

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION FOR
HUMAN RIGHTS, PAULA M. HALEY,
EXECUTIVE DIRECTOR, *ex rel.*,
OLGA L. PAWLACZYK,

Complainant,

v.

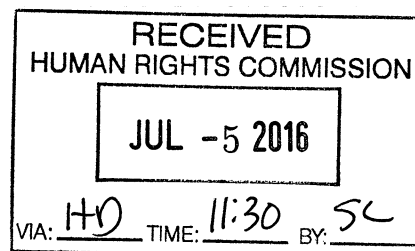
MERITAGE MANAGEMENT COMPANY,
LLC, d/b/a INLET TOWER,

Respondent.

ASCHR No. J-12-178
OAH No. 15-0465-HRC

**ORDER GRANTING MOTION TO DISMISS
AND DENYING MOTION FOR SANCTIONS**

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the record and recommended decision, now ORDER that the Administrative Law Judge's Recommended Decision of February 23, 2016 recommending that the executive director's motion to dismiss be granted and that Respondent's motion for sanctions be denied is hereby ADOPTED by the Commission in its entirety.

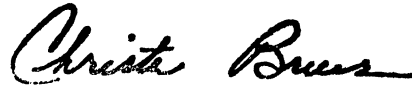


**ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION FOR
SANCTIONS – Page 1**

ASCHR, Paula M. Haley, Executive Director, ex rel. Olga L. Pawlaczyk v. Meritage Management Company, LLC, d/b/a Inlet Tower, ASCHR No. J-12-178

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.



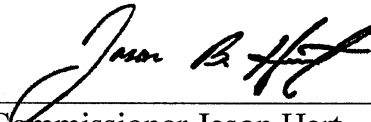
Dated: July 5, 2016

Commissioner Christa Bruce



Dated: July 5, 2016

Commissioner Michele Christiansen



Dated: July 5, 2016

Commissioner Jason Hart

ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION FOR SANCTIONS – Page 2

ASCHR, Paula M. Haley, Executive Director, ex rel. Olga L. Pawlaczyk v. Meritage Management Company, LLC, d/b/a/ Inlet Tower, ASCHR No. J-12-178

CERTIFICATE OF SERVICE

I certify that on July 5, 2016, a true and correct copy of the **ORDER GRANTING MOTION TO DISMISS** was mailed or delivered to the following parties:

✓ Stephen Koteff, Human Rights Advocate
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, AK 99501 (hand delivery)

Respondent or Respondent's Representative
Brett von Gemmingen, Esq.
Law Office of Brett von Gemmingen
637 W. Third Avenue
Anchorage, AK 99501

Jack Barrett, Registered Agent
Meritage Management Company, LLC
d/b/a Inlet Tower
P.O. Box 770468
Eagle River, AK 99577

and a courtesy copy to:

Kathleen A. Frederick, Chief Administrative Law Judge
State of Alaska
Office of Administrative Hearings
550 W. 7th Avenue, Suite 1940
Anchorage, AK 99501



Shari Ketchum
Commission Secretary

ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION FOR SANCTIONS – Page 3

ASCHR, Paula M. Haley, Executive Director, ex rel. Olga L. Pawlaczyk v. Meritage Management Company, LLC, d/b/a/ Inlet Tower, ASCHR No. J-12-178

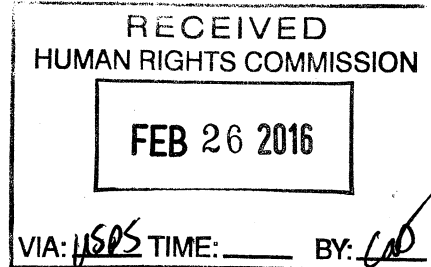
**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
APPOINTMENT BY THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS**

ALASKA STATE COMMISSION FOR)
HUMAN RIGHTS, PAULA M. HALEY,)
EXECUTIVE DIRECTOR, *ex rel.*, OLGA)
PAWLACZYK, complainant)

OAH No. 15-0465-HRC
Agency No. J-12-178

v.)

MERITAGE MANAGEMENT COMPANY,)
LLC, DBA INLET TOWER, Respondent)
_____)



**RECOMMENDED DECISION
DENYING MERITAGE'S MOTION FOR SANCTIONS
AND
GRANTING EXECUTIVE DIRECTOR'S MOTION TO DISMISS**

I. Introduction

The Executive Director of the Alaska State Commission for Human Rights filed a complaint alleging that Meritage Management Company, LLC, had discriminated against a former employee, Olga Pawlaczyk. During discovery that occurred after the dispute had been referred to the Office of Administrative Hearings (OAH), the Executive Director discovered that Meritage could state a nondiscriminatory reason for terminating Ms. Pawlaczyk that would obviate the discrimination claim. The Director moved to dismiss the case, and filed a motion for sanctions against Meritage based on Meritage's alleged failure to disclose the factual basis for terminating Ms. Pawlaczyk. The Director's motion was based on OAH's sanctioning authority under AS 44.64.040(b)(1)(2). Meanwhile, Meritage had also filed a motion for sanctions, alleging that the Executive Director had failed to comply with an order to produce a witness for a deposition. Meritage's motion was based on the Commission's sanctioning authority under 6 AAC 30.492(b).

This order addresses Meritage's motion and the Director's motion to dismiss. For these motions, the final decisionmaker is the Commission. In contrast, because the Executive Director's motion for sanctions was based on OAH's sanctioning authority, the final decisionmaker for that motion is OAH. That motion is addressed in a separate final order issued by OAH.

Meritage's motion for sanctions is denied because the regulation under which Meritage requested sanctions does not provide for sanctions based on the Executive Director's failure to

Hearing Unit
Calendared 3-14
Scanned 2/26/16

produce a witness for a deposition. Because no live issues remain in this case, the Executive Director's motion to dismiss is granted.

II. Facts

In 2011, Inlet Towers, a hotel located in Anchorage, was purchased by Meritage Management Company, LLC. In 2012, after a remodel, Meritage changed Inlet Towers' business model from pure hotel to mixed hotel/apartments/suites. As a result, the business needed significantly fewer housekeepers. In addition, where formerly it needed two housekeeping supervisors, now, it needed only one.

Olga Pawlaczyk was one of the two housekeeping supervisors at Inlet Towers. She had worked there since 2006. Bob Gross, an owner and the manager of Meritage, elected to terminate Ms. Pawlaczyk, and retain the other supervisor, Grace Laxa. Ms. Pawlaczyk was born in Poland and is a native Polish speaker. Ms. Laxa is from the Philippines and is a native Tagalog speaker.¹

Ms. Pawlaczyk was concerned that the decision to terminate her, and retain Ms. Laxa, may have been discriminatory, based on her national origin. She filed a complaint with the Human Rights Commission.²

The Commission investigated the complaint to determine whether it would need to file an accusation against Meritage. During the investigation, the Commission's investigator interviewed Mr. Gross on two occasions. Mr. Gross was asked several times why he selected Ms. Pawlaczyk, instead of Ms. Laxa, for termination. He said that he saw no significant factors that influenced his choice.³ He felt Ms. Laxa would do a better job, but was unable to articulate a reason for believing that Ms. Laxa would do a better job.⁴

On March 21, 2013, the Commission sent a subpoena *duces tecum* to Meritage. The subpoena requested "All documents relating to the employment of complainant Olga Pawlaczyk, including complainant's personnel file and any performance reviews or evaluations of complainant's job."⁵ According to the testimony of the Commission's investigator, Meritage's response to the subpoena provided only "six pages of documents related to Ms. Pawlaczyk, and fourteen pages related to Ms. Laxa."⁶ Meritage did not provide any documents related to a sting

¹ Jendrusina Aff. ¶ 21.

² Exhibit 1 at 56.

³ E.g., Exhibit 1 at 82

⁴ Exhibit 1 at 83; 88.

⁵ Exhibit 1 at 131.

⁶ Jendrusina Aff. ¶ 13. Meritage also sent 290 pages in response to the subpoena's demand that Meritage produce information about other employees. *Id.*

operation involving Ms. Pawlaczyk or any document that would indicate that Meritage suspected she was stealing tips.

On January 23, 2015, Ms. Pawlaczyk told the Commission's investigator that "I am not interested in fighting with this company anymore with no memory of what happened."⁷ She further stated "I am completely done with this problem."⁸

Based on the information gathered in the investigation, Executive Director Paula Haley determined that substantial evidence supported Ms. Pawlaczyk's allegation that her termination was discriminatory. This determination led to the issuance of an accusation against Meritage on April 17, 2015, and the subsequent referral of the dispute to the Office of Administrative Hearings for a hearing.

After the referral of the case to OAH, Elizabeth Smith, counsel for the Executive Director, propounded discovery requests on Meritage, and then arranged to inspect records at Inlet Tower's premises on July 10, 2015.⁹ After arriving at the office, Ms. Smith was directed to two folders in the top drawer of a file cabinet.¹⁰ Inside these folders were

- A memorandum from Mr. Gross. The memorandum described that Ms. Pawlaczyk was suspected of stealing tips when she inspected rooms before the housekeepers came in to clean the rooms. This came to light when a customer had left a \$20 tip in a room, then returned to the room to find the room not cleaned but the tip gone. Ms. Pawlaczyk had inspected the room. The memorandum recounted how a "sting" operation had been conducted. Tips were left in four rooms just before Ms. Pawlaczyk's inspection. The tips were taken or partially taken from the rooms before the housekeepers arrived to clean the rooms.
- Photographs of the dollar bills that had been used in the sting operation.
- A print out from the Alaska Court System's online records system (called "CourtView") showing that in 2003 Ms. Pawlaczyk had been convicted of theft.¹¹

Although Ms. Smith discovered this evidence on July 10, 2015, for the next month, the Executive Director did not take action to curtail the litigation. During this interval, the parties engaged in two time-consuming discovery disputes before OAH.

⁷ Exhibit A at 2 to Meritage's Response to Stay Request and Cross-Motion for Sanctions (Aug. 25, 2015).

⁸ *Id.*

⁹ Smith Aff. ¶¶ 3-4.

¹⁰ *Id.* ¶ 5.

¹¹ *Id.*; Exhibit 5.

First, Meritage filed a motion to compel more complete answers to interrogatories.¹² Second, Meritage noticed the deposition of Ms. Palawczyk for August 7, 2015.¹³ The Executive Director informed Meritage that Ms. Pawlaczyk would require a Polish interpreter, and would walk out of any deposition unless a Polish interpreter was provided. On July 21, 2015, Meritage filed a Motion to compel Ms. Pawlaczyk's attendance.¹⁴ The parties filed extensive briefing on both motions, and oral argument was held. On August 4, 2015, I denied both motions. With regard to the motion to compel Ms. Pawlaczyk's attendance at the deposition, the order noted that the Executive Director had agreed that Ms. Pawlaczyk would attend the deposition. The only dispute was who would pay for the interpreter. I ordered that the Executive Director pay for the interpreter.¹⁵ On August 6, 2015, Meritage re-noticed the deposition for August 14, 2015.¹⁶

During a status conference on August 11, 2015, however, Ms. Smith disclosed to me that she had discovered the potentially litigation-ending information regarding the reason for Ms. Pawlaczyk's termination. The litigation was stayed so that the information could be verified and the case dismissed without incurring additional expense.¹⁷ On August 24, the Executive Director requested an extension of the stay. On August 25, 2015, Meritage opposed extension of the stay and moved for sanctions based on the Executive Director's alleged refusal to produce Ms. Pawlaczyk for deposition. Meritage also expressed its intent to seek further discovery and attorney's fees based on the Executive Director's alleged bad faith in pursuing this case. In Meritage's view, the Accusation was in bad faith because no evidence supported the claim, and Ms. Pawlaczyk had informed the Executive Director that she was no longer interested in pursuing the claim.¹⁸

After receiving the stay, the Executive Director's staff conducted some further investigation to make sure that the contents of this file were not recent fabrications. Staff examined the electronic version of the memorandum and interviewed two of the principals of the sting operation.¹⁹ After determining that these documents were likely genuine, and that, as a

¹² Meritage's Motion and Memorandum to Compel Attendance at Deposition (July 21, 2015).

¹³ Exhibit 1 to Meritage's July 21, 2015, Motion to Compel.

¹⁴ Meritage's July 21, 2015, Motion to Compel.

¹⁵ Order Denying Motions and Requiring Party Offering Witness to Pay for Interpreter (Aug. 4, 2015).

¹⁶ Meritage's Re-Notice of Taking Deposition (Aug. 6, 2015).

¹⁷ Order Staying Proceedings Pending Investigation of Electronic Record and Extending Deadlines.

¹⁸ Meritage's Response to Stay Request and Cross-Motion for Sanctions (Aug. 25, 2015).

¹⁹ Smith Aff. ¶¶ 10-12.

consequence, Meritage could state “a legitimate, nondiscriminatory reason for its action,” the Executive Director determined that the case should be dismissed.²⁰

On October 12, 2015, the Executive Director filed a Motion for Sanctions and a Motion to Dismiss. The Motion for Sanctions sought an award of attorney’s fees and costs expended by the Commission to prosecute this case. It argued that sanctions were appropriate under AS 44.64.040(b)(1)(2) and 2 AAC 64.360(b) because, in the Director’s view, Meritage acted in bad faith by failing to produce the evidence that would have prevented the Accusation from being filed.

On October 26, 2015, Meritage opposed the Executive Director’s motion for sanctions. It asserted that its own motion for sanctions was ripe. With regard to the Director’s motion to dismiss, Meritage stated that it would agree to dismissal if neither side was awarded attorney’s fees for conducting the case, and if the Executive Director was not allowed to refile the action unless she first paid Meritage’s attorney’s fees.²¹

III. Discussion

A. Under what circumstances can the Commission sanction a party under 6 AAC 30.492(b)?

Sanctions are an extraordinary remedy. As a procedural matter, identifying the basis for the motion is very important. For a motion made under the Commission’s authority, the Commission is the final decisionmaker. For a motion made under OAH’s authority, the ALJ is the final decisionmaker.²² Therefore, the analysis of the current motions for sanctions will be strictly limited to the grounds for sanctions stated within the motion.

Meritage has moved for sanctions under 6 AAC 30.492(b), a regulation that allows the Commission to award attorney’s fees against a complainant in certain circumstances:

(b) An award of attorney's fees and costs will be made against a complainant upon a showing that he or she pursued an action not authorized by the executive director that was frivolous, unreasonable, or groundless, or that an action authorized by the executive director was based upon information furnished in bad faith by complainant.²³

²⁰ Haley Aff. ¶ 13.

²¹ Meritage’s Response to Motions to Dismiss, for Sanctions, and for Redactions (Oct. 26, 2015).

²² See *Aadland Marketing Group, Inc., v. Dep’t of Trans. and Pub. Fac.*, OAH No. 07-0709-PRO (Office of Administrative Hearings, 2007) at 1.

²³ 6 AAC 30.492(b). This is the ground for sanctions cited in both Meritage’s Response to Stay Request and Cross-Motion for Sanctions (Aug. 25, 2015) and its Response to Motions to Dismiss, for Sanctions, and for Redactions (Oct. 26, 2015).

Meritage has not moved for sanctions under the Commission's sanctioning authority found in 6 AAC 30.495 or under OAH's sanctioning authority found in AS 44.64.040(b) and 2 AAC 64.360. Therefore, the sole sanctioning authority to be considered in this motion is that found in 6 AAC 30.492(b).

B. Does Meritage's motion for sanctions state a ground for awarding attorney's fees?

The conduct that Meritage has identified as warranting sanctions was the Executive Director's alleged refusal to produce a witness for a deposition after being ordered to do so.²⁴ I have considerable doubt about the premise for Meritage's motion—although I did order that the deposition could go forward, based on the Commission's assurance that it would produce Ms. Pawlaczyk, I did not issue an order to compel. More important, I also stayed the proceedings shortly thereafter to give the Director the time to investigate whether to dismiss. Although I would agree that the Director would have had a good-faith obligation to produce the witness if I had not stayed the case, I think it likely that the stay obviated any obligation to show up at a deposition. We do not, however, need to reach the issue of whether a technical violation of an order occurred. Meritage relies exclusively on 6 AAC 30.492(b) as the basis for its motion.²⁵ This regulation applies only when a complainant has taken action not authorized by the Director or furnishes information in bad faith. It does not allow an award of fees when the Director fails to follow an order regarding attendance at a deposition. Therefore, Meritage has failed to state a ground for sanctions. Its motion is denied.

C. Can the Commission dismiss this case?

The Executive Director has moved to dismiss. Meritage has agreed that "[o]nce Meritage's sanctions motion is decided, the case is ripe for a dismissal."²⁶ Meritage's motion has now been decided, which means that both parties are in agreement that the case should be

²⁴ See Meritage's Oct. 26, 2015, Response at 3.

²⁵ The result would likely be no different if Meritage had filed for sanctions under the Commission's sanctioning authority (6 AAC 30.495) or under OAH's sanctioning authority (AS 44.64.040(b)). Both of these provisions allow a sanction to be imposed only for actual damages from actual harm. Even assuming that the Executive Director did ignore an order, the failure to comply did not cause any unnecessary expense to Meritage—indeed, it saved Meritage the cost of a deposition. Moreover, although Meritage had earlier suggested that a deposition of Ms. Pawlaczyk could have been useful in fleshing out a motion for sanctions based on the theory that this case never should have been brought in the first place, it is no longer pursuing that theory. See Meritage's Response to Motions to Dismiss, for Sanctions, and for Redactions (Oct. 26, 2015).

²⁶ *Id.*

dismissed. Under 2 AAC 64.230(c), an action may be dismissed upon the request of the agency when the party who requested the hearing consents. Therefore, this case is dismissed.²⁷

IV. Order

1. Meritage's motion for sanctions is denied.
2. This case is dismissed.

DATED this 23rd of February, 2016.

By: _____



Stephen C. Slotnick
Administrative Law Judge

²⁷

The parties dispute whether the dismissal should be with or without prejudice. Meritage cites to the Alaska Rules of Civil Procedure (which are not applicable here) to argue that an order should be entered requiring the Commission to pay Meritage's fees and costs for this action if it refiles a subsequent action. Neither party has given me sufficient research or briefing to decide whether dismissal should be with or without prejudice. Given that the Commission will likely *not* refile this case, requesting additional briefing on the subject is not worthwhile. The motion to dismiss should be granted with no specification. We note that both parties have reserved the issue of whether the dismissal is with or without prejudice. That question can be addressed if necessary should a subsequent action be filed.