye. The parties agreed that Ms. Lahaie would take the night off work and not work with Mr. Daye again. Subway did not pay Ms. Lahaie for the shift she would have worked on September 2, 2010. Ms. Lahaie returned to work at her home store and did not work or interact with Mr. Daye again.

Within 48 hours, Ms. Wyatt asked Mr. Daye about the alleged incident. Mr. Daye denied that it occurred. Ms. Wyatt also asked other store employees if there had been any issues with Mr. Daye. None was reported.<sup>2</sup> Subway did not discipline Mr. Daye. Within a day or two of the incident, Mr. Daye gave notice to Ms. Perfect that he was moving out of town and that his last day of work would be September 14, 2010.<sup>3</sup>

A few days later, while investigating a tip jar robbery, Ms. Perfect viewed the store's video surveillance footage. The footage captured Mr. Daye slapping Ms. Lahaie's buttocks. Ms. Perfect informed Ms. Wyatt, who was at the Dimond Center store, that the video captured the slap. Ms. Wyatt did not view the video. According to Ms. Wyatt, she did not view the video because she believed Ms. Lahaie's report of harassment, particularly after Ms. Perfect told her it was captured on video. Neither Ms. Wyatt nor Ms. Perfect made a copy of the video. The tape copied over itself a week or two later, erasing the evidence, which was Subway's standard practice at the time.

Even after viewing the video, Subway failed to discipline Mr. Daye and marked his exit paperwork as eligible for rehire.<sup>4</sup> Ms. Perfect gave Mr. Daye an employment reference, despite knowing of the harassment. Subway allowed Mr. Daye to remain on the schedule until his departure date. According to Ms. Wyatt and Ms. Perfect, they considered Mr. Daye's voluntary departure and Ms. Lahaie's return to her home store satisfactory to prevent future harassment or interaction and keep Ms. Lahaie out of harm's way. Ms. Perfect felt she "just got lucky" that Mr. Daye was quitting.<sup>5</sup> In retrospect and after going through sexual harassment training, both Ms. Perfect and Ms. Wyatt believe that Mr. Daye should have been disciplined.

Ms. Wyatt did not report the sexual harassment to her manager or notify Swan Employer Services, which handles many of Subway's human resource tasks. Subway's written policy directed managers to report harassment to Swan and submit a written report within 24 hours.<sup>6</sup> Ms. Wyatt was later written up for her failure to discipline Mr. Daye after the video confirmed the harassment. Both Ms. Wyatt and Ms. Perfect were required to attend sexual harassment

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<sup>2</sup> Ms. Lahaie had also worked with Mr. Daye without incident before September 1, 2010.

<sup>3</sup> The evidence at hearing did not establish whether Mr. Daye gave notice just before or just after September 1, 2010.

<sup>4</sup> Ex. 17. Either Subway or Swan Employer Services, which handles many of Subway's human resource tasks, changed Mr. Daye's status to ineligible for rehire at some point between Mr. Daye's departure and the hearing. *See* Ex. 24. The record does not contain information as to who ordered or implemented the change.

<sup>5</sup> Perfect testimony.

<sup>6</sup> Ex. 18, R. 0007.

training.<sup>7</sup> Ms. Wyatt's work notebook, containing whatever scant information existed regarding Ms. Lahaie's harassment, was lost when her car was totaled in December 2010.<sup>8</sup>

### **B. Disciplinary Actions and Filing of the ASCHR Complaint**

While working at the Bailey's store on September 7, 2010, Ms. Lahaie left the store for a disputed period of time between fifteen and ninety minutes. She left a minor employee alone in the store, against company policy. The record contains conflicting information as to why Ms. Lahaie left. Ms. Lahaie testified that she took out the trash and went to another Subway location to get green peppers. When Ms. Lahaie was interviewed by Investigator Williams in 2011, much closer in time to the original incident, she denied leaving the store other than to take out the trash.<sup>9</sup> Ms. Lahaie also stated that another, non-minor, worker was there when she went for her break.<sup>10</sup> The record does not contain evidence of another non-minor employee working the shift. Subway contends that Ms. Lahaie left the store to get lotion for her new tattoo and pick up her boyfriend.

Subway gave Ms. Lahaie an employee warning notice. It states, "Left the store leaving a minor in store by herself. Left to get lotion for tattoo."<sup>11</sup> Mr. Madrid and Ashley Lahaie, signed the notice.<sup>12</sup> The form contains room for an employee statement and space to check whether the employee agrees or disagrees with the warning. This area is blank. Ms. Lahaie testified that she was told to sign the form and did so because she left a minor alone, but not because she went to get lotion. As a result of the incident, Subway suspended Ms. Lahaie for five days without pay.<sup>13</sup> This was Ms. Lahaie's first employee warning notice.

Based on the employee notice, Ms. Wyatt's testimony, and Ms. Lahaie's conflicting description of the incident, it is more likely than not the Ms. Lahaie left a minor alone in the store to get lotion for her tattoo, at least in part.<sup>14</sup>

Ms. Wyatt determined that Ms. Lahaie was not ready for a management position after she left the minor alone in the store.<sup>15</sup> Ms. Wyatt rescinded Ms. Lahaie's management training offer

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<sup>7</sup> Respondent's Ex. 16, Memo from Wilson to Wyatt; Wyatt testimony; Wilson testimony.

<sup>8</sup> Wyatt testimony.

<sup>9</sup> Respondent's Exhibit 19, p.2; Memorandum of Conversation, Carla Williams and Ashley Lahaie (January 14, 2011).

<sup>10</sup> *Id.*

<sup>11</sup> Respondent's Ex. 3.

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

<sup>13</sup> *Id.*

<sup>14</sup> Ms. Lahaie may also have taken out the trash or went to another location for green peppers. However, it is unlikely that Mr. Madrid and Ms. Wyatt made the lotion for her tattoo information up from whole cloth.

and transferred her to the Old Seward Road store as an “on-call” employee.<sup>16</sup> Ms. Wyatt testified that Ms. Lahaie’s discipline had nothing to do with her report of sexual harassment. According to Ms. Wyatt, Subway would have taken the same actions against Ms. Lahaie regardless of whether the sexual harassment occurred.

The events and timelines following Subway’s management-track training rescission are disputed. Witnesses spent significant time at hearing discussing a meeting that occurred between Subway and the Lahaies. Ms. Lahaie, her parents, Ms. Wyatt, Robert Lindstrom, and Chris Wilson met in person at the Subway offices. Ms. Perfect, who was ill, participated telephonically. Mr. Wilson is Subway of Alaska’s Vice President. Mr. Lindstrom is the Human Resource Manager for Swan, which performs some of Subway’s human resource functions. Neither Ms. Wyatt nor Ms. Perfect told Mr. Wilson or Mr. Lindstrom before the meeting that Ms. Lahaie had been sexually harassed by a co-worker. The date of the meeting, who arranged the meeting, and the topics of discussion are hotly contested.<sup>17</sup>

Mr. Lahaie testified that the meeting occurred after Mr. Lahaie filed a complaint on Subway’s corporate website.<sup>18</sup> In the Lahaies’s view, the meeting’s purpose was to discuss Subway’s response to Ms. Lahaie’s sexual harassment. The Lahaie family testified that Subway tried to focus the issues on Ms. Lahaie’s work issues, while the Lahaies repeatedly brought up the harassment. Mr. Lahaie testified that he repeatedly said, “We’re not here to talk about my daughter’s work habits, we’re here to talk about the sexual harassment.” According to the Lahaie family, Subway did not respond to these statements. After the frustration of the meeting, Mr. Lahaie advised Ashley Lahaie to file an ASCHR complaint.<sup>19</sup>

Mr. Lindstrom and Subway’s witnesses all testified that the subject of the meeting was Ms. Lahaie’s lack of hours, performance issues, and management training rescission. Subway’s witnesses testified that no mention of sexual harassment occurred at the meeting. According to their testimony, neither Ms. Wyatt nor Ms. Perfect informed Mr. Wilson or Mr. Lindstrom of the

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<sup>15</sup> Wyatt testimony.

<sup>16</sup> Ex. 4; Wyatt testimony; Lahaie testimony.

<sup>17</sup> The parties testified that the meeting occurred either before the ASCHR complaint filing or in October 2010. However, the record also indicates that the meeting may have occurred as late as January 2010. *See* ASCHR Ex. 15, R. 5, Record of Cindy Perfect Interview (February 20, 2011); Respondents Ex. 20, Memorandum of Conversation, Ashley Lahaie and her father (January 18, 2011). Parties seemed to believe their deeply conflicting memories of the event.

<sup>18</sup> Ashley Lahaie did not recall her father contacting Subway corporate to initiate the meeting.

<sup>19</sup> Dan Lahaie testimony.

sexual harassment incident prior to meeting with Ms. Lahaie and her family.<sup>20</sup> The record contains no notes of the meeting.<sup>21</sup> The only thing the parties agree upon is that at the end of the meeting it was clear Ms. Lahaie would continue to work at Subway.

While there was a great deal of confusion surrounding the meeting, the details of the meeting are not critical to reaching a decision on the merits. The particulars of the meeting shed little light on whether Subway subjected Ms. Lahaie to a hostile work environment or retaliated against her. It does not appear to be disputed that the meeting occurred after Mr. Daye's departure from Subway. At that point, disciplining Mr. Daye was no longer an option.

Ms. Lahaie filed a complaint with the Human Rights Commission on September 24, 2010.<sup>22</sup> The complaint alleges that Ms. Lahaie reported sexual harassment to her store manager on September 2, 2010.<sup>23</sup> The complaint also states that, "Respondent took no action against my coworker and told me I would have to transfer to another store. Respondent took me off the schedule on September 10, 2010, and I have not worked since."<sup>24</sup> The complaint did not mention the employee warning notice.<sup>25</sup>

Ms. Lahaie did not get hours at the Old Seward store until after the ASCHR Accusation was served on Subway on October 6, 2010.<sup>26</sup> Ms. Wyatt testified that Ms. Lahaie was unhappy with the transfer to Old Seward and explained that Ms. Lahaie told her and the Old Seward store manager that she was looking to get her job back at Fred Meyer.<sup>27</sup> Ms. Wyatt also stated that Ms. Lahaie did not respond to calls from the Old Seward store manager offering her hours.<sup>28</sup> Ms. Lahaie testified that she does not know why she was not given hours.<sup>29</sup> She denied that Subway phoned offering her hours, but admitted she told Subway that she was thinking of going back to work at Fred Meyer.<sup>30</sup>

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<sup>20</sup> Perfect testimony; Wyatt testimony; Lindstrom testimony; Wilson testimony.

<sup>21</sup> Mr. Lindstrom testified that no notes from the meeting exist. Multiple witnesses remembered notes being taken, most likely by Mr. Lindstrom. It seems unlikely that a Human Resource specialist like Mr. Lindstrom would not make notes during a meeting.

<sup>22</sup> Williams testimony.

<sup>23</sup> Ex. 27.

<sup>24</sup> *Id.*

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

<sup>26</sup> See Respondent's Ex. 18, Ms. Lahaie's pay history.

<sup>27</sup> Wyatt testimony; Ex. 18, letter from Lindstrom to ASCHR with attachments (October 29, 2010).

<sup>28</sup> *Id.*

<sup>29</sup> Lahaie testimony.

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

Ms. Wyatt stated that Ms. Lahaie phoned her on October 6, 2010, the same day Ms. Wyatt accepted delivery of the accusation, requesting to get on the schedule.<sup>31</sup> Ms. Lahaie met with Ms. Wyatt and the Old Seward store manager, and Ms. Lahaie was put on the schedule. Ms. Lahaie continued to work for Subway, at the Dowling store. Overall, Ms. Lahaie worked more hours after the report of sexual harassment than before.<sup>32</sup>

Ms. Lahaie was given keys to the Dowling store and performed store openings and closings, but she was not promoted or offered management training again.<sup>33</sup> Ms. Lahaie was written up, or given employee warning notices, nine times between September 7, 2010 and May 2011.<sup>34</sup> The bases for the writes ups included multiple bad closings, having her mother help with a closing, and being out of uniform. Except for the warning notice for leaving a minor alone in the store, Ms. Lahaie checked, "I agree with the Employer's statement" on every write up.

Ms. Lahaie felt that Subway wrote her up for every minor infraction, yet failed to discipline Mr. Daye for sexual harassment. Ms. Lahaie testified that she felt bad each time she was written up, because of the disparity in discipline. Ms. Lahaie felt angry that Subway suspended her for leaving a minor alone in a store while Mr. Daye suffered no consequence for harassment. According to Ms. Lahaie, she was upset at the meeting because she felt Subway did not believe her based on only Ms. Perfect having viewed the tape. When asked what changed about Subway's attitude towards her after the sexual harassment incident and reporting of it, Ms. Lahaie testified that Subway was always nice to her after the complaint was filed.

Ms. Lahaie's last day at Subway was September 15, 2011. Ms. Lahaie left Subway because she found a better job and went back to school.<sup>35</sup> Ms. Lahaie's gave Subway high marks in every category, except advancement opportunities provided, during her exit interview.<sup>36</sup> Overall she rated Subway as a satisfactory place to work.<sup>37</sup> On December 31, 2014, Ms. Lahaie initiated a civil suit against Subway on these same facts.<sup>38</sup>

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<sup>31</sup> Wyatt testimony, Ex.

<sup>32</sup> This is aside from the period from September 7 through October 6, 2010, when Ms. Lahaie did not get placed on the Old Seward schedule.

<sup>33</sup> Lahaie testimony.

<sup>34</sup> Ex. 3; Exs. 5 – 12.

<sup>35</sup> Ex. 13; Lahaie testimony.

<sup>36</sup> Ex. 14.

<sup>37</sup> Ex. 14.

<sup>38</sup> Ex. 23; *Lahaie v. Subway of Alaska*, 3AN-14-11061CI (pending).

After investigation, the Executive Director of ASCHR, Paula M. Haley, issued an accusation against Subway on March 27, 2014, alleging a hostile work environment and retaliation. A hearing was held on January 13 – 14, 2015. Elizabeth Smith represented the Executive Director. Sherman Ernouf represented Subway of Alaska. Witnesses included Ashley Lahaie, her parents Dan and Ann Lahaie, and Carla Williams, commission complaint investigator. Cindy Perfect, Shannon Wyatt, Chris Wilson, and Robert Lindstrom testified on Subway’s behalf.

### III. DISCUSSION

The Executive Director has the burden of proving the allegations in the accusation.<sup>39</sup> Under Alaska’s human rights statutes, it is unlawful for an employer to discriminate against a person in the terms, conditions, or privileges of employment because of the person’s sex.<sup>40</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 who engaged in the discriminatory practice to refrain from engaging in the practice and also may order other appropriate relief.<sup>41</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>42</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>43</sup> The Alaska Supreme Court looks to federal discrimination law for guidance in interpreting AS 18.80, which is liberally construed.<sup>44</sup>

#### A. Hostile Work Environment Law

Discriminatory behavior that is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and to create a discriminatory hostile work environment violates

<sup>39</sup> 6 AAC 30.440.

<sup>40</sup> AS 18.80.220(a)(1).

<sup>41</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>42</sup> AS 18.80.130(c).

<sup>43</sup> 6 AAC 30.440(a).

<sup>44</sup> *Moody-Herrera v. State*, 967 P.2d 79, 83 (Alaska 1998).

AS18.80.220.”<sup>45</sup> To establish that a hostile work environment exists, the complainant must show that a reasonable person would find it hostile or abusive, and that the victim subjectively views the work environment as abusive. If the harasser is the victim’s co-worker, the employer will be held liable only if the employer provided no reasonable avenue for complaint or knew of the harassment and did nothing about it.<sup>46</sup> An employer will be held liable if it reacts negligently to a harassment complaint.<sup>47</sup> When determining a hostile work environment claim, all circumstances are considered.<sup>48</sup>

Here, Ms. Lahaie was subjected to sexual harassment in the workplace by a co-worker. Once Ms. Lahaie reported the harassment to Ms. Perfect, Subway had an obligation to take action to remedy the situation.<sup>49</sup> This obligation consists of two parts. First, it must take immediate steps to address the harassing situation while it investigated whether the complaint is justified and, second, permanent remedial steps taken if its investigation sustained the allegation of harassment.<sup>50</sup> An inadequate investigation may support a finding of employer liability.<sup>51</sup> However, if an employer takes prompt steps to end the harassment and its actions support a commitment to maintaining a harassment-free workplace, liability cannot be premised on perceived inadequacies in the investigation.<sup>52</sup>

“If the employer fails to take corrective action after learning of an employee’s sexually harassing conduct, or takes inadequate action that emboldens the harasser to continue his conduct, the employer can be deemed to have adopted the offending conduct and its results.”<sup>53</sup> An employer may be deemed to have ratified the harassment if no action is taken, even if the harassment voluntarily ceases.<sup>54</sup>

“An employer’s action is appropriate if it fully remedies the conduct without adversely affecting the terms or conditions of the charging party’s employment.”<sup>55</sup> For example, an

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<sup>45</sup> *French v. Jadon*, 911 P.2d 20, 28 (Alaska 1996).

<sup>46</sup> *EEOC v. Suffolk Laundry Services*, 48 F.Supp.3d 497, 520 (Dist. N.Y. 2014).

<sup>47</sup> *Swenson v. Potter*, 271 F.3d 1184, 1192 (9<sup>th</sup> Cir. 2001)(citing *Ellerth*).

<sup>48</sup> *French*, 911 p.2d at 30.

<sup>49</sup> *Ellison v. Brady*, 924 F.2d 872, 881 (9<sup>th</sup> Cir. 1991) (Employers are liable for failing to remedy a hostile work environment once management knows or reasonably should know of the problem).

<sup>50</sup> *Swenson v. Potter*, 271 F.3d 1184, 1192 (9<sup>th</sup> Cir. 2001)(internal citations omitted).

<sup>51</sup> *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475-76 (5<sup>th</sup> Cir. 2002) .

<sup>52</sup> *Swenson v. Potter*, 271 F.3d at 1197.

<sup>53</sup> *Swenson v. Potter*, 271 F.3d at 1192.

<sup>54</sup> *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9<sup>th</sup> Cir. 1995) (holding that even if the harassment has ended voluntarily, the employer must take some action to deter future potential harassment).

<sup>55</sup> *Swenson v. Potter*, 271 F.3d at 1194 (internal citations omitted).

employer may not move the victim to a less desirable location or less rewarding position.<sup>56</sup> However, an “employer has wide discretion in choosing how to minimize contact between the parties, so long as the accuser is not moved to an objectively less desirable position.”<sup>57</sup>

### **B. Application of Law to the Facts**

There is no claim here that Subway is in any way responsible for Mr. Daye’s actions on the evening of September 1, 2010. Instead, the claim in this matter is that Subway’s response to Ms. Lahaie’s report of sexual harassment created a hostile work environment. Specifically, the Executive Director argues a hostile work environment was created, because Subway took no action to remedy the harassment or to deter potential future harassment.<sup>58</sup> The Executive Director asserts that Subway’s poor investigation (not retaining a copy of the videotape and losing the investigative files) and failure to discipline Mr. Daye combined with employee warning notices to Ms. Lahaie created a hostile work environment. The Executive Director’s posits that Subway violated Alaska Human Rights records retention regulations through its failure to obtain a copy of the videotape and its loss of investigative files.

The Executive Director also characterizes Subway’s treatment of Ms. Lahaie as “punishing the victim,” a wholly impermissible response to harassment. The Executive Director maintains that a hostile work environment existed even though Ms. Lahaie was never again sexually harassed, and never worked with or saw Mr. Daye again.

Subway argues that it took appropriate action by making sure that Ms. Lahaie did not have to work with Mr. Daye again and through its investigation. Subway admits that it should have taken disciplinary action against Mr. Daye after the videotape confirmed Ms. Lahaie’s allegations, but denies it had a legal duty to discipline Mr. Daye. Subway asserts its only duties were to end the harassment and prevent future harassment. Subway also denies that its investigation was improper or that it violated the Alaska Human Rights record retention law.

The evidence at hearing fails to support the hostile work place accusation. The Executive Director seeks liability premised on its belief that Subway’s response created a hostile or abusive work environment. To support its assertion, the Executive Director relies upon cases that establish employer liability based in part on either a faulty investigation or failure to take measures to prevent harassment when the harassment voluntarily stops.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> ASCHR *Accusation*.

Those cases, however, are distinguishable. In *EEOC v. Suffolk Laundry Services*, for example, the employer learned of long-term, multi-victim harassment by a supervisor.<sup>59</sup> It responded by telling two of the reporting employees they could look for other jobs because it preferred the alleged harasser over them, told another that it did not believe her report, and a fourth that if she did not like her job, she could look for another.<sup>60</sup>

In *Fuller v. City of Oakland*, the employer, after learning of long-term harassment, failed to interview the alleged harasser for over three months, and left the alleged harasser in a supervisory position over the victim during its investigation.<sup>61</sup> The employer placed the victim in a subordinate role under the alleged harasser after she returned from leave, despite a letter from the victim's psychiatrist recommending against it. In *Fuller*, the harassment stopped after the harasser was informed that he was being investigated.<sup>62</sup> The court stated, "[w]e refuse to make liability for ratification of past harassment turn on the fortuity of whether the harasser, as he did here, voluntarily elects to cease his activities, for the damage done by the employer's ratification will be the same regardless."<sup>63</sup> But the facts of the present case are much different, and the totality of the circumstances here do not support a hostility finding.

The totality of the circumstances necessarily encompasses Subway's response to Ms. Lahaie, its investigation, and Ms. Lahaie's actual experience after the harassment. Upon hearing Ms. Lahaie's report, Ms. Perfect's wanted to fire Mr. Daye immediately. Ms. Perfect believed Ms. Lahaie and did not want her subjected to future harassment. Because Ms. Lahaie was understandably upset and because Dimond Center was not her home store, it made sense at the time to send Ms. Lahaie home. Additionally, because Dimond Center was not Ms. Lahaie's home store, this is not a case where the employer transferred the victim to a less desirable location, as argued by the Executive Director. Ms. Lahaie returned to her usual store – no transfer occurred.

In retrospect, Subway likely should have paid Ms. Lahaie for the evening of September 2, 2010. But this does not necessarily support a finding of hostile work environment. First, it appears that everyone present agreed it was best if Ms. Lahaie were allowed to go home. Second, there was no discussion of pay that evening and the record does not indicate that Ms.

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<sup>59</sup> 48 F.Supp.3d 497 (E.D.N.Y. 2014).

<sup>60</sup> *Id.*

<sup>61</sup> *Fuller*, 47 F.3d at 1526.

<sup>62</sup> *Fuller*, 47 F.3d at 1526.

<sup>63</sup> *Fuller*, 47 F.3d at 1529.

Lahaie requested pay for that evening. Put simply, no one thought to pay Ms. Lahaie for a shift she did not work. And the Executive Director does not seek back pay for the evening of September 2, 2010, in its requested remedies.<sup>64</sup>

As to the investigation, Subway argues that its investigation was adequate. Subway failed to view the video immediately, failed to save the video, and failed to report the harassment to Swan per company policy. The video was in an awkward position and one had to use a ladder to view it, but that is little excuse for not thinking of viewing the video until the tip jar theft occurred. Likewise, it would have been better if Subway had made a copy of the video.<sup>65</sup> And surely it would have been better if Ms. Wyatt's work notebook was not lost in a car wreck.<sup>66</sup> However, case law does not support finding employer liability solely on improper investigation or failure to follow company reporting policies.

The Executive Director points to Subway's investigative failures as evidence 1) it never seriously intended to discipline Mr. Daye, and 2) did not take Ms. Lahaie's harassment seriously. The Executive Director is correct that Subway did not intend to discipline Mr. Daye. Ms. Perfect's immediate response was to shield Ms. Lahaie from future harassment and fire Mr. Daye. Ms. Wyatt exercised caution, realizing the need to investigate before disciplining an employee.<sup>67</sup> She interviewed Mr. Daye and other workers about the incident. This investigation put Mr. Daye and others on notice that Subway was following up, a type of employee action required by law. Initially, Subway had conflicting information. Mr. Daye denied the allegations and no other employees reported problems with Mr. Daye. By the time the video corroborated Ms. Lahaie's report, Mr. Daye was set to leave employment. The Executive Director rightly

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<sup>64</sup> Complainant's Prehearing Brief, at 18 (January 12, 2015).

<sup>65</sup> The Executive Director argues that Subway violated 6 AAC 30.810 by failing to keep the video tape. This requires an employer who is under ASCHR investigation to maintain associated records until the case's disposition. Subway was not under investigation when the video was recorded over. Whether the video could have been necessary for a criminal investigation, as argued by the Executive Director, is beyond the scope of this decision.

Furthermore, Ms. Perfect believed Ms. Lahaie's report of harassment and Ms. Wyatt believed Ms. Lahaie upon hearing of the video. It is not clear what effect retaining the video would have had on Ms. Lahaie's work environment.

<sup>66</sup> The Executive Director asserts that Subway violated 6 AAC 30.810 by failing to keep the "investigative files" lost in Ms. Wyatt's December 2010 accident. Ms. Wyatt describes the lost information as her work notebook, not "investigative files." Regardless of nomenclature, Subway did have a duty to maintain that information. It is not disputed that the motor vehicle accident occurred. *See* Ex. 13, R.0009, Alaska Motor Vehicle Collision Report.

<sup>67</sup> Employers are mindful of potential tort claims of wrongful discharge stemming from harassment charges. *See Swenson v. Potter*, 271 F.3d at 1196 ("We are mindful of the difficulty employers face when dealing with claims of harassment, finding themselves between the rock of an inadequate response under Title VII and the hard place of potential tort liability for wrongful discharge of the alleged harasser.") *Stuck in the Middle: Employers Can Face Lawsuits from Accused as Well as Accusers*, 69 U.S.L.W. 2539 (Mar. 13, 2001)).

believes, and Subway admits, that Subway should have disciplined Mr. Daye after viewing the video. Subway took the easy way out and let Mr. Daye quit.

By the time upper management learned of the incident through the accusation, Mr. Daye was no longer with the company. At that point, Subway had no more recourse against him. As noted, Mr. Wilson wrote a memo to Ms. Wyatt criticizing her failure to discipline Daye. Subway provided training to the managers that handled the situation and, at some point before the hearing, marked Mr. Daye ineligible for rehire. These actions combined indicate that Subway takes sexual harassment seriously. Furthermore, the Executive Director did not provide, nor could this ALJ locate, any cases where an employer was held liable for unforeseen co-worker harassment, when the victim never worked with or saw the harasser again.

In terms of subjective victim beliefs, Ms. Lahaie was not asked, nor did she describe, her experience at Subway as abusive. She felt angry that Mr. Daye was not disciplined for a very serious infraction, and she was disciplined a number of times for less egregious actions. Overall though, Ms. Lahaie seemed pleased with her work environment at Subway. She never experienced harassment again, nor interacted with her harasser. Ms. Lahaie, even after removal from management training, continued to work at Subway and attempted to “move up the ladder,” albeit unsuccessfully.

It does not follow, either from her testimony, the exhibits, or the Executive Director’s argument that Ms. Lahaie genuinely experienced her workplace as abusive after the sexual harassment incident. Although Subway initially marked Mr. Daye as eligible for rehire, that is not information Ms. Lahaie or any employee would know, except through litigation discovery.<sup>68</sup> Feeling angry that you were written up and that your harasser was allowed to exit without discipline does not rise to the “hostile or abusive” requirement in law. Similarly, Ms. Lahaie’s belief that Subway doubted her reports of sexual abuse because only one person watched the video is not supported by the rest of the record. There is no record of anyone at Subway expressing disbelief to her report of harassment.

Ms. Lahaie clearly wished that Subway responded differently, but it is not clear what other action, other than disciplining an employee who was already on his way out, Ms. Lahaie expected or desired Subway to take. Ms. Lahaie testified that she is now fearful of African-

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<sup>68</sup> This decision does not condone Subway’s failure to mark Mr. Daye as ineligible for rehire. It simply notes that Ms. Lahaie’s subjective beliefs could not be influenced by a fact that she was unaware of.

American men.<sup>69</sup> It does not follow, however, that Ms. Lahaie's fears would have been lessened by a different Subway response.

Additionally, when asked if there was a timeline to alleged hostile work environment, the Executive Director argued that it continued at least through May 24, 2011, the date of Ms. Lahaie's last employee warning notice. It is not clear how allowing Ms. Lahaie to go without recourse for her own infractions would prevent a hostile work environment.

Nor has it been established that a reasonable person would view the Subway workplace as hostile or abusive. Mr. Daye's actions were hostile and abusive. But it is doubtful that a reasonable person would view Subway's imperfect response as sufficiently severe or pervasive to alter the conditions of Ms. Lahaie's employment. The significance of the harassment should in no way be minimized, but in terms of proving altered work environment and establishing employer liability, this was a single unforeseen incident by a coworker.

Subway's response was less than perfect, but, without more, liability for a hostile work environment does not attach for imperfect responses to sexual harassment. Liability attaches when an employer knows of harassment and does nothing about it or responds in a way that could be construed as condoning or ratifying the harassment.<sup>70</sup> In sum, the Executive Director did not establish that Subway's response created a hostile work environment.

### **C. Retaliation Law**

Alaska law prohibits retaliation by an employer for opposing illegal discrimination.<sup>71</sup> Ms. Lahaie opposed illegal discrimination both when she reported sexual harassment in the workplace, and when she filed the ASCHR complaint. The question is whether Subway's imposition of adverse employment measures was in response to her opposition to sexual harassment. This decision concludes that it was not.

An employee alleging retaliation can claim (i) that the employer's asserted reason for the employment action was a pretext for a discriminatory motive; (ii) that the employer had a mixture of proper and improper motives for the action; or (iii) both.<sup>72</sup>

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<sup>69</sup> Mr. Daye is African-American.

<sup>70</sup> *Fuller*, 47 F.3d at 1529.

<sup>71</sup> AS 18.80.220(a)(4).

<sup>72</sup> *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 660 (Alaska 2006). The Executive Director's pre-hearing brief outlines analysis under both pretext and mixed-motive, but describes this as a pretext case. At hearing the Executive Director admitted that there was some basis for Ms. Lahaie's discipline. This decision therefore addresses both.

In a pretext case, the employee must first make a *prima facie* case that she was involved in a protected activity, that an adverse employment action was taken against her, and that there is a causal link between the two.<sup>73</sup> At that point, the employer must produce admissible evidence to show a legitimate, non-retaliatory reason for the adverse employment action.<sup>74</sup> Finally, if the employer has offered evidence to rebut the *prima facie* case, the burden shifts back to the employee to show that the employer's explanation is a pretext.<sup>75</sup> "Pretext may be established by showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that are unworthy of credence."<sup>76</sup>

With regard to establishing causation, "causation sufficient to establish a *prima facie* case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge."<sup>77</sup> However, "case law . . . cautions against the permissibility of drawing an inference of causation from temporal proximity alone."<sup>78</sup>

An employee may show she engaged in a protected activity by either opposing the allegedly discriminatory practice (the opposition clause) or by participating or stating the intent to participate in an antidiscrimination proceeding (the participation clause).<sup>79</sup> A retaliation claim does not fail simply because the hostile work environment was unproven, as in the case here.<sup>80</sup> "An employee must only have a reasonable good faith that the opposed practice is against the law."<sup>81</sup>

Under the mixed-motive theory, a claimant must present direct evidence of discriminatory intent.<sup>82</sup> Direct evidence relates to the quantum of proof; it must be direct or circumstantial evidence strong enough to be functionally the equivalent of direct proof.<sup>83</sup> Direct proof must be evidence of "conduct or statement by persons involved in the decision-making

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Parello v ASCHR*, Case No. 3AN-09-12723 CR (Alaska Superior Ct, Administrative Decision on Appeal, 2011)(citing *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1250(10<sup>th</sup> Cir. 2002) and *Raad v. Fairbanks North Star Borough School Dist*, 323 F.3d 1185, 1194. (9<sup>th</sup> Cir. 2003)).

<sup>77</sup> *Id.* (internal citations omitted).

<sup>78</sup> *Williams v. Zurz*, 503 Fed.Appx.367, 373 (6<sup>th</sup> Cir. 2012).

<sup>79</sup> See *Dorsey v. Office Product Services*, ASCHR No. C-99-32, p.11-132 (ASCHR 2002).

<sup>80</sup> See *Dorsey v. Office Product Services*, at p.12 (ASCHR 2002)(internal citations omitted).

<sup>81</sup> *Id.*

<sup>82</sup> *Smith v. Anchorage School Dist*, 240 P.3d 834, 840(Alaska 2010).

<sup>83</sup> *Smith v. Anchorage School Dist*, 240 P.3d at 840.

process that may be viewed as directly reflecting a discriminatory attitude.”<sup>84</sup> Once direct evidence of discriminatory intent or illegitimate reasons is presented, the claimant may prevail if she can show that discriminatory intent was a motivating factor. Then, in order to avoid liability, the employer must show that it would have taken the same actions even if its improper motive was not a factor.<sup>85</sup> If direct evidence is not available, the complainant may only prevail under a pretext analysis.

**D. Application of law to the facts**

1. The Parties’ Positions

The Executive Director’s asserts that Subway retaliated against Ms. Lahaie by demoting her to her former position and reducing her hours.<sup>86</sup> Subway took multiple adverse employment actions against Ms. Lahaie. Subway removed Ms. Lahaie from the management training track shortly after she reported sexual harassment. Subway did not schedule Ms. Lahaie between her suspension and her filing of the ASCHR complaint. Lastly, Subway issued Ms. Lahaie multiple employee warning notices.

Subway denies any retaliation occurred. Subway argues that it has legitimate, non-retaliatory reasons for each adverse action. Subway also asserts that it would have taken the same actions regardless of whether the sexual harassment and reporting occurred.

2. The Executive Director did not prove Retaliation under a Pretext Analysis

The Executive Director established a *prima facie* case at the hearing. Ms. Lahaie engaged in a protected activity both when she reported the sexual harassment (opposition) and when she filed her complaint with ASCHR (participation). Ms. Lahaie experienced adverse employment actions, and the temporal proximity between these events and the filing of the human rights complaint is enough to infer causation.

In opposing this *prima facie* case, Subway advanced reasonable non-retaliatory reasons for each of its actions. Suspension for leaving a minor alone in a store may be severe, but Subway testified to the heightened importance related to maintaining two people in the store due to an increase in robberies. The reason behind Ms. Lahaie’s departure from the store, getting lotion, likely increased the severity of the administered discipline: Ms. Wyatt genuinely

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<sup>84</sup> *Mahan v. Arctic Catering*, 133 P.3d at 662.

<sup>85</sup> *Id* at 662-63.

<sup>86</sup> Accusation.

expressed disbelief at her excuse, and determined that Ms. Lahaie's actions indicated she was not ready for the management track.

Ms. Lahaie indicated she knew leaving a minor alone in the store violated Subway's rules, but did not realize the gravity of the infraction at the time. Ms. Lahaie testified that she was left alone in the store, shortly after she began working and while she was still a minor, while her manager went to the bank and to another Subway store. Mr. Wilson followed up by explaining that Subway implemented a stronger policy against leaving anyone alone in a store, after experiencing multiple robberies in 2010. Taking into account all of the evidence, this decision concludes that Ms. Lahaie's suspension and management training rescission were supported by legitimate reasons. The Executive Director did not provide persuasive evidence that undermined Subway's explanation as to why it disciplined Ms. Lahaie.

Likewise, the evidence regarding Subway's failure to give Ms. Lahaie hours after her suspension was conflicting. Subway's proffered explanations demonstrated legitimate, non-retaliatory bases for its adverse employment actions.<sup>87</sup> The evidence is inconclusive as to whether Subway attempted to contact Ms. Lahaie for hours while she was "on call." The record does not contain evidence that Ms. Lahaie contacted Subway to request hours during that time. Neither party called the former Old Seward store manager to testify regarding Ms. Lahaie's lack of hours during this time. And both Ms. Lahaie and Ms. Wyatt testified that Ms. Lahaie discussed her possible return to Fred Meyer with Subway. Though a closer call, this decision concludes that the Executive Director did not establish that Subway's failure to give Ms. Lahaie hours after her suspension and before the filing of the ASCHR complaint was retaliation.

After the ASCHR filing, Subway put Ms. Lahaie back on the schedule and her hours increased overall, compared to before the sexual harassment incident. Subway responded to Ms. Lahaie's filing of the ASCHR Complaint by putting her back on the schedule, not by retaliating against her. It is likely that Ms. Lahaie's return to work was a result of the ASHCR filing, and not the purported coincidentally-timed phone call from Ms. Lahaie. This, however, is not retaliation. Unlike other cases where an employer terminated or threatened termination upon notice of a complaint, Subway responded to the ASCHR accusation by fulfilling Ms. Lahaie's request for hours.

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<sup>87</sup> Subway need only to offer, not prove, legitimate, nondiscriminatory reasons for its actions. *See Dorsey v. Office Product Services*, at n.2.

As to the eight other employee warning notices, the record establishes a legitimate, non-retaliatory basis for each other adverse employment actions. Aside from the write-up for leaving a minor alone, Ms. Lahaie signed and “agreed with” the employee warning notices accompanying each write-up. And Ms. Lahaie testified at hearing that her violations of company policy were likely terminable offenses. Furthermore, the causal link between protected activity and adverse employment actions weakens over time. As a result, the assertion that any adverse employment action after October 2010 was motivated by retaliation is not supported. Similarly, the Executive Director’s argument that Subway should have promoted Ms. Lahaie back to management training or keyholder status is undermined by the numerous employee warning notices.

The Executive Director argued that Subway disciplined Ms. Lahaie for a variety of relatively minor infractions, but failed to discipline Mr. Daye for sexual harassment. Though true, this inconsistency does not establish that Subway’s explanations are unworthy of credence. Mr. Daye gave his notice and was no longer going to be an employee. Subway erred by not disciplining him, but that does not mean they were obligated to withhold discipline in Ms. Lahaie’s case. Because Subway offered legitimate, non-discriminatory reasons for each adverse employment action and because the evidence does not demonstrate that its explanation were not credible, the retaliation claim fails under the pretext analysis.

3. The Executive Director did not Prove Retaliation under a Mixed-Motive Analysis

Examples of direct evidence of discriminatory intent include termination because an employer threatened to sue for discrimination,<sup>88</sup> employer animus triggered by the filing of a safety complaint,<sup>89</sup> and a landlord’s desire to remove service animals from his property.<sup>90</sup> What constitutes direct evidence is not always straightforward. At no time did Subway express that its decision to remove Ms. Lahaie from the management track or place her on call status was related to her report of sexual harassment or her filing of the complaint. The question then becomes whether circumstantial evidence exists strong enough to be functionally the equivalent of direct proof. The temporal proximity between Ms. Lahaie’s report of sexual harassment and her

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<sup>88</sup> See *Dorsey v. Office Product Service*; See also, *Ex. rel. Whedon v. Loutrel*, OAH No. 11-0196-HRC, p.7 (ASCHR 2012).

<sup>89</sup> See *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 436 (Alaska 2004).

<sup>90</sup>


suspension can be used to infer causation, which was done here under the pretext analysis, where an inference of causation can be made without direct proof.

This decision will not, however, extend that inference to finding direct proof of retaliatory purpose under a mixed-motive analysis. The intervening incident, leaving a minor alone in the store, undercuts any assertion that Subway's response directly reflects a discriminatory attitude. Moreover, even if there were direct evidence of discriminatory intent, the claim would still fail. The Executive Director did not put forth evidence, other than its own assertion, that discriminatory intent was a motivating factor for Subway's adverse employment actions against Ms. Lahaie. Further, Ms. Wyatt testified that she would have taken the same disciplinary measures against Ms. Lahaie whether or not the sexual harassment and its reporting occurred. Ms. Wyatt's testimony was credible on this point.

#### **IV. RECOMMENDATION**

Although Subway's response to Ms. Lahaie's report of sexual harassment by a coworker was not ideal, it did not violate the Alaska Human Rights Act. Because the Executive Director did not support its hostile work environment and retaliation claims by a preponderance of the evidence, a discussion of remedies sought is unnecessary and this complaint should be dismissed.

DATED this 16<sup>th</sup> day of July, 2015.

  
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Bride Seifert  
Administrative Law Judge