ALASKA STATE COMMISSION FOR HUMAN RIGHTS
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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY, EXECUTIVE DIRECTOR, ex rel. ROBIN BLOCK, Complainant, v. CHARLIE PARELLO dba PULSE PUBLICATIONS Respondent.	)	ASCHR No. C-03-165 OAH No. 07-0665-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 Proposed Decision of May 29, 2009 is hereby ADOPTED by the Commission in its entirety.

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 24, 2009

Lester C. Lunceford, Commissioner

DATED: November 24, 2009

Karen Rhoades, Commissioner

DATED: November 24, 2009

Grace E. Merkes, Commissioner

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CERTIFICATE OF SERVICE

This is to certify that on November 25, 2009,
A copy of the foregoing was mailed
by first-class U.S. mail, postage prepaid, to:

Charlie Parello, Owner
Pulse Newspaper
P. O. Box 92896
Anchorage, AK 99509

Rebecca J. Pauli, Administrative Law Judge
Office of Administrative Hearings
State of Alaska
Department of Administration
550 W. 7th Avenue, Suite 1600
Anchorage, AK 99501

and hand-delivered to:

Stephen Koteff, Human Rights Advocate
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, AK 99501-3669

M. Anne Keene
Administrative Officer

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.* ROBIN BLOCK,	)	
Complainant,	)	
v.	)	
CHARLIE PARELLO dba PULSE PUBLICATIONS,	)	
Respondent.	)	OAH No. 07-0665-HRC ASCHR No. C-03-165

ADMINISTRATIVE LAW JUDGE'S RULING
ON OBJECTIONS TO RECOMMENDED DECISION

I. Introduction

The Recommended Decision was issued in this case on May 29, 2009. On June 15, 2009, respondent, Charlie Parello dba Pulse Publications, filed his Objections to the Recommended Decision. The complainant, Robin Block, did not file an objection.

Mr. Parello's objections have been considered and rejected. His objections focus on the "complaint's inability to establish a [*prima facie*] case of discrimination under the standards of the [*McDonnell Douglas*] test."[1] Mr. Parello's objections miss the mark. The Recommended Decision finds that Mr. Parello did not discriminate against Ms. Block by failing to comply with the provisions of the Americans With Disabilities Act (ADA). Rather, the Recommended Decision finds that Mr. Parello's decision to terminate Ms. Block was unlawful retaliation for engaging in a protected activity:

> Notwithstanding that his mixed motives apparently included an impermissible retaliatory component, Mr. Parello could escape liability if he showed that he "would have made the same decision" without the improper motive. He did not meet this burden. His vague testimony did not establish that business conditions compelled him to act at or near that

[1] Respondent's Objections To Recommended Decision at 4.

particular time. Accordingly, he is liable for the retaliatory discharge of Robin Block.[2]

Therefore, I find respondent's objections unpersuasive and decline to revise the Recommended Decision.

DATED this 18th day of June, 2009.

By: Rebecca L. Pauli
Rebecca L. Pauli
Administrative Law Judge

Certificate of Service: The undersigned certifies that on the 18th day of June, 2009, a true and correct copy of this document was mailed to the following: Charlie Parello, and Caitlin Shortell, ASCHR.

By: _____
Linda Schwass/Kim DeMoss

[2] *Paula M. Haley ex rel. Robin Block v. Charlie Parello dba Pulse Publications,* ASCHR No. C-03-165, OAH No. 07-0665-HRC, May 29, 2009 Recommended Decision at 14 (citations omitted).

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.* ROBIN BLOCK,	)	
Complainant,	)	
v.	)	
CHARLIE PARELLO dba PULSE PUBLICATIONS,	)	
Respondent.	)	OAH No. 07-0665-HRC ASCHR No. C-03-165

RECOMMENDED DECISION

I. INTRODUCTION

This case grows out of an allegation of Robin Block that her employer, a small sole proprietorship operating an advertising newspaper, failed to accommodate a disability by providing her with an appropriate parking space. Ms. Block also alleges that her employer retaliated against her when she requested accommodation and filed a complaint about the lack of accommodation with the Alaska State Commission for Human Rights (ASCHR).

This recommendation concludes that the employer is not liable for failing to accommodate Ms. Block's disability because she did not request the accommodation she desired until just before that accommodation was in fact provided. However, it concludes that Pulse Publications impermissibly retaliated against Ms. Block for seeking an accommodation and for making a complaint to the ASCHR. It recommends that Pulse Publications be ordered to refrain from retaliatory conduct in the future and that it be required to pay damages in the principal amount of $2,160.00, together with interest at 3.5 percent per annum.

II. GENERAL FACTUAL BACKGROUND

A. Procedural History

Robin Block filed a formal Complaint of Discrimination with the Alaska State Commission for Human Rights on June 17, 2003.[1] After an investigation that occupied about four and a half years, the Executive Director's representative determined on October 15, 2007, that substantial evidence supported the allegations. Conciliation was unsuccessful, and the matter was referred to this office for hearing the following month.

After a short period of discovery, Administrative Law Judge (ALJ) James Stanley conducted a hearing on March 18, 2008. Human Rights Attorney, Caitlin Shortell, under the direction of the Human Rights Advocate represented Ms. Block at the hearing; Mr. Parello represented himself. ALJ Stanley conducted an informal hearing, working with the self-represented respondent to ensure he could present his case and, at the same time, extending procedural latitude to the counsel for the complainant.[2]

Some months after the hearing, ALJ Stanley resigned from the Office of Administrative Hearings without completing a recommended decision. On February 12, 2009, the Chief Administrative Law Judge reassigned the case to the undersigned. This recommended decision has been prepared based on the digital recording of the hearing and the exhibits admitted at the hearing.[3]

B. Sequence of Events

Robin Block's right leg was amputated four inches above the knee in 1971 due to injuries suffered in a traffic accident.[4] After working in a number of jobs, she began receiving social

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1 Exhibit A, p 3. Ms. Block had informally contacted the commission staff a few days previously. *Id.* at 1-2.

2 Counsel was permitted an unusual procedural sequence in adopting Mr. Parello as a witness at the end of the case but not as part of rebuttal, as well as in the offering of certain exhibits. These accommodations ensured a complete record and did not prejudice the respondent.

In a more significant effort to ensure that the interests of justice would not be affected by errors or oversights, the Office of Administrative Hearings has *sua sponte* reformed the name of the captioned respondent to ensure that any orders or awards entered in the case would not, on account of an error by counsel, be entered against a nonexistent entity and thus be of no value. This adjustment is explained in the Notice of Intent to Change Caption (April 22, 2009).

3 The Office of Administrative Hearings regrets the delay of a year in completing a decision in this matter, and apologizes to the parties for that portion of the approximately six years it has taken to bring this matter to resolution.

4 Direct exam of Block.

security disability payments in 1995; after that time, she could not work more than a certain amount and still receive full benefits.[5]

In recent years, Ms. Block has been using a prosthesis.[6] The prosthesis can be uncomfortable and she sometimes takes it off when working at a desk. She needs to have it on when walking, however. She does quite well when walking on level pavement and floors, but uneven ground, stairs, and ice can be treacherous. She has handicapped license plates.[7]

In about 2000, Ms. Block began doing irregular work for Charlie Parello's sole proprietorship, Pulse Publications. At first she generally worked in the warehouse stuffing flyers, although she may have done some office work as well in 2001.[8] The warehouse work was difficult for her because it involved either picking up heavy bundles or asking others to do that for her.[9] The work was quite infrequent, amounting to about one shift per month.[10]

In October of 2002, Ms. Block applied for a job in the Pulse Publications business office. She interviewed for the job with Mr. Parello. When she drove up to the office for the interview, she fell in the parking lot as she got out of her car. Mr. Parello, who was in the lot at the time, helped her up.[11]

Ms. Block got the job. It entailed arranging sales calls and doing data entry a few hours a day, four days per week. The total weekly hours were about fifteen on average.[12] She did the work well and received raises in February and April of 2003.[13] Her final pay rate was $9.00 per hour.[14]

The location for this job was 7645 King Street in Anchorage, a U-shaped building located in an industrial park managed by PTP Management, Inc. Pulse Publications was a tenant in the building. The building had many tenants, with Pulse occupying only a small section. At the time of Ms. Block's employment, 7645 King Street had several handicapped parking spaces, but they were located inside the "U" of the building. The entrance to the Pulse office was on the

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5 Direct and cross-exam of Block.

6 Direct exam of Block. The picture in Ex. 14 shows prostheses similar to the one she uses.

7 Direct exam of Block.

8 Direct and cross-exam of Block.

9 Direct exam of Block; direct testimony of Parello.

10 Direct exam of Block.

11 *Id.*

12 *Id.*; Ex. 10.

13 *See* Ex. 10.

14 *Id.* at 12-14.

outside of the "U," and to reach it from these spaces one had to walk around the outside of the building, the equivalent of a city block. There was no sidewalk for this walk.[15]

Employees without any disability parked their cars on the street and walked to the Pulse office.[16] Closer to the office, directly in front of the entrance, was paved parking with space for about three cars. None of them was designated for handicapped use at the time. These spaces were very often unusable because customers of the neighboring business—a marine electronics firm—would pull their boat trailers across the spaces.[17] It did not concern Mr. Parello that the boats were parked in front.[18] To facilitate Ms. Block's access to the office, he permitted her to park in front of a loading bay door, from which she could use a side door to the office.[19] With this arrangement, it was necessary for her car to move whenever the loading bay door was needed for a delivery. This happened two or three times a week.[20] If Ms. Block moved the car herself, she might need to put on her prosthesis to go out and move it, and the process of putting on the prosthesis in front of others could be embarrassing since the prosthesis reaches to the groin area.[21] Alternatively, Mr. Parello or another employee could move her car, and this occurred with some frequency.[22] Eventually—Ms. Block did not specify in her testimony when this occurred—Ms. Block decided to prohibit the practice of letting others move her car, because, among other things, it exposed her private belongings to others.[23] Another difficulty with the bay door parking was that Ms. Block could herself be blocked in by other vehicles on occasion.[24]

Ms. Block asserted at the 2008 hearing that she specifically requested of Mr. Parello—more than once—that he arrange a handicapped parking space in front of the building.[25] In so

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15 ALJ exam and second redirect exam of Frances Marin (property manager). Alternatively, it was apparently possible to walk from these spaces to the Pulse office by going through the Pulse warehouse. This involved negotiating a steep flight of outdoor wooden stairs, which were treacherous for Ms. Block, particularly in winter. Direct exam of Block.

16 Ex. 6 at 3.

17 Direct exam of Block.

18 Ex. 6 at 3.

19 Direct and ALJ exam of Block; *see also* Ex. 2 at 2 ("where she normally parked").

20 Cross-exam of Block.

21 Direct exam of Block.

22 *E.g.*, Ex. 6 at 3.

23 Direct exam of Block.

24 *Id.*

25 *Id.*

testifying, she did not put any time frame on the requests. Mr. Parello has consistently and firmly denied that she made any such request to him prior to June 11, 2003, a date of special significance that will be discussed below.[26] Significantly, the early documentation of Ms. Block's 2003 complaint to the Human Rights Commission, there is no indication that she alleged at that time, closer to the events in question, that she had made prior requests for a designated handicapped space.[27] In light of this evidence, I find that, most likely, Ms. Block's recollection in 2008 was incorrect and in fact she had not made a specific request for a designated space prior to June 11, 2003. On the other hand, Mr. Parello was aware that Ms. Block required special parking accommodation of some kind. The loading bay parking was the solution he devised for that need.[28]

Early in the morning of June 11, 2003, Ms. Block was unable to park in front of the building because a boat was blocking the spaces.[29] She parked in front of the loading bay door.[30] Mr. Parello was not at work at the time.[31] On her own initiative, she called PTP Management and requested that a handicapped space be designated in front of the building.[32] PTP indicated they would take care of it.[33] When Mr. Parello arrived at work, she told him what she had done.[34] Mr. Parello became angry, asserted that she did not need the handicapped space, and told her not to contact PTP again.[35]

Fearing that she would be fired over the matter, Ms. Block called the Human Rights Commission on June 12, 2003.[36] She made a complaint regarding her boss's unwillingness to support handicapped parking in front of the office.[37] She informed Mr. Parello on June 12 that she had contacted the commission.[38]

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26 *E.g.,* cross-exam of Parello; Ex. 5 at 5, 6; Ex. 6 at 3.

27 Ex. A at 1-8.

28 Cross-exam of Parello.

29 ALJ exam of Block upon recall.

30 Ex. 6 at 3.

31 ALJ exam of Block upon recall.

32 *Id.*; direct exam of Block; cross-exam of Marin.

33 Direct exam of Block.

34 Direct exam of Block; ALJ exam of Block upon recall.

35 Ex. 11 (record of second and third phone calls to PTP); direct exam of Marin; ALJ voir dire of Marin re Ex. 11 during cross-exam of Marin; ALJ exam of Block upon recall.

36 Ex. 11; Ex. A at 1; direct exam of Block; ALJ exam of Block on recall.

37 Ex. A at 1-2.

38 Direct exam of Block; Ex. A at 3 (sworn complaint of June 17, 2003).

On June 13, 2003, Mr. Parello invited his three office workers (Ms. Block, Tiffany Tellef, and Ryan Katchatag) to lunch and told them he was laying them off, effective in one week.[39] He told Ms. Block that she could come in one day a month to stuff flyers—the job she had done before which was difficult for her to perform—but she did not accept. The following week, on June 17, Mr. Parello told Ms. Block he would pay her for the rest of the week and she could leave immediately.[40] This was the end of her employment at Pulse Publications.[41]

At the time of the June 13 meeting, Mr. Parello felt that Ryan Katchatag was not "working out" as an employee, and Katchatag was planning to leave the company anyway.[42] As for Tiffany Tellef, although she was ostensibly laid off on June 13 she continued to work for Pulse for several more months, but with greatly reduced hours. Thus, while she had worked between 20 and 30 hours per week in the eight weeks preceding the layoff, her average over the course of July through October of 2003 was below two hours per week.[43] This residual work appears to have been primarily or entirely work in the warehouse rather than in the office.[44]

Mr. Parello later explained that he ended the work of his office sales force for the following reason:

> I looked at all the new advertising the office workers were bringing in comp[ared] to their salaries paid out. It was a losing situation.
>
> With advertising slow, Ryan leaving, not doing well and planning to leave, Tiffany not wanting to pass out information, and me not wanting to go on sales calls, there was no reason for Robin to make appointments for someone anymore. I could take on the rest of her duties.[45]

As he explained it, he had been thinking about this step "a while" before he took it.[46]

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39 Direct exam of Block.

40 *Id.* Mr. Parello appears to have honored the promise to pay through the end of the week. Ex. 10 at 14.

41 Direct exam of Block.

42 Direct testimony of Parello.

43 Ex. 8. The pay period ending July 2, 2003 has been excluded from these figures. It would have encompassed the possible severance week of June 16-22, and the 35.5 hours recorded during the two-week pay period may be largely or entirely accounted for by the severance week.

44 Since Ms. Block's June 2003 complaint to ASCHR was not investigated by ASCHR staff until two years later, no contemporaneous investigation was made of what Ms. Tellef was doing for Pulse in her last four months there. The witness statements beginning in 2005 are essentially consistent in describing her work during this final period as warehouse work (*e.g.*, Ex. A at 13, Ex. 2, 3, 4, cross-exam of Parello). Consistent with this, ASCHR Investigator Nanette Gay concluded on October 15, 2007 that Tellef was employed for several more months "to do physical work." Ex. B at 2.

45 Ex. 2 at 2 (letter from Parello to investigator, June 28, 2005).

46 Ex. A at 13.

Mr. Parello did not (and does not, to this day) believe Robin Block needed a handicapped parking space while she was working at Pulse,[47] and he did not request one for her from PTP Management.[48] Nonetheless, PTP striped in a handicapped space in front of the Pulse office very soon after Ms. Block's request (although apparently this was done after her employment ended). Pulse was charged nothing for the alteration.[49]

After leaving the Pulse job, Robin Block looked for work until October 13, 2003, but she was unsuccessful.[50] The search consisted of applying for three or four jobs over the course of four months, and making thrice-weekly calls to Manpower, which had employed her in the past. There is no persuasive evidence that she sought work actively after October 13, and there is some evidence that she did not; I find that she discontinued active job-seeking on October 13 for at least the remainder of 2003.[51] She essentially remained unemployed until February of 2005, when she obtained a good position with For the Kids Foundation, Inc.[52] The job with the foundation replaced her income from Pulse until she stopped working altogether to attend to family obligations in September of 2005.

III. DISCUSSION

A. Failure to accommodate disability

The first count of the Amended Complaint alleges a violation of AS 18.80.220(a)(1), a provision of Alaska's Human Rights law, because Pulse failed to provide a reasonable accommodation for Ms. Block's physical limitations as required by that provision and the Americans with Disabilities Act of 1990 (ADA). The reasonable accommodation that allegedly was required, but not provided, was a designated disabled parking space in front of the Pulse office.[53]

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47 Cross-exam of Parello.

48 Direct exam of Marin.

49 *Id.*

50 Direct exam of Block.

51 Through use of a calendar on which she had logged her efforts, the complainant showed that she applied for various jobs and made calls to Manpower three times a week until October 13, 2003. The calendar is blank after that date, and when questioned by counsel as to whether she had continued the Manpower calls, she said "I don't know." The lack of entries on the calendar on which she had routinely been logging her job-finding efforts is some evidence that those efforts discontinued as of October 13, 2003. Ms. Block was asked no questions about job applications later than October 13, 2003.

52 Direct exam of Block.

53 Amended Complaint at ¶¶ 15, 21, 22.

1. Violation of the ADA is Unlawful Discrimination Under AS 18.80.220(a)(1)

AS 18 18.220(a)(1) makes it unlawful to "discriminate against a person in . . . a privilege of employment . . . because of...physical...disability." In this case, the complaint alleges that Pulse violated AS 18.80.220(a)(1) because it discriminated against Ms. Block by failing to comply with the provisions of the Americans With Disabilities Act (ADA). The Alaska Supreme Court has decided that violation of the ADA constitutes discrimination for purposes of AS 18.80.220.[54]

2. Ms. Block Did Require a Designated Space

There is no dispute in this case that Ms. Block had a significant disability affecting her ability to walk safely from a parking space to the Pulse office. Mr. Parello recognized that she needed an accommodation and provided one, the accommodation being permission to park at the loading bay. However, evidence showed that this arrangement resulted in Ms. Block being obstructed from leaving her space at the end of her day, and that it also involved either having to move her car herself during some days—which was inconvenient and potentially embarrassing in light of her disability—or having others move her car for her. She came to find the latter unacceptable because she reasonably regarded the interior of her own vehicle as private. The evidence also showed that providing a regular, designated handicapped space in front of the office was extraordinarily easy; it could be arranged almost immediately by a single call to the property managers, who readily appreciated their obligation to provide it and charged nothing for the service. Under these circumstances, the designated space was a reasonable accommodation.[55]

3. Pulse Is Not Liable for Failing to Provide the Designated Space

The general rule in ADA caselaw is that the complaining party must request a particular accommodation before an employer can become liable for failing to provide it. For example, in *Mole v. Buckhorn Rubber Products, Inc.*,[56] Ms. Mole did not request the accommodation she

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54 *See Moody-Herrera v. State, Department of Natural Resources*, 967 P.2d 79, 86-87 (Alaska 1998).

55 In federal ADA caselaw, accommodations are not reasonable if they are not available or if they would impose an undue hardship on the employer. *See id.* at 88 & n. 42. In this case, the accommodation was clearly available and imposed essentially no hardship.

56 165 F.3d 1212 (8th Cir. 1999).

alleged should have been provided until the day of her termination. The Court of Appeals upheld summary judgment against Ms. Mole, observing:

> Only Mole could accurately identify the need for accommodations specific to her job and workplace. Mole cannot "expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it."[57]

Likewise, in *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*,[58] another federal appellate court found a termination for absenteeism to be lawful where the plaintiff had never requested reasonable accommodation, despite repeated warnings about excessive absenteeism; the court observed that "the standard rule is that a plaintiff must normally request an accommodation before liability under the ADA attaches."[59] The request needs to be "sufficiently direct and specific" to put the employer on notice of the needed step.[60]

There are occasional exceptions to the general rule that ADA liability for failure to accommodate only attaches when the accommodation has been requested. This can be true where the disability (such as certain kinds of mental disabilities) prevents the employee from asking for the accommodation;[61] that circumstance does not apply in this case. It can also be true where the employee's need for the accommodation is obvious.[62]

In this case, as discussed in Part II, I simply do not believe Ms. Block's vague, recently-articulated claim that she requested a designated space prior to June 11, 2003. She made no such claim closer to the time of the events in question, when her memory would have been fresher. Instead, I have found that she first requested the space on June 11, 2003. The precise accommodation that she requested was installed promptly after she made the request. To be sure, it was not Mr. Parello who brought that prompt accommodation about, but nonetheless it is not possible to find that the accommodation was denied once it was requested.

Since Ms. Block did not request the designated space prior to June 11, the question becomes whether her need for it was so obvious that Pulse may be made liable for the lack of a designated space in the preceding weeks and months despite the lack of a request. In a general

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57 *Id.* at 1218 (quoting *Ferry v. Roosevelt Bank*, 883 F. Supp. 435, 441 (E.D. Mo. 1995).

58 201 F.3d 894 (7th Cir. 2000).

59 *Id.* at 899 (the cited holding is an alternative holding, that is, one of two alternative bases for the result reached in the case).

60 *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001) (quoting prior authority).

61 *See, e.g., id.* at 261 n.7.

62 *See id.*

sense, Ms. Block's need for accommodation was indeed obvious; this is an employee whose difficulty in walking was graphically demonstrated for Mr. Parello on the very day she came to interview for the job in question, when she fell in the parking lot. However, Mr. Parello did provide an accommodation: he permitted Ms. Block to park at the loading bay, right next to the side door to the office. Ms. Block's eventual view that this was not a satisfactory solution was reasonable, but the question for purposes of liability is whether the employer, not Ms. Block, should have come to that realization without any prompting from Ms. Block.

ADA caselaw recognizes that "both parties bear responsibility for determining what accommodation is necessary," a joint process that "requires a great deal of communication."[63] If communication has been imperfect, one must "look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary."[64] In this case, there does seem to have been some communication that led to the initial accommodation—permission to park at the loading bay. There is no evidence that Mr. Parello closed off that communication or forbade Ms. Block from addressing the issue further. Instead, the evidence indicates that Ms. Block was able to communicate her needs—indeed, she did so on June 11. To the extent that she perceived a need for a designated parking space prior to that date, however, she did not "help the other party determine what specific accommodations are necessary." In the absence of that help, the record does not create a convincing picture that the problems with the loading bay parking were so obvious or overwhelming that Mr. Parello should have picked up on them himself prior to June 11. In this context, one must bear in mind that Ms. Block was a part-time worker in a business with a number of employees, and that she worked in her position only a relatively short time.

Because Ms. Block, under the circumstances, needed to request a designated space before her employer became obligated to arrange for it, because she did not make the request until June 11, 2003, and because the space was installed promptly after she requested it, Pulse did not violate the ADA or the Alaska Human Rights law by failing to provide a designated parking space as a reasonable accommodation for Ms. Block's disability.

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63 *Bultemeyer v. Fort Wayne Community Schools,* 100 F.3d 1281, 1285 (7th Cir. 1996).

64 *Id.*

B. Retaliation

It is unlawful for an employer to discriminate based either on a person's filing of a complaint with the ASCHR or on a person's opposition to a practice forbidden under Alaska's human rights law.[65] Both of these types of retaliation were possible on the facts of this case: one could theorize that Ms. Block's discharge on June 13, 2003, was retaliation for her complaint to the ASCHR the day before, or that it was retaliation for her demand for additional reasonable accommodation, which she had made two days earlier. In this case, there is no direct evidence of either type of retaliation—that is, no witness or document directly attests to an improper, retaliatory motive for the discharge.

When, as here, there is no direct evidence of retaliatory intent, the courts apply a three-part burden shifting analysis. This test is known as the *McDonnell Douglas* test, named after the case in which it was first articulated.[66] Initially designed for other contexts, the *McDonnell Douglas* test has been adapted to the retaliation context as follows:[67]

First, the complainant must establish (1) the complainant engaged in a protected activity; (2) the complainant suffered an adverse employment action, such as termination; and (3) there was a potential causal link between the protected activity and the employer's action.[68] The last element entails bringing forward evidence from which a reasonable trier of fact could conclude that the employer was aware of the prior protected activity, coupled with evidence (a showing of proximity in time between the protected activity and the adverse employment will suffice) from which causation could be inferred.[69]

Once a *prima facie* case of retaliation is established, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for the employment action. To satisfy its burden, the employer "need only produce admissible evidence which would allow the trier of fact

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65 AS 18.80.220(a)(4).

66 *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Alaska adopted the *McDonnell Douglas* test in *Brown v. Wood,* 575 P.2d 760, 770 (Alaska 1978).

67 *VECO, Inc. v. Rosebrock,* 970 P.2d 906, 918-19 (Alaska 1999); *Raad v. Alaska State Commission for Human Rights,* 86 P.3d 899, 905 (Alaska 2004).

68 *Raad v. ASCHR,* 86 P.3d at 905.

69 *Id.*; *VECO,* 970 P.2d at 919; *Raad v. Fairbanks North Star Borough Sch. Dist.,* 323 F.3d 1185,1196-97 (9th Cir. 2003)(cited with approval in *Raad v. ASCHR,* 86 P.3d at 905 n.25).

rationally to conclude that the employment decision had not been motivated by [retaliatory] animus."[70] The reason must be one that existed at the time the employment decision was made.[71]

If the employer meets this burden, the burden shifts back to the complainant to show that discriminatory reasons were a more likely motive for the employer's action than the reason offered by the employer. This is ordinarily done by showing the employers' reason or reasons to be pretextual.[72] There are a number of ways to prove pretext.[73] In the absence of direct evidence, complainant could establish pretext by showing such internal "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action" that they are unworthy of credence.[74]

A special situation, of particular importance to this case, is presented when the motives for the adverse employment action are a mix of proper and improper considerations. It is not necessary for the complainant to prove that the employer's explanation was wholly pretextual—that is, that it played no role at all. Instead, the employee will prevail on a retaliation claim if the evidence as a whole indicates that the improper, retaliatory motive was "a motivating factor in the decision."[75] In this mixed-motive situation, the employer may avoid liability by showing that "it would have made the same decision" even if it had not allowed the improper motive to play a role.[76]

Let us now apply this framework to the present case. Ms. Block plainly made out a *prima facie* case. Regarding the first element—that the complainant engaged in a protected activity—Ms. Block did two protected things prior to her discharge: she raised the issue of a further accommodation with her employer,[77] and she made a complaint on the subject of accommodation to the ASCHR. Regarding the second element, the termination of her

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70 *Raad v. ASCHR,* 86 P.3d at 905 (quoting prior authority).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1250 (10th Cir. 2002); *see also Raad v. FNSBS,* 323 F.3d at 1194.

75 *VECO*, 970 P.2d at 920.

76 This principle was laid out in a federal Title VII case, *Price Waterhouse v. Hopkins,* 490 U.S. 228, 244-45 & n.10 (1989), which was later discussed with approval as a guide for Alaska human rights cases by the Alaska Supreme Court in *VECO*, 970 P.2d at 920-21.

77 This is a reference to her bringing her concern to Mr. Parello on the morning of June 11. It is not clear that the related, but separate, act of unilaterally calling PTP without consulting her boss beforehand was a protected activity.

employment qualifies as an adverse employment action. As to the third element, a potential causal link between the protected activity and the adverse action is established by extremely close temporal proximity: the discharge occurred just two days after she took her request for a designated space to her employer, and one day after she informed him that she had made a complaint to the ASCHR.

The burden then shifts to Pulse to "produce admissible evidence" of a legitimate, nonretaliatory motive for the discharge. Pulse has done this. Mr. Parello's written explanation is admissible, and in that explanation he attributes the discharge to, in essence, a business decision that maintaining an office staff was not worth the money he was spending to do so. The burden then returns to complainant to show either that this explanation is entirely pretextual or that retaliation was at least "a motivating factor" in the discharge.

In this case, the evidence points to a mixed motive. The action Mr. Parello took on June 13 permanently ended the office-staff component of Pulse's business. While the commission staff attempted to prove that Pulse promptly brought one of the employees, Tiffany Tellef, back to work to continue the tasks that had previously been assigned to Ms. Block, it failed in this effort: Mr. Parello was able to show that Ms. Tellef's hours were cut back to a tiny fraction of their prior level, attributable entirely to work in the warehouse. Thus, there seems to have been some substance to Mr. Parello's calculation that Pulse could function without the expense of an office staff. Mr. Parello genuinely ended that component of the business when he terminated Ms. Block. On the other hand, there is a remarkable correlation in timing: Ms. Block complained about the lack of a designated space on June 11, there is undisputed evidence that Mr. Parello was angry, and Ms. Block complained to the commission on June 12; the very next day, these events were followed by the discharge. This timing is enormously suggestive of a relationship between the events and her discharge. Mr. Parello never offered an explanation of why it was that particular day, right after the confrontation over parking, that he reached the decision to fundamentally reorient his business, something he had been contemplating for some time. Moreover, he had only recently had a more positive view of Ms. Block's economic value to the business, having given her a raise two months earlier. It seems most likely that on June 11 or 12 Mr. Parello became fed up with Ms. Block for reasons related to her accommodation request, and he moved forward immediately with a plan he had up to then only been mulling

over. Thus, irritation related to her request or the ASCHR complaint, or both, was the catalyst the pushed him to act.[78]

Notwithstanding that his mixed motives apparently included an impermissible retaliatory component, Mr. Parello could escape liability if he showed that he "would have made the same decision" without the improper motive.[79] He did not meet this burden. His vague testimony did not establish that business conditions compelled him to act at or near that particular time. Accordingly, he is liable for the retaliatory discharge of Robin Block.

C. Remedies

1. Damages--Principal

Alaska Human Rights law provides that "if the commission finds that a person against whom a complaint was filed has engaged in the discriminatory conduct alleged in the complaint, . . . [i]n a case involving discrimination in . . . employment, the commission may order any appropriate relief, including but not limited to, the hiring, reinstatement or upgrading of an employee with or without back pay..."[80] In an interpretive regulation, the Commission construed this statute to authorize, among other things, "any legal or equitable relief . . . which reasonably compensates the complainant . . . ."[81]

In this case, the Executive Director seeks back pay for Ms. Block from the date of her termination until she was employed at ARC of Anchorage in 2005. The general principal for back pay damages is that they should ordinarily be awarded where needed to put the claimant in the position he or she would have been but for discriminatory or retaliatory treatment.[82] Nonetheless, victims of unlawful employment action are required to mitigate their damages by

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78 An additional candidate for a motive might be that Mr. Parello was angry that Ms. Block bypassed him and went to PTP directly. However, neither side has contended that this was a motive for the discharge.

79 *Price Waterhouse,* 490 U.S. at 244-45

80 AS 18.80.130(a). The version of AS 18.80.130(a) that applies to this case is the version in effect prior to amendments in 2006. *See* § 14, ch. 63 SLA 2006. The quoted language has not changed, however.

81 6 AAC 30.480(b) [prior to 2007 amendment]. The earlier version of this regulation is quoted because it is the interpretation of the pre-2006 statute that is relevant to this case. The quoted language has not changed significantly, however.

82 *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975). *Albemarle* interprets Title VII of the federal Civil Rights Act. Alaska's Human Rights Law is modeled on that act, and federal cases interpreting it are considered helpful in interpreting the parallel Alaska law. *Wondzell v. Alaska Wood Products, Inc.,* 583 P.2d 860, 862-63 (Alaska 1978).

seeking and accepting alternative employment.[83] The issue of mitigation is generally viewed as an affirmative defense with the burden of proof falling on the employer; that is, the employee is assumed to have met this requirement unless the preponderance of the evidence shows otherwise. Classically, this requires proof that suitable work was available in the marketplace and that the employee did not make adequate efforts to secure it.[84] However, under the most common interpretation of the mitigation requirement, when the evidence shows that the employee "failed to pursue employment at all," the employer does not also have to establish the availability of substantially comparable employment."[85]

Here, there is no evidence regarding the amount of comparable work available in the marketplace. Ms. Block made a showing that for a few months, until October 13, 2003, she sought other employment to some degree (the evidence suggests that she devoted no more than an hour or two a week to the effort). At that point, the evidence indicates that she discontinued her job hunting for some time. She may have resumed it in some fashion at some later date, because she did later obtain another job. At the same time, the longer the time after the June layoffs the more implausible it becomes that Pulse would have continued to employ office workers even if there had not been a confrontation over parking.

The statute gives the commission broad discretion to fashion an "any appropriate" remedy.[86] Under the circumstances, the fairest approach seems to be to compensate Ms. Block for lost income so long as she was making some effort to find alternative employment, but not after she stopped doing so. This accords with the mainstream approach to mitigation issues in employment rights cases: so long as the employee is making some effort to find work, the employer cannot escape liability based on failure to mitigate unless the employer shows that alternative employment was available in the marketplace. However, if the preponderance of the evidence shows the employee is not seeking work at all, the employee is deemed not to be mitigating damages even if there is no evidence about the availability of alternative work.[87]

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83 *See, e.g., Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 53 (2d Cir. 1998). In a statutory change that is too recent to be directly applicable to Ms. Block's case, the Alaska Legislature has codified this longstanding principle into AS 18.80.130(a)(1) ("an order for back pay or front pay must be reduced by the amount the employee could have earned or could earn by making reasonably diligent efforts to obtain similar employment"). See §§ 6-8 and 14, ch. 63 SLA 2006.

84 *Greenway,* 143 F.3d at 53.

85 *Greenway,* 143 F.3d at 54.

86 AS 18.80.130(a)(1) (the quoted language appears in both the pre- and post-2006 versions of the statute).

87 *See Greenway, supra.*

The last week for which Ms. Block was paid was the week of June 16-22, 2003.[88] There were sixteen work weeks from the end of that week until Ms. Block stopped looking for work on October 13. Using her average hours per week (15) and her final pay rate ($9.00), the lost wages are 16 x (9 x 15) = 16 x 135 = $2160.00.

2. Damages—Interest

At the time the complaint was filed in this case, the commission had general statutory authority to order interest on awards under the statute's authorization to order "any appropriate relief."[89] The commission had further addressed interest in a regulation, 6 AAC 30.480(b), which at that time provided for an interest rate of 10.5 percent per annum.[90] The Alaska Supreme Court reviewed this version of the regulation in *Pyramid Printing Co. v. ASCHR*,[91] holding that in the economic climate prevailing in 2003 (a low-interest environment similar to today's), the 10.5 percent rate was punitive and could not be imposed. The court remanded to the commission to choose "any reasonable rate," but suggested that a rate calculation using the 12th Federal Reserve District discount rate plus an appropriate surcharge (that is, a calculation in keeping with AS 09.30.070(a)) would be reasonable.[92] In late 2004, in a regulatory amendment that may not be strictly applicable to this case since it post-dates the complaint, the commission changed 6 AAC 30.480 to provide for interest at three percentage points above the 12th Federal Reserve District discount rate as found in AS 09.30.070(a).[93] In a statute that was expressly made inapplicable to complaints filed before September 13, 2006, the legislature, in effect, approved the commission's choice of the AS 09.30.070(a) method.[94]

To the extent that it has discretion to choose a rate methodology, the commission should choose the one it has selected as a matter of policy in its recent regulatory change, that is, the one set out in AS 09.30.070(a). That provision states that "the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points

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88 The undisputed testimony was that Mr. Parello paid Ms. Block for the full week after telling her on June 17 to take the rest of the week off, and this is borne out by Ex. 10, p. 14. In its illustrative damages calculation (found in the record at Ex. 15, an unadmitted exhibit used solely for argument), the staff seems to have overlooked this extra week of pay actually received when it calculated lost earnings in the second quarter of 2003.

89 AS 18.80.130(a)(1) (pre-2006 version).

90 Alaska Admin. Code, Reg. 91.

91 153 P.3d 994, 1001-1002 (Alaska 2007).

92 *Id.* at n.31.

93 *See id.* at n.21; Alaska Admin. Code, Reg. 172.

94 §§ 6-8 and 14, ch. 63 SLA 2006, amending AS 18.80.130.

above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered . . . ." The discount rate in effect on January 2, 2009 was 0.5 percent making the applicable interest rate 3.5 percent for damages awarded in this case.[95]

The starting date for interest calculated under AS 09.30.070(a) is ordinarily the date on which the defendant or respondent "received written notification that an injury has occurred and that a claim may be brought."[96] In this case, the Executive Director has offered no evidence that Pulse received *written* notification of this claim until the Determination issued on October 15, 2007.[97] Interest should therefore be assessed from that date. Interest assessed in accordance with AS 09.30.070 is simple, not compound, interest.[98]

Applying these concepts, the interest on the $2160.00 in principle damages in this case has accrued since October 15, 2007 at $75.60 per year, or 20.7 cents per day. The amount owing as of May 15, 2009 is $2160.00 in principle and $119.51 in interest, for a total as of that date of $2,279.51.

3. Other Relief

The commission is required by statute to order the respondent to refrain from engaging in any discriminatory conduct he has been found to be engaged in.[99] Here, the respondent has been found to have discriminated against an employee based on her filing of a complaint with the ASCHR and her opposition to a practice forbidden under Alaska's human rights law. The respondent must be ordered not to engage in such retaliation in the future.

The commission has discretion to order a wide range of other relief, including imposition of conditions on the respondent's future business conduct. The only relief other than damages, interest, and an order to desist that the Executive Director has advocated in this case is an order that Mr. Parello receive training specific to disability discrimination and accommodation. However, no such order for training would be appropriate if the commission accepts the finding

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95 *See http://www.state.ak.us/courts/forms/adm-505.pdf.*

96 AS 09.30.070(b). Note that the 2006 amendments to AS 18.80.130 made the whole of AS 09.30.070, including this provision, applicable to ASCHR orders. This should remove any doubt as to whether state policy is to apply interest from the date of written notice or from some earlier date.

97 The Determination was offered by respondent and is found at Exhibit B. In seeking to determine the date of *written* notice to the respondent, the undersigned is somewhat handicapped by the limited written record the staff chose to submit at the hearing.

98 *See Alyeska Pipeline Serv. Co. v. Anderson,* 669 P.2d 956, 956 (Alaska 1983).

99 AS 18.80.130(a) (the requirement, with minor linguistic adjustments, appears in both the pre- and post-2006 versions of the statute).

in this recommendation that Pulse did not discriminate based on disability and did not commit a failure-to-accommodate violation, but rather committed only a retaliation violation. It is unlikely that training programs exist to instruct employers in how not to retaliate against their employees.

The impression given by the testimony in this case is that Pulse Newspapers was, and to the extent that it still exists it remains, a very small business operating with a tiny payroll. It is likely that having to pay an award of over $2000 will make a substantial impression on Mr. Parello and will act as a substantial deterrent against ever repeating the mistake of retaliating against an employee for requesting an accommodation or for making a complaint to the ASCHR.

IV. RECOMMENDATION

Based on the reasoning and authorities set forth above, I recommend that the Alaska State Commission for Human Rights enter an order requiring respondent to pay Robin Block damages in the principal amount of $2160.00, together with simple interest from October 15, 2007 at 3.5 percent per annum ($2,279.51 as of May 15, 2009 plus 20.7 cents per day for each additional day the principal amount remains unpaid). I further recommend that respondent be ordered to refrain from retaliating against any employee for requesting an accommodation or for making a complaint to the Alaska State Commission for Human Rights.

DATED at Anchorage, Alaska this 29th day of May, 2009.

Rebecca L. Pauli
Administrative Law Judge

Certificate of Service: The Undersigned certifies that on the 29th day of May, 2009, a true and correct copy of this document was emailed and mailed by certified mail, return receipt requested, to the following: Caitlin Shortell, Human Rights Attorney; Charlie Parello.

By: Linda Schwass/Kimberly DeMoss