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

ALASKA STATE COMMISSION FOR HUMAN RIGHTS, PAULA M. HALEY, EXECUTIVE DIRECTOR, *ex rel.* MICHELLE LAVINE, Complainant, v. SCSL, INC. d/b/a PIONEER LODGE Respondent.	)	ASCHR NO. j-09-161 OAH NO. 11-0105-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 to dismiss the complaint is adopted by the Commission in its entirety:

Judicial review is available to the parties pursuant to AS 18.80.135 and 44.62.560-.570. An appeal must be filed with the superior court within 30 days from the date of this Final Order is mailed or otherwise distributed to the parties

IT IS SO ORDERED.

Dated: November 8, 2012

Faith M. Peters

Commissioner Faith Peters

Dated: November 8, 2012

Grace E. Merkes

Commissioner Grace Merkes

Dated: November 8, 2012

Lester Lunceford

Commissioner Lester Lunceford

This is to certify that on November 8, 2012 a copy of the foregoing was hand-delivered to the ASCHR Human Rights Advocate Stephen Koteff, and mailed to William G. Royce, Esq. with a courtesy copy to Administrative Law Judge Rebecca L. Pauli.

Margaret Salda

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.* MICHELE LAVINE, Complainant, v. SCSL, INC. d/b/a Pioneer Lodge, Respondent.	)	OAH No. 11-0105-HRC ASCHR No. J-09-161

RECOMMENDED DECISION[1]

I. INTRODUCTION

The Executive Director accuses the respondent, SCSL, Inc., d/b/a Pioneer Lodge (Pioneer), of unlawfully terminating the complainant, Michele LaVine, because she was pregnant. If true, the termination would violate AS 18.80.

The Executive Director's complaint rises or falls on one factual determination – whether the Pioneer actually terminated Ms. LaVine. She alleges that Linda Stillwell, officer and shareholder of SCSL, Inc., and the manager of the Pioneer, terminated Ms. LaVine because Ms. LaVine was pregnant. The Pioneer contends that Ms. LaVine voluntarily terminated.

The separation from employment occurred during a short telephone conversation on June 5, 2009 when Ms. LaVine called the Pioneer to arrange for someone to cover her shift the following day. At hearing, the Pioneer agreed that if the facts support a finding that the Pioneer actually terminated Ms. LaVine, then the termination would have been unlawful. However, it vigorously denied that there was any adverse action against Ms. LaVine and contended the separation from employment was voluntary.

The evidence is insufficient to support a finding that there was an adverse action.

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[1] This decision has been modified for clarity. The outcome and rationale in support has not changed. The modifications are minor, such as replacing "believed" with "testified", and other adjustments.

II. FACTS

The relevant facts can be placed into one of three time periods: pre-telephone call, the telephone call, and the post-telephone call actions taken by parties and witnesses in response to Ms. LaVine's complaint to the Commission. The following factual findings are presented by time period.

A. *Background and Pre-Telephone Call*

The Pioneer, before it was destroyed by fire in August 2009, was a small hospitality business located in Willow, Alaska, owned and operated by Linda and Curtis Stillwell through their corporation, SCSL, Inc. It consisted of a campground, cabin rental, boat launch, and small store, as well as a bar and restaurant. They had recently taken over the operation of the Pioneer. Ms. Stillwell was the manager of the business; Mr. Stillwell did the maintenance and upkeep. The Stillwells were unsophisticated employers. They had no prior experience running a hospitality business. Any experience they had as an employer with employees was over 15 years earlier and lasted only a few months.[2]

The Pioneer relied upon its employees. It employed two cooks in the kitchen and several waitresses. Typically only one waitress was scheduled to work a shift unless it was a special event, in which case two waitresses would be scheduled.[3]

Waiting tables at the Pioneer was physically demanding. A shift was typically ten hours. A waitress was expected to tend bar, take food orders, serve food and drinks, and clean the tables. A waitress at the Pioneer earned $8 per hour plus tips. On the weekend a waitress working the day shift averaged $120 in tips and on weekdays tips would average $50. Pay records revealed the Pioneer did not pay overtime.[4]

If someone was not going to work a shift or wanted to leave early, it was customary for the employee to find a replacement; if not, then it fell to Ms. Stillwell to fill in. This was hard on Ms. Stillwell.[5] On these occasions Ms. Stillwell described working until 5:00 a.m. only to have to turn around and be back on the floor at 7:00 a.m. The demands of the Pioneer left Ms.

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[2] They employed three to five loggers for a few months in the early 1990s. During her testimony, Ms. Stillwell attempted to place the relationship of a contractor working on her home in the same category as an employer/employee relationship. This underscores her lack of experience and knowledge.

[3] Testimony indicated that the number of employees fluctuated. In the spring of 2009, the Pioneer was running with a crew of nine to twelve employees.

[4] This was established through unchallenged testimony and Ms. LaVine's paystubs, Exh. 3.

[5] Testimony of L. Stillwell.

Stillwell feeling as if she was working all day every day. Finding the time to return phone calls was next to impossible.[6] Ms. Stillwell characterized the decision to purchase the Pioneer as a "big mistake."[7]

In the spring of 2008, Ms. Stillwell was looking to hire a waitress. She wanted someone young, energetic, and dependable. Dependability was very important.[8]

Ms. LaVine and her husband, Ron Reed, were regular customers at the Pioneer. Ms. Stillwell and Ms. LaVine were not friends, but they would talk from time to time. She struck Ms. Stillwell as dependable, energetic, young, and smart, so Ms. LaVine was offered the position.

She started working the weekend day shift in April 2008. She caught on quickly, did her job well, soon had her own regular customers, and was a reliable employee.[9] Working at the Pioneer was Ms. LaVine's second job. During the winter months Ms. LaVine worked for the local school district as a Special Education Class Room Assistant. In the summer, she would work one mid-week shift. Her husband was unemployed and the family needed Ms. LaVine's income from this second job.[10]

One year later, in March 2009, Ms. Stillwell hired another waitress, Gail Jones. Ms. Jones was an experienced waitress. One witness, kitchen manager Shawn Culp, described Ms. Jones as a "blessing" to the Pioneer.

Shortly after Ms. Jones began work, rumors began to surface that Ms. LaVine was pregnant. As time went on her pregnancy became common knowledge in the community and at the Pioneer. Ms. LaVine and Ms. Stillwell gave contradictory testimony regarding whether Ms. LaVine ever told them she was pregnant. Ms. LaVine testified she told the Stillwells she was pregnant. Ms. Stillwell testified that Ms. LaVine never told her or Mr. Stillwell about the pregnancy and if they asked her, Ms. LaVine would deny the rumor and "stomp off." However, Ms. Stillwell reluctantly acknowledged at the hearing that she was aware Ms. LaVine was pregnant.

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6 Testimony of L. Stillwell.
7 Testimony of L. Stillwell.
8 Testimony of L. Stillwell.
9 Testimony of L. Stillwell; Testimony of M. LaVine; Testimony of S. Culp.
10 Testimony of M. LaVine.

On May 17, 2009, the State of Alaska Department of Labor and Workforce Development served the Pioneer with a stop-work order because they had no workers' compensation insurance.[11] The stop-work order was ignored and the Pioneer continued to operate.

Around this same time, Ms. LaVine noticed Ms. Stillwell seemed to be spending more time in her office with the door closed.[12] She was concerned that Ms. Stillwell was talking behind her back because she was aware that Ms. Stillwell had done so with other employees.[13]

Ms. Stillwell noticed that Ms. LaVine was missing or leaving work early without arranging for someone to work her shift. Because she had not arranged for her shift to be covered, Ms. Stillwell had to work the shifts in addition to her regular work. At the hearing it was established that Ms. LaVine left work early two days (Saturday, April 18, 2009 and Sunday, May 17, 2009) and missed an entire shift (May 24, 2009).[14]

Ms. Stillwell believed Ms. LaVine was not feeling well. About two weeks after the missed shift, not wanting to be caught unprepared should Ms. LaVine call in, Ms. Stillwell arranged with Ms. Jones to be available if the need arose. Because neither Ms. LaVine nor Ms. Stillwell had talked to each other, Ms. LaVine was unaware that Ms. Jones was "on-call" or that the Stillwells perceived her as excessively absent.[15]

B. *June 5, 2009 and the Two-Minute Phone Call*

On Friday, June 5, 2009, Ms. LaVine called the Pioneer to see if the waitress working, Helen LaRiviere, would work Ms. LaVine's Saturday shift. Ms. LaRiviere said she would if Ms. Stillwell approved and she handed the phone to Ms. Stillwell. There was a short conversation between Ms. LaVine and Ms. Stillwell. Ms. LaVine became upset during the conversation and hung up on Ms. Stillwell.[16] A few weeks later Ms. LaVine filed a complaint with the Commission contending that during that conversation Ms. Stillwell had fired her because she was pregnant.

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[11] *In re: SCS Lodges, In., et. al.* AWCB Decision Nos. 09-0095 (May 15, 2009) and 10-0001 (January 5, 2010).

[12] Testimony of M. LaVine.

[13] Testimony of M. LaVine.

[14] It is not known whether Ms. Stillwell covered this absence, or if it was covered by someone other than Ms. Stillwell, who arranged for the coverage.

[15] Testimony of M. LaVine.

[16] Testimony of M. LaVine. Initially Ms. LaVine denied being upset or yelling, a position she abandoned in later testimony.

There are four witnesses to the phone call: Ms. LaVine, Ms. Stillwell, Ms. LaRiviere, and the Pioneer's kitchen manager, Shawn Culp. Ms. Stillwell's side of the conversation was heard in part or in its entirety by all four individuals. Only Ms. LaVine and Ms. Stillwell can testify to the contents of Ms. LaVine's side of the conversation.

As is often the case, each witness has a slightly different recollection of the conversation. These differences do not necessarily imply that a witness was untruthful in his or her testimony. Rather, differences in testimony may reflect how a person processes and remembers information. Each witness's testimony regarding the June 5, 2009 conversation is set out below.

1. Ms. LaVine's Testimony

Ms. LaVine was in the process of moving, was tired, and did not feel well. She called the Pioneer to find out if Ms. LaRiviere would cover her Saturday shift. Ms. LaRiviere said she could cover, if Ms. Stillwell approved.

Ms. LaVine recalled telling Ms. Stillwell she was not feeling well and that Ms. LaRiviere was willing to cover her Saturday shift. According to Ms. LaVine it was at that point that "[Ms. Stillwell] had told me that she had gotten all of my shifts covered and that I did not need to worry about it." Ms. LaVine testified that she replied, "When was [Ms. Stillwell] planning on telling me that she got all of my shifts covered, when I showed up for work and someone else was working?" Ms. LaVine could not recall Ms. Stillwell's exact words, but that Ms. Stillwell "said pretty much you were pregnant anyway so you were going to leave eventually, don't worry about coming back." Even though Ms. LaVine does not recall ever being told she was "fired" she understood Ms. Stillwell was telling her that she was terminated because she was pregnant, so don't bother coming back.

Ms. LaVine became upset when she heard Ms. Stillwell say her shifts (plural) were covered. She hung up the phone on Ms. Stillwell. Ms. LaVine called back shortly thereafter and left a message on the office line wanting to know why she had been treated that way.

Ms. LaVine testified she had intended to wait tables as long as she could. She planned on taking time off when the baby was born and then return to the Pioneer. Ms. LaVine thought that at some point in the future she and the Stillwells would talk about future plans. When she was terminated, Ms. LaVine testified that she immediately started looking for work at other lodges but no jobs were available. She did work for the school district during summer school and was eventually placed on bed rest as of August 6, 2009.

2. Ms. Stillwell's Testimony

Ms. Stillwell remembers that just prior to the call she was standing in front of the dining room window chatting with a customer and watching birds play in the water. Ms. LaRiviere handed her the phone, telling her that it was Ms. LaVine wondering if she (Ms. LaRiviere) could cover Saturday's shift. Ms. Stillwell took the phone and headed to the office. Mr. Culp was in the office completing a kitchen order.

Ms. Stillwell recalled that Ms. LaVine said she was not feeling well and wanted to know if Ms. LaRiviere could cover for her. Ms. Stillwell responded, "I already had it covered, that Gail would do it and when I mentioned Gail's name, [Ms. LaVine] seemed to go off and yell at me 'when were you going to tell me that you had my shifts covered?'" Ms. Stillwell replied, "When you called in." Ms. LaVine then asked, "When were you going to tell me you fired me?" Ms. Stillwell was steadfast in her testimony that she said "I didn't fire you," to which Ms. LaVine responded, "'I quit then' and slammed the phone down....I was shocked that she quit."[17] Ms. Stillwell explained the action was unexpected because Mr. Reed was not employed and Ms. LaVine needed the job. Ms. Stillwell claimed that she would have been foolish to fire Ms. Lavine because there was no one to take her place and Ms. Stillwell did not want to nor did she have the time to wait tables.

Ms. Stillwell denies telling Ms. LaVine that her shifts were covered. To the extent the word was used, it was the singular shift.

3. Mr. Culp's Testimony

One of Mr. Culp's duties as the kitchen manager was to order supplies. Mr. Culp testified that he and Ms. Stillwell were in the office when Ms. LaRiviere handed Ms. Stillwell the phone. The office was small. He was sitting where he could overhear pieces of the conversation, but he was not paying close attention. He heard Ms. LaVine raising her voice and concluded that she was upset. He heard nothing that would indicate she was being terminated. He did not hear Ms. Stillwell or Ms. LaVine use the word "fired." If Ms. Stillwell had used the word "fired" or "fire" in her conversation, it would have caught his attention. He was under the impression that Ms. Stillwell was telling Ms. LaVine that it was o.k. for her to take the weekend off because Ms. Stillwell had it covered. When the conversation was over, Ms. Stillwell had a

[17] Testimony of L. Stillwell.

"dumbfounded" look on her face, hung up the phone, and told him that Ms. LaVine had just quit.[18]

Mr. Culp does not recall if Ms. Stillwell used the singular "shift" or the plural "shifts." He heard nothing that would lead him to believe Ms. Stillwell had terminated Ms. LaVine.

4. Ms. LaRiviere's Testimony

Ms. LaRiviere was not a traditional employee. She "volunteered" at the Pioneer in exchange for tips.[19] Her primary occupation was as an AFLAC insurance representative. She was volunteering at the Pioneer because she had worked in restaurants in the past and enjoyed the work but, because of back problems, was no longer physically able to earn a living waiting tables. Also, she felt bad for Ms. Stillwell; times were tough and Ms. Stillwell did not have reliable people, so Ms. LaRiviere felt compelled to step in and help.[20] Ms. Stillwell knew of Ms. LaRiviere's physical limitations and did not want her volunteering more than one day a week.

Ms. LaRiviere answered the phone in the bar. It was Ms. LaVine asking if she could work Saturday. Ms. LaRiviere said she would if Ms. Stillwell approved. Ms. LaRiviere handed the phone to Ms. Stillwell but does not recall if this occurred in the office or in the dining room. She heard Ms. Stillwell say "I already had that covered," then raised voices but no specifics, as she was in the bar area and in the kitchen when the conversation took place and did not hear the entire conversation. When Ms. Stillwell brought the phone back, she had a stunned look on her face and said Ms. LaVine had quit.

As with Mr. Culp, Ms. LaRiviere does not recall if Ms. Stillwell used the singular "shift" or the plural "shifts." Regardless, she heard nothing that would lead her to believe Ms. Stillwell terminated Ms. LaVine.

C. *After the Separation from Employment*

Ms. Jones was not given Ms. LaVine's shifts. Ms. Stillwell attempted to hire another waitress, and eventually did hire a waitress to replace Ms. LaVine.

A few weeks after the phone call, Ms. LaVine filed her complaint with the Human Rights Commission alleging unlawful termination and an investigation commenced. On July 12, 2009,

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[18] Testimony of S. Culp.

[19] This decision makes no factual findings regarding the legal relationship between Ms. LaRiviere and SCSL, Inc.; the Pioneer; or the Stillwells.

[20] Testimony of H. LaRiviere.

in response to the complaint, Mr. Stillwell wrote to the investigator denying that Ms. LaVine was terminated because of her pregnancy. Rather, Mr. Stillwell emphasized that

> [i]n this business we keep a back-up plan at all times concerning our employees. It is the nature of this business to not have someone show up for a shift and we keep a contingent plan for these occasions. . . the contingent plan was for another person to cover for [Ms. LaVine]. This was for only one shift. . . We were only covering for one shift and she chose to quit. I hope this answers any questions and I hope she stops this nonsense soon.[21]

On August 9, 2009, the Pioneer was destroyed by fire.

On August 11, 2009, Mr. Stillwell added to his prior correspondence informing the investigator that Ms. LaVine

> never once, I repeat never once told us that she was pregnant. There are rumors running around about that fact but unless I am told from the person to whom this relates, I DO NOT have time to chase unfounded rumors. Ms. LaVine chose to quit, she was never fired.[22]

On May 21, 2010, Robin and Alberta Nordberg wrote two letters regarding Ms. LaVine. The Nordbergs are customers of the Pioneer and friends of the Stillwells. The letters were written after Mr. Nordberg ran into Ms. LaVine and Mr. Reed while out shopping. They exchanged words and Mr. Nordberg was admittedly "pissed" when he wrote the letters.[23] One letter was addressed to Ms. LaVine and Mr. Reed; the other letter was "To Whom It May Concern."[24]

The former was a demand letter. It outlined the landlord/tenant history between the Nordbergs and Ms. LaVine's family. Mr. Nordberg was upset because he felt that Ms. LaVine's family had taken advantage of his and his wife's generosity. They thought they were doing the family a favor because they had needed a place to stay on short notice and they were not charged fair rental value. When Ms. LaVine's family moved out on May 23, 2009, they had accumulated over $450 in unpaid utility bills and had left the house in poor shape both inside and out. Mr. Nordberg was upset that his wife had to go clean up after Ms. LaVine's dogs.

The "To Whom It May Concern" letter was notarized and signed by Mr. and Ms. Nordberg. In this letter the Nordbergs wrote that in late April 2009, during a casual conversation, Ms. LaVine told the Nordbergs that she was going to quit working at the Pioneer

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21 Exh. 5.
22 Exh. 6 (emphasis in original).
23 Testimony of R. Nordberg.
24 Exh. 15; Exh. 16.

because of the secondhand smoke and concerns for her baby. Ms. LaVine denies this conversation ever took place.

On June 14, 2010, at Mr. Stillwell's request, Mr. Culp wrote down his recollection of what had occurred a year earlier. He wrote that Ms. Stillwell mentioned to him "that if Michele followed her regular pattern and called out on this coming weekend that she had the shift covered."[25]

At the end of June 2010, Patricia Watts, investigator with ASCHR, interviewed Ms. Stillwell once;[26] she interviewed both Mr. Culp[27] and Ms. LaRiviere twice.[28] The interviews were not recorded and the interviewee was never given an opportunity to review the investigator's typed "Record of Interview." The interviewees all mentioned Ms. LaVine having been absent and there being a need to ensure her shifts were covered. According to Ms. Watts' Record of Interview, Mr. Culp believed that for the month and a half prior to the phone call, Ms. LaVine had been calling in every other week.[29] When asked how he would know if Ms. LaVine had missed work, Ms. Watts wrote down, "I live on the property. My cabin is about 30 feet from the lodge. I was working at the same time."[30] However, consistent with his June 14, 2010 written statement, Mr. Culp testified it was Ms. Stillwell who told him that Ms. LaVine had been missing work every other weekend and that he had no personal knowledge of her attendance. To the extent the June 14, 2010 letter conflicted with subsequent statements he may have made to the investigator regarding how he knew Ms. LaVine had been missing work, Mr. Culp testified that the June 14, 2010 writing was more accurate because it was "closer in time" to the event.

In early August 2010, Mr. Stillwell, in another communication with Ms. Watts, provided "time cards that prove she was missing from work . . . And as stated earlier, SHE NEVER STATED SHE WAS PREGNANT EVEN WHEN I ASKED POINT BLANK . . . ."[31]

It was never resolved how or when Ms. Stillwell learned Ms. LaVine had not been feeling well. At first, Ms. LaVine stated that she had heard it from Mr. Reed. Mr. Reed denied discussing Ms. LaVine's health during the week in question. When pressed, Ms. Stillwell admitted she did not know. She also admitted it could have been the prior week.

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25 Exh. 13.
26 Interview conducted on June 22, 2010. Exh. 7.
27 Interviews conducted on June 22, 2010 and June 25, 2010. Exh. 8.
28 Interviews conducted on June 21, 2010 and June 24, 2010. Exh. 9.
29 Exh. 8.
30 Exh. 8.
31 Exh. No. 10 (emphasis in original).

The Monday following the telephone call, Ms. LaVine received her final paycheck from the Pioneer. Shortly thereafter she filed her complaint with the Commission.

III. DISCUSSION

Typically there are three steps to proving a claim of discrimination.[32] The first step requires the complainant prove a *prima facie* case. To do so, the complainant must establish that: (1) she is a member of a protected class (pregnant); (2) she was qualified for the job; (3) the employer took an adverse action; and (4) the employer hired an individual not within the same protected class as the complainant.[33] The second step requires the Pioneer to produce evidence of a legitimate business reason for the adverse action and the final step requires the complainant prove the reason offered was pretextual. The Pioneer concedes that it had no legitimate business reason to terminate Ms. LaVine.

The Stillwells knew that Ms. LaVine was pregnant, she was qualified for her position, satisfactorily performing her duties, and her position was filled by someone who was not pregnant.[34] This leaves only the third element of the *prima facie* case in dispute - whether Ms. LaVine was terminated or whether Ms. LaVine quit. Without an adverse employment action, there is no *prima facie* case and Ms. LaVine's complaint fails. If the Executive Director presents evidence of an adverse action but that evidence is insufficient to meet her burden, Ms. LaVine's case fails. If there was an adverse action, then, under the facts of this case, the Executive Director will have established that Ms. LaVine was unlawfully terminated.

The Executive Director contends Ms. LaVine is more credible than Ms. Stillwell. The Executive Director asserts that when the record is viewed in its entirety (the use of the plural shifts, Ms. Stillwell's ever changing version of what occured, the Stillwells' original position that they did not know Ms. LaVine was pregnant, telling others that Ms. LaVine had been absent every other weekend for the past month and a half, and concerns of personal liability because

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[32] When, as here, there is no direct evidence of discriminatory intent, a three-part burden shifting framework known as the *McDonnell Douglas* test is applied. *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). Under this test the complainant has the burden of establishing a *prima facie* case of discrimination. Once this is established the burden then shifts to the respondent to provide a legitimate, non-discriminatory reason for its actions. Finally, if that burden is met, the complainant has the burden of producing evidence to show that the reason offered by the respondent is pretextual.

[33] *Haroldsen v. Omni Enterprises, Inc.*, 901 P.2d 426, 430 (Alaska 1995).

[34] Although Ms. Stillwell contends neither she nor her husband had first hand actual knowledge of the pregnancy, the Stillwells were aware of Ms. LaVine's pregnancy, a fact reluctantly acknowledged by Ms. Stillwell in her testimony.

there was no workers' compensation coverage), she will have established that Ms. Stillwell's testimony cannot be trusted and Ms. LaVine is telling the truth. The Executive Director emphasized that Ms. LaVine's story has remained consistent throughout and that she had every reason **not** to quit: her husband was unemployed, the school year had wrapped up and she was no longer working that job, and she had a baby on the way.

Conversely, Ms. Stillwell contends that she did not terminate Ms. LaVine, but rather, as testified to by Mr. Nordberg, Ms. LaVine planned on quitting because of the cigarette smoke. Ms. Stillwell asserted she would not have terminated Ms. LaVine, knowing that she would have to pick up any uncovered shifts. She had every reason **not** to terminate Ms. LaVine because she had no one to take her place. She tried to assure Ms. LaVine that she was not fired, and that Ms. Jones was on call only if needed, and that it was o.k. to take the shift off. In response Ms. LaVine quit and hung up. Ms. Stillwell was dumbfounded.

A. *Termination for Purposes of a* Prima Facie *Case*

For purposes of the Human Rights Act, a termination of employment is a "discharge" if it is an actual discharge or a constructive discharge.[35] An actual discharge is the termination of employment by the employer against the employee's will.[36] A voluntary resignation by the employee is not an actual discharge,[37] but it may be a constructive discharge.

Constructive discharge occurs when an employer has made working conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign.[38] It is not necessary to prove that the employer had the specific intent of causing the employee to quit.[39] Here, the Executive Director is not claiming Ms. LaVine's working conditions were so intolerable that a reasonable person would have felt compelled to resign. She contends that Ms. LaVine was actually terminated by the Pioneer.

An actual termination occurs when the employer tells the employee that the employment relationship is terminated (*e.g.*, "you're fired") or when the employer "engages in conduct that

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35 *Chertkova v. Connecticut General Life Insurance Company,* 92 F.3d 81, 87 (2d Cir. 1996); The Alaska Supreme Court looks to federal discrimination law for guidance in interpreting AS 18.80. *Moody-Herrera v State,* 967 P.2d 79, 83 (Alaska 1998).

36 *Marks v. National Communications Association,* 72 F.Supp. 2d 322, 328 (S.D.N.Y. 1999).

37 *See, e.g., Khaleel v. Metro One Loss Prevention Services Group,* 469 F. Supp. 2d 130 (S.D.N.Y. 2007); *Mattera v. Gambro, Inc.,* 2004 WL 723239 (10th Cir. 2004).

38 *Charles v. Interior Regional Housing Authority,* 55 P.3d 57, 60 (Alaska 2002).

39 *Id.*

'would logically lead a prudent person to believe his tenure has been terminated.'"[40] The employee must reasonably perceive that the employer actually intended[41] to dispense with the employee's services.[42]

The issue presented here is whether the Executive Direction has established by a preponderance of the evidence that the Pioneer, through Ms. Stillwell's actions, unlawfully terminated Ms. LaVine. The Executive Director cited several cases in her prehearing brief where the court found ample evidence of an adverse action prompted by the plaintiff's pregnancy. However, the cases cited are inapposite to the issue before the Commission, because in each of those cases the employer unambiguously took an adverse action and the issue on appeal was whether the adverse action was taken for an unlawful reason.[43]

B. *Voluntary or Involuntary Separation*

Whether there was an involuntary termination is a factual determination that turns on the contents of the two-minute conversation between Ms. LaVine and Ms. Stillwell. The Executive Director asserts that this case is not complex, all that is required is a credibility determination between Ms. LaVine and Ms. Stillwell – whoever is more credible was telling the truth. Credibility always plays an important role. However, as the testimony of Ms. LaVine, Ms. Stillwell, Ms. LaRiviere, and Mr. Culp establish, four people can be part of or observe the same event and have four different recollections of the event. This does not mean that one is credible and the other three are not. The issue is not who is more credible, but whether the Executive Director has presented evidence sufficient to establish that a reasonable person listening to the conversation would have understood that Ms. Stillwell was terminating Ms. LaVine.

The Executive Director's case was built around the testimony of Ms. LaVine, Mr. Reed, and efforts to impeach the testimony of Ms. Stillwell, Ms. LaRiviere, Mr. Culp and Mr. Nordberg. While she did present evidence that could tip the scales in favor of Ms. LaVine's version, in the end the Executive Director did not prove her claim. Addressing Mr. Nordberg's testimony first, the Executive Director successfully discredited his testimony that Ms. LaVine

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40 *Chertkova*, 92 F.3d at 88, *quoting NLRB v. Trumbull Asphalt Company*, 327 F.2d 841, 843 (8th Cir. 1964).

41 *See Thomas v. Dillard Department Stores*, 116 F.3d 1432, 1434 (11th Cir. 1997).

42 *Chertkova, supra, citing NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222, 1224 (5th Cir. 1980).

43 *E.E.O.C. v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831 (6th Cir. 1997) (neither party disputed that employer terminated plaintiff's employment); *Adams v. Nolan*, 962 F.2d 971, 974 (8th Cir. 1992) ("There is no dispute that plaintiff established the first three elements of her *prima facie* case); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 151 - 152 (1st Cir. 1990) (neither party disputed that employer terminated employee).

told him she was intending to quit the Pioneer. The evidence established that Ms. LaVine and Mr. Nordberg did not have a relationship that would invite intimate sharing regarding future employment plans. Mr. Nordberg's relationship was with the Stillwells, not Ms. LaVine. Moreover, Mr. Nordberg was very upset with Ms. LaVine and her husband when he wrote the letter indicating that she was planning on quitting. Without independent corroboration, it is unlikely that Ms. LaVine told Mr. Nordberg she intended to quit the Pioneer.

The Executive Director's attempts to discredit the testimony of Mr. Culp and Ms. LaRiviere were less successful. Mr. Culp, as part of his employment with the Pioneer, was allowed to live in one of the cabins at the Pioneer. The Executive Director presented no persuasive evidence that this arrangement was unusual for the area. Nor did she present evidence that would establish how Mr. Culp or Ms. LaRiviere would benefit if the Pioneer prevailed. It was unknown if the Pioneer would be rebuilt. Regardless, Mr. Culp now had his own business and would not seek re-employment with the Stillwells.

Similarly, any attempt to establish a motive for termination was unsuccessful. Two possible motives were identified. First, the Pioneer was operating without workers' compensation insurance in violation of a Department of Labor and Workforce Developments stop-work order. Without workers' compensation insurance, and by violating the stop work order, the Stillwells may have been personally liable for any workplace injury. If Ms. Stillwell was concerned about the risk created by Ms. LaVine's pregnancy, the greater risk was Ms. LaRiviere and her bad back. The second motive alluded to by the Executive Director was because Ms. Jones wanted to work more at the Pioneer. Ms. Stillwell's hiring other waitresses to work Ms. LaVine's shift disproves the Executive Director's theory that the Pioneer wanted to give Ms. Jones more shifts.

Turning to the substance of the phone conversation, Ms. LaVine left the conversation with the impression that she had been told not to bother coming back, since she was going to quit anyway because she was pregnant. There were, in addition to Ms. LaVine and Ms. Stillwell, other witnesses to Ms. Stillwell's end of the conversation and neither corroborates either Ms. LaVine's or Ms. Stillwell's recollection of what was said.

Ms. Stillwell was adamant that she tried to reassure Ms. LaVine that she was not fired, and in response, Ms. LaVine quit. Only Ms. Stillwell testified that she used the word "fired" during the conversation. Mr. Culp and Ms. LaRiviere testified convincingly that while neither

was paying particular attention to the conversation and Ms. LaRiviere may not have been able to hear the conversation in its entirity, had they heard Ms. Stillwell use the word "fired," it would have been noted. This is reasonable. It is not uncommon that when certain words enter conversations, a person who was not paying attention suddenly begins to pay attention. The word "fired" or a derivative thereof is that type of word.

All who overheard the conversation recall the word "shift" or "shifts" being used. Ms. LaVine testified that Ms. Stillwell used the plural "shifts." She believed that by using the plural "shifts," Ms. Stillwell was conveying she did not need to come in to work. Whether Ms. Stillwell used the singular "shift" or plural "shifts" is not a factor tending to establish actual termination. First, the singular and the plural are so close that it would be difficult to say with certainty what was said versus what was heard. Moreover, had Ms. Stillwell used the plural, she could reasonably have intended to convey that the weekend was covered if Ms. LaVine wanted to take it off. Use of the plural "shifts" would not lead a prudent person to believe he or she had been terminated. Mr. Culp testified that from what he heard of the conversation, he understood Ms. Stillwell to be telling Ms. LaVine that it was o.k. if she wanted to take the day or weekend off because she [Ms. Stillwell] had it covered.

Although she could not recall when or from whom she had heard Ms. LaVine was not feeling well, Ms. Stillwell was concerned that if Ms. LaVine decided not to come in, that she would have to work Ms. LaVine's shift. To make sure she was not stuck again, Ms. Stillwell asked Ms. Jones to be on call. Ms. Stillwell, as the employer, was within her rights to have a floater available to work when the scheduled person did not show up.

The Executive Director argued that Ms. Ms. Stillwell's inconsistencies and misrepresentations when compared with Ms. LaVine's unchanging recollection of the phone call should be sufficient to prove Ms. LaVine's version – she was unlawfully terminated. Ms. Stillwell is not the most credible witness. However, calling into question a witnesses credibility does not establish a fact. This is especially true when viewed in context with the remaining record. Having observed Ms. Stillwell, it is apparent that these inconsistencies mistakes are likely tied to her lack of experience managing employees than an unlawful motive. Had she been more experienced, she would have communicated directly with Ms. LaVine regarding what she perceived to be excessive absences or what Ms. LaVine would like to do regarding her future

plans and whether she needed time off. None of this was done, but this does not mean Ms. LaVine's claim has been proven

Circumstantial evidence may be sufficient at times to support a finding of unlawful termination.[44] In this case it is not. All parties agree on the following: Ms. LaVine was upset. She was so upset that she hung up the phone on Ms. Stillwell. Ms. Stillwell, Mr. Culp and Ms. LaRiviere all testified that Ms. Stillwell said, with a shocked expression after Ms. LaVine hung up, that Ms. LaVine quit. The fact that they had differing recollections of the specifics of the conversation, including where it took place, bolster their credibility regarding Ms. Stillwell's reaction. Human nature would tend to overlook that which did not stand out, such as a call from an employee to say she needed time off, but a reaction that was not ordinary would be memorable. Therefore, as presented, the more reliable evidence is Mr. Culp and Ms. LaRiviere's recollection as to how Ms. Stillwell looked and reacted after Ms. LaVine terminated the conversation - shocked.

The Executive Director has established that something took place during that phone conversation that resulted in Ms. LaVine's separation from the Pioneer. She has not established that it is more likely than not that Ms. Stillwell had any plan or active desire to terminate Ms. LaVine. Nor has Ms. Stillwell established that Ms. LaVine quit. Simply put, the Executive Director not proven her case.

IV. CONCLUSION

This was a close case. No one will ever know for sure what took place during that conversation. However, after listening to and observing the witnesses while testifying, and considering the record as a whole, it is my conclusion that the Executive Director's evidence did not establish facts sufficient to conclude that it is more likely than not that there was an adverse action.

I recommend that the Commission find that the Executive Director has not met her burden. From this finding it does not necessarily follow that the Commission is finding that Ms. Stillwell has proven her version of the conversation.

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[44] *See e.g., Era Aviation, Inc. v. Lindfors* 17 P.3d 40, 44 - 45 (Alaska 2000) (discussing the role of circumstantial evidence in an individual disparate treatment claim).

The Executive Director has not established by a preponderance of the evidence that SCSL, Inc., d/b/a Pioneer Lodge unlawfully terminated Michele LaVine. I therefore recommend that the Commission issue an order dismissing the accusation against the respondent pursuant to AS 18.80.130(c).

DATED this 20th day of April, 2012.

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