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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.*)
DAVID WHEDON,)
)
Complainant,)
v.)
DAVID LOUTREL, d/b/a)
WILD SALMON DIRECT)
)
Respondent.)

ASCHR NO. J-09-167
OAH NO. 11-0196-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 as set forth below:

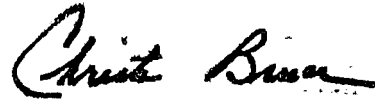
1. The Administrative Law Judge's Recommended Decision to dismiss the complaint is adopted.
2. It is unnecessary to address the issue raised by the Executive Director in her objections regarding whether the Commission has the authority to Order injunctive relief such as training in a mixed-motive case. This is unnecessary because this is not a mixed motive case. The Commission interprets the Recommended Decision as finding that the decision to dismiss Mr. Whedon was made before his purported protected activity. The employer did not dismiss Whedon because of any protected activity.

1 3. Based on the facts of this case, it is unnecessary to address the issue of
2 whether direct evidence must be presented in order to establish a mixed motive claim.

3
4 Judicial review is available to the parties pursuant to AS 18.80.135 and
5 44.62.560-.570. An appeal must be filed with the superior court within 30 days from
6 the date of this Final Order is mailed or otherwise distributed to the parties

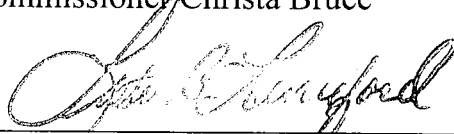
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8 IT IS SO ORDERED.

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10 Dated: November 6, 2012



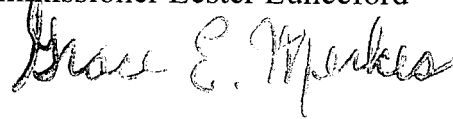
11 Commissioner Christa Bruce

12 Dated: November 6, 2012



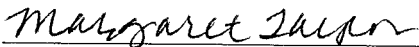
13 Commissioner Lester Luceford

14
15 Dated: November 6, 2012



16 Commissioner Grace Merkes

17
18 This is to certify that on November 8, 2012
19 a copy of the foregoing was hand-delivered
20 to the ASCHR Human Rights Advocate Stephen
21 Koteff, and mailed to Charles A. Dunnagan, with a
22 courtesy copy to Administrative Law Judge Jeffrey
23 Friedman.

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Name

Final Order

ASCHR, Paula M. Haley ex rel. David Whedon v. David Loutrel d/b/a Wild Salmon Direct, ASCHR No. J-09-167, OAH No. 11-0196-HRC

Page 2 of 2

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.*)
DAVID WHEDON,)
)
Complainant,)
)
v.)
)
DAVID LOUTREL d/b/a)
WILD SALMON DIRECT,)
)
Respondent.)

OAH No. 11-0196-HRC
ASCHR No. J-09-167

RECOMMENDED DECISION¹

I. Introduction

David Whedon was hired as a deck hand for the F/V *Seldovia*, a fishing boat owned and operated by David Loutrel. During the relevant portion of the summer of 2009, the *Seldovia* served as a fish tender in Bristol Bay. According to Mr. Whedon, while traveling to Bristol Bay from Anacortes, Washington, and while operating in Bristol Bay, Mr. Loutrel treated him in a discriminatory manner. Mr. Whedon's employment was terminated on July 2, 2009.

The Executive Director, Paula M. Haley (Director), investigated Mr. Whedon's complaint. After the investigation, the Director issued an accusation alleging that Mr. Whedon was terminated in retaliation for stating he intended to file a legal action against Mr. Loutrel. The accusation did not allege any other discriminatory act.

A hearing was held on January 24, 2012. Exhibits A, B, C, I, N, O, P & Q, as well as a portion of Exhibit L, were admitted.² Based on the evidence presented at the hearing, Mr. Loutrel did not retaliate against Mr. Whedon for stating he intended to file a legal action. The complaint should therefore be dismissed.

//

¹ This recommended decision has been revised after receiving objections from the Executive Director, and Mr. Loutrel's response to those objections.

² The exhibits not admitted, and the portion of Exhibit L that was not admitted, have been removed from the case file.

II. Facts

During the summer of 2009, the *Seldovia* operated as a fish tender in Bristol Bay.³ A fish tender receives fish from different boats and then delivers those fish to a processing plant. Usually, the *Seldovia* delivered fish to a floating processing plant in Bristol Bay, but it also made at least two deliveries to an on-shore processing plant in Dillingham. The *Seldovia* was at sea for the majority of the time it was receiving and delivering fish. The crew of the *Seldovia* initially consisted of its captain, David Loutrel, his wife Barbara Loutrel,⁴ David Whedon, and the vessel's engineer, Marion Lovric. During the fishing season, Kyle King was placed on board by the fish processing company as a quality control technician. Mr. King was subsequently hired to replace Mr. Whedon.

It is undisputed that rough language was used onboard the F/V *Seldovia*, including many swear words. It is also undisputed that Mr. Loutrel would refer to Mr. Whedon and other crew members as "homo" or "nigga." The entire crew was Caucasian, and the record does not disclose whether any were homosexual.

According to Mr. Whedon, on June 28, 2009, Mr. Loutrel elbowed him in the stomach and said, "Get out of my way, nigger."⁵ Mr. Whedon testified that he responded by telling Mr. Loutrel that if he called him that again, "I will shoot you."⁶ According to Mr. Whedon, on July 1, 2009, he informed Mr. Loutrel that he was going to sue Mr. Loutrel.⁷

Mr. Whedon also testified that he threatened to sue Mr. Loutrel just after the June 28 altercation, and on his complaint to the Commission "June 28" is handwritten immediately above paragraph number 3 which states: "On July 1, 2009, I told [Mr. Loutrel] that I objected to his treatment of me."⁸ On cross-examination, Mr. Whedon said that June 28 referred to the date of the altercation in which he was elbowed by Mr. Loutrel. Mr. Whedon confirmed that July 1 was the date he threatened to sue.

Mr. Loutrel denied striking Mr. Whedon during the June 28 altercation, and denies that Mr. Whedon ever threatened to sue him.⁹

³ The facts concerning the vessel's operations were not in dispute and are taken from Mr. Loutrel's testimony.

⁴ Ms. Loutrel joined the vessel in Alaska.

⁵ Testimony of David Whedon.

⁶ *Id.*

⁷ Testimony of David Whedon.

⁸ Exhibit A, page 2.

⁹ Testimony of David Loutrel.

Mr. Whedon was terminated at approximately 2:00 a.m. on July 2, 2009.¹⁰ According to Mr. Loutrel, he terminated Mr. Whedon because he was not satisfied with Mr. Whedon's performance. He testified that Mr. Whedon was insubordinate and would go out of his way to irritate others. One time he found Mr. Whedon asleep at the wheel when he was supposed to be operating the *Seldovia*. He described Mr. Whedon as the worst crewman he had ever had in all his years of fishing.

The relevant portion of the Accusation in this matter states

9. During Mr. Whedon's employment, Mr. Loutrel physically struck Mr. Whedon while referring to him in a racially derogatory manner.
10. Mr. Whedon believed that Mr. Loutrel's action of striking him and Mr. Loutrel's reference to him in a racially derogatory manner violated the laws prohibiting discrimination in employment.
11. In response to Mr. Loutrel's physically striking him and reference to him in a racially derogatory manner, Mr. Whedon informed Mr. Loutrel that he intended to take legal action against him.
12. Mr. Whedon's statement described in Paragraph 11 constituted activity that is protected by AS 18.80.220(a)(4).
13. Mr. Loutrel terminated Mr. Whedon's employment because of Mr. Whedon's statement described in Paragraph 11.^[11]

III. Discussion

A. *Legal Standard*

The legislature has determined that discrimination based on race and other listed characteristics is detrimental to the welfare of the state and its inhabitants.¹² It is unlawful for employers to discriminate against employees or potential employees because of their race.¹³ It is also unlawful for

an employer . . . to discharge, expel, or otherwise discriminate against a person because the person has opposed any practices forbidden under AS 18.80.200 – 18.80.280 or because the person has filed a complaint, testified, or assisted in a proceeding under this chapter.^{14]}

¹⁰ Testimony of Mr. Whedon and Mr. Loutrel; Exhibit I, page 83 (Ship's Log). The page numbers used to refer to Exhibit I are the numbers added at the bottom of each page, rather than the number printed at the top of the page.

¹¹ Executive Director's Accusation, pages 2 – 3.

¹² AS 18.80.200.

¹³ AS 18.80.220(a)(1).

¹⁴ AS 18.80.220(a)(4).

Thus, in addition to the prohibition against racial discrimination in the workplace, it is also illegal to retaliate against someone who has opposed discrimination in the workplace – the opposition clause – or participated in a proceeding held to determine whether illegal discrimination has occurred – the participation clause.¹⁵ The accusation in this matter raises a claim under the participation clause.¹⁶

Retaliation cases can be analyzed in two different ways. Under a pretext analysis, the Executive Director must show

- (1) that [Mr. Whedon] engaged in a protected activity;
- (2) that an adverse employment decision was made; and
- (3) that there was a causal connection between the two.^{17]}

Once this *prima facie* case has been made, the employer must show a legitimate reason for the adverse employment action. If the *prima facie* case is successfully rebutted, the burden shifts back to the employee to prove that the employer’s explanation is a pretext for retaliation.¹⁸

Under a mixed motive analysis, the employee must show that the protected action was a motivating factor for the adverse employment action.¹⁹ If this is shown, the burden then shifts to the employer to prove that it would have taken the same adverse action without consideration of the protected action.²⁰

B. Pretext Analysis

1. Prima facie case

Mr. Whedon testified that he threatened to file a legal action for discrimination based on Mr. Loutrel’s actions.²¹ There is no dispute that Mr. Whedon was terminated, which is an adverse employment action. That the two events occurred within a short period of time is

¹⁵ See *Dorsey v. Office Products Services*, No. C-99-032 (ASCHR 2002), page 11 (Identifying two types of protected activity: opposition and participation).

¹⁶ See, *Gifford v. Atchison, Topeka and Santa Fe Railway Co.*, 685 F.2d 1149, 1155 – 1156 (9th Cir. 1982) (Threatening to file a discrimination complaint constitutes “participation.”); *Dorsey*, No. C-99-032, page 13 (same).

¹⁷ *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 433 (Alaska 2004), quoting *Veco, Inc. v. Rosebrock*, 970 P.2d 906, 921 (Alaska 1999).

¹⁸ *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 660 (Alaska 2006).

¹⁹ A finding that the threat to sue was a motivating factor must be supported by direct evidence, or by circumstantial evidence that is sufficiently strong to be the functional equivalent of direct evidence. *Kinzel*, 93 P.3d at 434.

²⁰ *Id.*

²¹ Mr. Whedon had been called “nigger” or “nigga” by Mr. Loutrel, and could reasonably believe that it is illegal for an employer to use those terms to refer to an employee regardless of the employee’s race. No ruling is made as to whether Mr. Whedon would have had a valid cause of action for discrimination based on these racial slurs. This case only concerns whether any illegal retaliation occurred.

evidence of a causal connection between the two.²² In addition, Mr. Lovric testified that shortly after Mr. Whedon was fired, Mr. Loutrel stated that he was not going to have someone working for him who had threatened to sue. This is evidence that the threat did occur and that there was a connection between that threat and the decision to terminate Mr. Whedon. It is more likely true than not true that Mr. Whedon did threaten to take some form of legal action against Mr. Loutrel. The evidence is sufficient to establish a *prima facie* case of retaliation in violation of AS 18.80.220(a)(4).

Although the Director established a *prima facie* case, it is noted that Mr. Whedon's credibility was substantially weakened during cross-examination. He was confronted with documents that purported to establish one or more prior convictions for theft. Mr. Whedon testified unconvincingly that he did not know whether he had any prior criminal convictions. That statement is inherently difficult to believe. A criminal conviction starts with an arrest followed by some type of court proceeding. Someone who has gone through that process will be aware that it occurred. Someone who has not gone through that process will be aware that it did not occur. At a minimum, if Mr. Whedon was being candid, he would have elaborated as to why he did not know whether he had ever been convicted. In addition, his pauses before answering questions on that topic, and attempts to evade the question indicate that he was not being truthful when answering those questions.

Because he was not truthful on the questions concerning his criminal background, all of his testimony was viewed critically and given less weight when compared to other evidence.

2. Mr. Loutrel's motivation

Because the Director established a *prima facie* case, the burden shifted to Mr. Loutrel to show that he had a legitimate reason for terminating Mr. Whedon. As discussed above, Mr. Loutrel was not satisfied with Mr. Whedon's job performance. Some of the incidents of alleged misconduct are documented in the ship's log. On one occasion, Mr. Loutrel watched for ten minutes while Mr. Whedon was asleep at the wheel.²³ On June 26, Mr. Loutrel was told that Mr. Whedon had wanted to sneak away to a liquor store.²⁴ The next day Mr. Loutrel warned him

²² *Kinzel*, 933 P.3d at 433.

²³ Exhibit I, page 60.

²⁴ Exhibit I, page 76.

about needing to pay attention, and Mr. Whedon started to argue with him.²⁵ The log also notes an occasion when Mr. Loutrel and Mr. Lovric had to do some of Mr. Whedon's work.²⁶

Mr. King's testimony supports Mr. Loutrel's description of Mr. Whedon's performance. Mr. King said that he observed Mr. Whedon, and that sometimes he would do his job; sometimes he would not. Mr. King also testified that Mr. Whedon did not follow directions well, refused to follow orders, and was disrespectful to Mr. Loutrel.

Mr. Whedon testified that he was never told he was a bad employee or that his job was in jeopardy. He stated that if he had failed to follow a request from Mr. Loutrel, it was not intentional. None of the other crewmembers testified that Mr. Whedon was a bad employee, though they also did not testify that his work performance was good.

Based on the testimony and other evidence in the record, there were problems with Mr. Whedon's job performance. Those problems were severe enough to give Mr. Loutrel a legitimate business reason for terminating Mr. Whedon. Mr. Loutrel has rebutted the *prima facie* case.

3. Pretext

Because the *prima facie* case has been rebutted, the burden shifts to the Director to prove that the employer's stated reason for the adverse employment action is a pretext. The Director has failed to meet her burden of proof on this issue. Other than his own testimony, there is no evidence in the record that Mr. Whedon was a good crew member, or that Mr. Loutrel thought he was a good crew member. In addition, Mr. Loutrel's evaluation of Mr. Whedon's work performance came before any threat to file legal action. Mr. Loutrel testified that by June 19, he had decided to terminate Mr. Whedon. He began looking for a replacement at that time. He explained that he could not simply fire Mr. Whedon on the spot because they were at sea and also because he wanted to have a replacement for Mr. Whedon first.

On June 19, 2009, Mr. Loutrel asked Mr. Lovric to help find someone to work as a deck hand. Mr. Lovric testified that his understanding was that this person would be hired to replace Mr. Whedon. This testimony was consistent with an affidavit previously provided by Mr. Lovric.²⁷

²⁵ Exhibit I, page 77.

²⁶ Exhibit I, page 80.

²⁷ Exhibit N.

Herman “Mac” Meiners also testified about Mr. Loutrel’s efforts to replace Mr. Whedon. Mr. Meiners has been involved in commercial fishing since 1967. He testified that he received a phone call from Mr. Loutrel on June 24, 2009. Mr. Loutrel was asking for help finding a replacement deckhand. Mr. Meiners’ understanding was that Mr. Loutrel intended to hire the replacement as soon as one was found.

Mr. King testified that he overheard Mr. Loutrel talking on the satellite phone, looking for a replacement crewmember a short time before Mr. Whedon was terminated. Mr. King offered to be that replacement and they worked out an arrangement for that to occur.

Based on the testimony from these witnesses, Mr. Loutrel made the decision to terminate Mr. Whedon before any threat to file a complaint was made. In the absence of any evidence that Mr. Whedon was a good deckhand, and because the decision to terminate his employment was made before any threat, it is more likely true than not true that the stated reason for terminating Mr. Loutrel was not a pretext.

C. Mixed Motive Analysis

Under a mixed motive analysis, the Director must prove that the protected activity was a motivating factor for the adverse employment action. Proof that the protected activity was a motivating factor must be in the form of direct evidence, or circumstantial evidence that is sufficiently strong to be the functional equivalent of direct evidence.²⁸ The burden then shifts to the employer to prove that it would have taken the same adverse action without consideration of the protected action.²⁹

Mr. Lovric testified that Mr. Loutrel said he did not want to have Mr. Whedon working for him because Mr. Whedon threatened to sue him.³⁰ This is direct evidence of a retaliatory motive. However, Mr. Loutrel proved by a preponderance of the evidence that he would have terminated Mr. Whedon on July 2 without consideration of this factor. As discussed above, Mr. Loutrel began to look for a replacement deckhand well before Mr. Whedon’s threat, and had agreed to hire Mr. King to fill that position before the threat to sue was made. At the time the decision to terminate was made, the only motive in existence was Mr. Whedon’s poor job performance.

²⁸ *Kinzel*, 93 P.3d at 434.

²⁹ *Id.*

³⁰ Mr. Loutrel denied making this statement.

Relying on *Desert Palace, Inc. v. Costa*,³¹ the Director asserts that injunctive and declaratory relief may be ordered if the threat was a motivating factor regardless of whether Mr. Loutrel would have taken the same action without the threat. In *Desert Palace*, the U.S. Supreme Court noted that as long as an illegal motivating factor exists, an award of declaratory or injunctive relief is permitted.³²

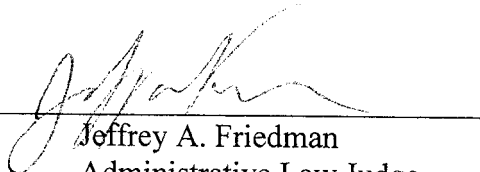
Relevant federal statutes and court decisions are instructive in interpreting AS 18.80 to the extent that those decisions do not limit the commission's obligation to construe AS 18.80 liberally.³³ *Desert Palace* is not a relevant decision, however, because it interprets a provision of federal law that does not correspond to any provision in Alaska law. The federal statute applied in *Desert Palace* specifically provides for the affirmative defense at issue here: that the employer would have taken the same action in the absence of the prohibited motivating factor.³⁴ This statute also limits the effect of this affirmative defense by allowing declaratory and injunctive relief, but not other types of relief.³⁵

There is no corresponding provision in AS 18.80 that allows any form of relief when an employer has successfully defended against a claim of discrimination. Mr. Loutrel has proven that he did not terminate Mr. Whedon because of Mr. Whedon's threat to file a complaint. The Commission must dismiss a complaint if the person charged "has not engaged in the discriminatory practice alleged in the accusation[.]"³⁶ There is no statutory basis for ordering training or any other injunctive relief in this case.

IV. Conclusion

Mr. Loutrel did not terminate Mr. Whedon's employment in retaliation for filing or threatening to file a discrimination complaint. Mr. Loutrel, therefore, did not violate AS 18.80.220(a)(4). The complaint in this matter should be dismissed.

DATED this 21st day of March, 2012.


Jeffrey A. Friedman
Administrative Law Judge

³¹ 539 U.S. 90 (2003).

³² *Desert Palace*, 539 U.S. at 94 – 95.

³³ 6 AAC 30.910(b).

³⁴ 42 U.S.C. § 2000e-5(g)(2)(B).

³⁵ *Id.*

³⁶ AS 18.80.130(c)