

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION)
 FOR HUMAN RIGHTS, PAULA M.)
 HALEY, EXECUTIVE DIRECTOR,)
ex rel., CONNOR CARLE, SYDNEY)
 PETERSON, BASHKIM HETEMI,)
 ROBIN BURGESS and ANTHONY)
 SHEPPARD)

Complainants,

v.

SULLIVAN'S OF ALASKA, INC.)
 d/b/a SULLIVAN'S STEAKHOUSE,)

Respondent.

ASCHR No. J-12-005, J-12-192,
 J-12-193
 OAH No. 14-2059-HRC

FINAL ORDER

A Proposed Order was issued by the Commission on March 8, 2018. No objections to the order were filed. In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners hereby ADOPT the proposed order in the entirety.

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.

RECEIVED
 HUMAN RIGHTS COMMISSION

MAY 8 2018

VIA: 4/12 TIME: 9:35 BY: CRB

FINAL ORDER – Page 1

ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.

Hearing Unit

Calendared

Scanned

5/8/18

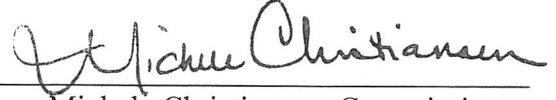
IT IS SO ORDERED.

DATED: May 8, 2018



Christa Bruce-Kotrc, Commissioner

DATED: May 8, 2018



Michele Christiansen, Commissioner

DATED: May 8, 2018



Brandon Nakasato, Commissioner

FINAL ORDER – Page 2

ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.

CERTIFICATE OF SERVICE

I certify that on May 8, 2018, a true and correct copy of the foregoing **Proposed Order** was hand delivered to:

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

and mailed by first-class U.S. mail, postage prepaid and emailed to:

Respondent or Respondent's Representative
W. Sherman Ernouf
Law Offices of Ernouf & Coffey
P.O. Box 212314
Anchorage, AK 99508
Email: sernouf@eclawfirm.org

and mailed by first-class U.S. mail, postage prepaid, 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

FINAL ORDER – Page 3

ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.

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

Marti Buscaglia, Executive Director, Alaska)
State Commission for Human Rights *ex rel.*)
CONNOR CARLE, SYDNEY PETERSON,)
BASHKIM HETEMI, ROBIN BURGESS and)
ANTHONY SHEPPARD,)

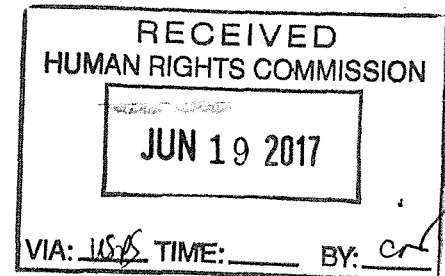
Complainant,)

v.)

SULLIVAN'S OF ALASKA, INC. d/b/a)
SULLIVAN'S STEAKHOUSE)

Respondent.)

OAH No. 14-2059-HRC
ASCHR Nos. J-12-005
J-12-192
J-12-193



RECOMMENDED REMEDIAL ORDER

I. Introduction

In a Recommended Decision dated June 14, 2016, the Administrative Law Judge determined that the five complainants, all of whom were under 18 years of age, had been dismissed from their employment at Sullivan's of Alaska, Inc. (Sullivan's) because of their age and concomitant status as minors. However, the Administrative Law Judge also concluded that AS 18.80.220 did not prohibit discrimination against minors on the basis of age, and recommended dismissal of the Executive Director's Accusations of age discrimination.

A majority of the Hearing Commissioners rejected the conclusion of law, set forth in the Recommended Decision, that AS 18.80.220 did not prohibit age-based discrimination against minor employees – *i.e.*, employees under the age of 18. Two of the three Hearing Commissioners concluded that the five complainants were dismissed because of their age, and that in dismissing these employees Sullivan's had violated AS 18.80.220.¹ The Commission then remanded the case to the Administrative Law Judge to prepare a recommended remedial order that provides appropriate relief.

Hearing Unit

Calendared 7/7
Scanned 6/19/17

¹ One Hearing Commissioner filed a dissent, concurring with the Administrative Law Judge's Recommended Decision that the case should be dismissed because AS 18.80.220 does not prohibit age-based discrimination against minor employees.

II. Back Pay/Front Pay as a Remedy

A. Back Pay

The Accusations the Commission's Executive Director filed on behalf of the five complainants requested back pay, including any lost benefits or remuneration for Mr. Carle, Ms. Peterson, Ms. Burgess, Mr. Hetemi, and Mr. Sheppard (hereinafter, collectively referred to as the "Minor Employees").² Although the Minor Employees' employment with Sullivan's ended on December 29, 2011, they received a final paycheck from Sullivan's at the beginning of 2012.³ Unless subject to offset, back pay would begin to accrue from January 10, 2012 – the date Sullivan's was served with a complaint of discrimination arising from the Minor Employees' termination on December 29, 2011.⁴

1. Connor Carle, Sydney Peterson, and Robin Burgess

The evidence presented at the hearing, held on May 4-6, 2015, showed that Mr. Carle, Ms. Peterson, and Ms. Burgess each earned more income in 2012 through 2014 than they had earned while employed at Sullivan's in 2011.⁵ Thus, these three Minor Employees mitigated their damages completely and are not eligible for an award of back pay.⁶

2. Bashkim Hetemi

After he was terminated from Sullivan's, Mr. Hetemi applied to numerous retail jobs at the Dimond Mall, but was not called for any interviews.⁷ He very briefly held a job at Denny's, but only worked there a few days.⁸ Soon afterwards, Mr. Hetemi was hired by GNC. Despite his mitigation efforts, Mr. Hetemi earned less in 2012 than he had earned in 2011 when he was employed by Sullivan's. Mr. Hetemi's gross earnings in 2011 from Sullivan's were \$3,795, comprised of \$2,759 in wages and \$1,036 in tips.⁹ By contrast, in 2012, Mr. Hetemi only earned

² The Executive Director filed three Accusations on October 27, 2017: one on behalf of Connor Carle, another on behalf of Sydney Peterson, and a third on behalf of Robin Burgess, Bashkim Hetemi, and Anthony Sheppard.

³ See Exh. 79, p. 3 (Burgess); Exh. 88, p. 4 (Carle); Exh. 95, p. 1 (Hetemi); Exh. 105, p. 4 (Peterson) & Exh. 111, p. 3 (Sheppard).

⁴ AS 09.30.070(b); Exh. 16; see also *Tookalook Sales and Service v. McGahan*, 846 P.2d 127, 129 (Alaska 1993), *reh'g den*.

⁵ Exhs. 79-83 (Burgess); Exhs. 86-89 (Carle); & Exhs. 102, 104-107 (Peterson).

⁶ See AS 18.30.130(a)(1).

⁷ Testimony of Bashkim Hetemi. Mr. Hetemi attributed his lack of success in finding a job despite diligent efforts to his disclosure on job applications that he had been fired by Sullivan's.

⁸ Testimony of Bashkim Hetemi. Sullivan's failed to introduce any evidence at the hearing showing Mr. Hetemi's voluntary departure from Denny's tolled his eligibility for back pay until he secured the position at GNC. Cf. *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1101(3rd Cir. 1995).

⁹ See Ex. 93. Sullivan's issued Mr. Hetemi's final paycheck in the amount of \$230.56 in 2012, but it was for work Mr. Hetemi had performed prior to his December 29, 2011 termination.

\$1881.20 from his new employment.¹⁰ Thus, Mr. Hetemi's earnings in 2012 were \$1,913.80 *less than* the amount he had earned the prior year at Sullivan's.¹¹ Accordingly, he is eligible for back pay in the amount of \$1,913.80 plus interest as calculated in Part II-C. Mr. Hetemi is not eligible for back pay after 2012: in 2013, Mr. Hetemi's annual earnings exceeded his 2011 income from Sullivan's, and there was no evidence in the record relating to his gross earnings in 2014.¹²

3. Anthony Sheppard

Anthony Sheppard earned \$1,782.37 in wages from Sullivan's in 2011.¹³ Following his termination from Sullivan's, Mr. Sheppard held a job at Alaska Custom Gutters in 2012 after school ended in late May, and earned \$10 an hour in that job.¹⁴ Mr. Sheppard said he could not give an "accurate estimate" of the number of hours he worked each week, but guessed that he had worked "maybe 10 hours a week give or take."¹⁵ There is, however, no evidence in the record indicating exactly how many weeks he held that job in 2012 or his gross earnings from Alaska Custom Gutters.¹⁶ In addition to his summer job at Alaska Custom Gutters, Mr. Sheppard briefly worked at the Alaska Sportsplex "after the football season ended" in 2012, and earned \$99.70 from that employment.¹⁷

Before a tribunal can award damages, Mr. Sheppard must first establish that he sustained an economic loss from the discrimination and the amount of that loss.¹⁸ Here, Mr. Sheppard failed to produce evidence showing his total gross earnings in 2012. Consequently, he has not

¹⁰ Exh. 95.

¹¹ It is the Respondent's burden to demonstrate that Mr. Hetemi failed to mitigate his damages by not remaining at Denny's. *See Lathem v. Dept. Of Children and Youth Services*, 172 F. 3d 786, 794 (11th Cir. 1999) (courts resolve uncertainties in back pay in favor of the discrimination victim; it is the defendant's burden to prove that the plaintiff did not use reasonable diligence to obtain comparable work); *see also EEOC v. Delight Wholesale Col.*, 973 F.2d 664, 670-671 (8th Cir. 1992). Since Respondent never made that argument, it need not be discussed here.

¹² Compare Exh. 93 with Exh. 94.

¹³ As a dishwasher, Mr. Sheppard did not receive tips. *See* Testimony of Anthony Sheppard. His 2011 earnings include wages (\$1,584.37 set forth in his W-2 from Sullivan's for 2011) plus his final paycheck for 2011 in the amount of \$198, which he received in 2012. *See* Exh. 111. Although Mr. Sheppard testified that he believed he was paid \$10.00 an hour at Sullivan's, his pay history at Sullivan's shows that he was paid approximately \$9.00 an hour and his W-2 form suggests that he was paid \$9.19 an hour. Compare Testimony of Anthony Sheppard with Exh. 111.

¹⁴ Testimony of Anthony Sheppard. There were no tax returns, W-2 forms, or pay stubs in the record showing that Mr. Sheppard had worked for Alaska Custom Gutters, the duration of that employment, or the gross earnings he had received from that job. *See* Exhs. 111-115.

¹⁵ Testimony of Anthony Sheppard.

¹⁶ Mr. Sheppard testified that he worked for Alaska Custom Gutters after the end of May until football season began. No other dates for this employment were given, either through testimony or in exhibits introduced into evidence. *See* Exhs. 111-115.

¹⁷ *See* Exhs. 113 & 115; *see also* Testimony of Anthony Sheppard.

¹⁸ *See Taylor v. Philips Indus., Inc.*, 593 F.2d 783, 787 (7th Cir. 1979).

met his burden of establishing an economic loss or the amount of that loss. Accordingly, he cannot recover back pay for 2012. Moreover, since Mr. Sheppard's earnings in 2013 and 2014 exceeded the income he received from Sullivan's in 2011, he is not eligible to receive back pay for those two years.¹⁹

B. Front Pay

Under AS 18.80.130, a complainant may receive front pay for a period of not more than one year under the circumstances enumerated in the statute.²⁰ Like back pay, front pay must be reduced by the amount the employee could have earned by making reasonably diligent efforts to obtain similar employment. Here, no evidence of a potential front pay loss was shown at the hearing for any of the Minor Employees. This was understandable, since by 2013, the Minor Employees had obtained jobs which paid better than the entry-level jobs they previously had held at Sullivan's. Accordingly, no award of front pay is appropriate in this case.

C. Interest

Pursuant to 6 AAC 30.480(b), the Commission may order interest on monetary awards in accordance with AS 09.30.070(a), and such an award is appropriate in this case to compensate the Minor Employees for the long delay in receiving lost wages. Damages are calculated on an annual basis, starting in 2012. Interest is calculated from January 1, 2013.²¹ The interest rate for state judgments rendered in 2017 is 4.25%. Interest assessed in accordance with AS 09.30.070 is simple, not compound, interest.²²

Applying these concepts, interest on the \$1,913.80 in back pay damages owed to Mr. Hetemi in this case has accrued since January 1, 2013 at the rate of 23 cents per day, or \$81.34 per year. Thus, the amount owing as of June 15, 2017 is \$1,913.80 in principle and \$363.30 in interest, for a total as of this date of \$2,277.10.

III. Other Remedial Steps

The Commission is required by statute to order the respondent to refrain from engaging in any discriminatory conduct it has been found to be engaged in.²³ Here, the respondent has been

¹⁹ Compare Exh. 111 with Exh. 112 & Exh. 113.

²⁰ Front pay, if applicable, would be calculated from the date of this recommended order. *See Zisumbo v. Ogden Regional Medical Center*, 801 F.3d 1185, 1205 (10th Cir. 2015) (Front pay is the money awarded for lost compensation during the period between judgement and reinstatement or in lieu of reinstatement to make the plaintiff whole).

²¹ *See Paula M. Haley ex rel., Cassandra Webb et al v. Die-Fast, Inc.*, OAH No. 06-0491-0495-HRC. Notice of the claim had occurred previously, when the Executive Director served a complaint of discrimination on behalf of the Minor Employees on January 10, 2012. *See* Exh. 16.

²² *See Alyeska Pipeline Serv. Co. v. Anderson*, 669 P.2d 956, 956 (Alaska 1983).

²³ AS 18.80.130(a).

found to have discriminated against employees based on their age and concomitant status as minors, which a majority of the Hearing Commissioners have determined to be impermissible. The respondent must be ordered not to engage in such discrimination in the future. The Commission also 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 and interest, that the Executive Director has advocated in the Accusations is that the Commission: (1) issue an order declaring that Sullivan's violated AS 18.80.220(a)(1) by terminating the Minor Employees; (2) order Sullivan's to adopt and disseminate a policy of nondiscrimination under the Alaska Human Rights Law (AHRL); (3) order Sullivan's to obtain in-person training, conducted by a neutral, third-party trainer, of at least six hours in length for its managers and supervisors and three hours in length for its employees, on the provisions of the AHRL that prohibit discrimination in employment, and that such order specify that the trainer and training curriculum be approved by the Executive Director prior to the training being conducted; (4) order Sullivan's to eliminate from the personnel records of the Minor Employees all documents and entries relating to the facts and circumstances that led to this case and any of the related events occurring thereafter; (5) order Sullivan's to refrain from penalizing any of the Minor Employees in any way in future considerations for employment and, if rehired, for transfers, promotions or upgrading because the Minor Employees complained about discrimination or because they filed a Complaint with the Commission; and (6) order Sullivan's to refrain from advising or informing any other employer or potential employer of any of the Minor Employees of the facts or circumstances involved in this case.

Sullivan's has not contested the appropriateness of this relief. All of it should be ordered, except that item (4) requires some further explanation. The Commission, in remanding the case for a recommended remedial order, has requested that an "appropriate" remedy be fashioned. Because the Minor Employees are in the early stages of their respective careers, it is appropriate that their future employment options not be restricted due to Sullivan's discriminatory conduct.

The Employee Status Change Form for each of the Minor Employees indicates that their termination was "involuntary."²⁴ The Form further stated that the reason for termination was "non-compliance with company policy" and "violation of local, state or federal statutes."²⁵ Not surprisingly, three of the Minor Employees – Connor Carle, Sydney Peterson, and Bashkim

²⁴ See Exhibit 1, pp. 69-73.

²⁵ *Id.*

Hetemi – testified that they initially had difficulty getting interviews after disclosing that they had been terminated from Sullivan’s on job applications for prospective employers.²⁶ Mr. Sheppard avoided that problem by securing employment with a family friend after his employment at Sullivan’s ended.²⁷ Ms. Burgess was able to get re-employed in the restaurant business shortly after her termination, but only because one of her former supervisors at Sullivan’s recruited her for a position at the Glacier Brewhouse, where he was then employed.²⁸

Since a termination, especially for those reasons, can affect future employment options, an appropriate remedy in this case is for Sullivan’s to change the termination codes for each of the Minor Employees to “T113, Discontinuation of Function/Position.”²⁹ This is the Code which best fits the situation here (*i.e.*, an involuntary termination) that is non-pejorative in nature.

ORDER

It is hereby **ORDERED** that:

1. Sullivan’s violated AS 18.80.220(a)(1) by terminating the employment of Connor Carle, Sydney Peterson, Robin Burgess, Bashkim Hetemi, and Anthony Sheppard on December 29, 2011 because they were under the age of 18.
2. Sullivan’s is permanently ordered not to discriminate in hiring or employment on the basis of an applicant’s or employee’s status as a minor.
3. By **September 1, 2017**, Sullivan’s shall adopt and disseminate a policy of non-discrimination under the Alaska Human Rights Act.
4. By **October 1, 2017**, Sullivan’s shall expunge from the personnel records of the Minor Employees any documents that are related to this case which arose after the Minor Employees were terminated from employment at Sullivan’s, ensure that the Minor Employees’ separation from employment at Sullivan’s is no longer designated as an “involuntary termination: Code T104/T110” but rather is deemed an “involuntary termination: Code T113,” and provide the Executive Director with documentation showing that it has corrected the personnel records reflecting the reason for the Minor Employees’ separation from employment.
5. By **December 31, 2017**, Sullivan’s shall provide six hours of in-person training conducted by a neutral, third-party trainer for its managers and supervisors and three

²⁶ Testimony of Connor Carle; Testimony of Sydney Peterson; Testimony of Bashkim Hetemi. Ms. Peterson testified she was kept “out of the restaurant business for a while” because her termination made potential employers leery of hiring her.

²⁷ Testimony of Anthony Sheppard.


²⁸ Testimony of Robin Burgess. Ms. Burgess testified that, had she not been recruited by a former manager at Sullivan’s who gave her a recommendation, her termination would “otherwise have been a problem.”

²⁹ See Exhibit 1, pp. 69-73.

hours of training for its employees on the provisions of the Alaska Human Rights Law that prohibit discrimination in employment. In addition, both the trainer selected to provide this training and the training curriculum shall be approved by the Executive Director of the Commission prior to the training being conducted.

6. Sullivan's shall refrain from penalizing the Minor Employees in any way regarding future considerations for employment and, if rehired, for transfers, promotions, or upgrading because of the Complaints the Executive Director filed with the Commission on their behalf.
7. Sullivan's shall refrain from advising or informing any other employer or potential employer of the Minor Employees of the facts or circumstances involved in this case, including the Minor Employees' involvement in a discrimination case against Sullivan's.
8. By **September 1, 2017**, Sullivan's shall pay \$2,277.10 to Bashkim Hetemi, plus interest at \$.23 per day commencing on June 16, 2017 to the date of payment.

DATED: June 15, 2017.

By: 
Kathleen A. Frederick
Chief Administrative Law Judge