

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

CHARLIE PARELLO dba  
PULSE PUBLICATIONS<sup>1</sup>,  
APPELLANT,

vs.

ALASKA STATE COMMISSION  
FOR HUMAN RIGHTS,

APPELLEE.

Case No. 3AN-09-12728 CI

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**DECISION ON APPEAL**

Robin Block (Block), contacted the Alaska State Commission for Human Rights (the Commission) complaining of discrimination on the basis of disability by her former employer, Charlie Parello (Parello), proprietor of Pulse Publications, on June 12, 2003. Her complaint set forth allegations that Parello failed to accommodate her disability and was later amended to include the allegation that he terminated her employment as retaliation for her complaint to the Commission. A hearing was held before Administrative Law Judge James T. Stanley (Judge Stanley) on March 18, 2008, pursuant to AS 18.80.120.

Judge Stanley resigned some time after he heard the case and Administrative Law judge Rebecca L. Pauli (Judge Pauli) crafted a Recommended Decision on May 29, 2009, based on the digital recording of the hearing and the

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<sup>1</sup> The Office of Administrative Hearings *sua sponte* reformed the caption in this case to ensure that any orders or awards enter in the case would not be entered against a nonexistent entity and thus be of no value. A full explanation of this adjustment can be found in the Notice of Intent to Change Caption (April 22, 2009) at page 33 of the Record.

exhibits submitted at the hearing.<sup>2</sup> The Recommended Decision held that Parello was not liable for failing to accommodate Block on the basis of her disability but that he had fired her as retaliation for protected activity as defined under Alaska's anti-discrimination statute, AS 18.80.220.<sup>3</sup> The Recommended Decision required Parello to pay damages of \$2,160.00 with interest at 3.5 percent per annum.<sup>4</sup> Parello objected to the Recommended Decision and Judge Pauli addressed his objections and affirmed the Recommended Decision.<sup>5</sup> The Commission adopted the Recommended Decision in its entirety on November 24, 2009.<sup>6</sup>

Parello now appeals the Commission's Final Order. Block does not appeal the portion of the Final Order denying her discrimination claim.

### **FACTS**

Block lost her right leg four inches above her knee in a motorcycle crash in 1971.<sup>7</sup> She has lived with a prosthesis since then and occasionally uses crutches.<sup>8</sup> Block began working in the Pulse Publications office in October 2002.<sup>9</sup> She had previously worked in the warehouse stuffing newspapers, but found it difficult due to her disability.<sup>10</sup>

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<sup>2</sup> R. at 5.

<sup>3</sup> R. at 15.

<sup>4</sup> *Id.*

<sup>5</sup> R. at 6-7.

<sup>6</sup> R. at 1.

<sup>7</sup> Administrative Hearing Transcript, March 18, 2008, 19 [hereinafter AHT].

<sup>8</sup> AHT at 20-21.

<sup>9</sup> AHT at 25.

<sup>10</sup> *Id.*

Pulse Publications is run from an office building that houses multiple businesses.<sup>11</sup> Parking is available on all sides of the building, but there were no handicapped spaces painted while Block worked for Pulse Publications.<sup>12</sup> Block parked near the back entrance to her office near a loading dock so that she did not have to use a set of stairs she felt were dangerous due to her disability, and to avoid navigating the parking lot when it was icy during the winter months.<sup>13</sup>

Block testified that she requested the designation of a handicapped spot in late 2002 or early 2003, but Parelo denied her request.<sup>14</sup> She noted that on one occasion another employee had parked in such a way that the loading dock was blocked and she was forced to drive home to use her phone to call Parelo and tell him she could not access the building.<sup>15</sup> Block also testified that at times cars would double park behind her when she parked in front of the loading dock, blocking her in.<sup>16</sup>

On some occasions Block's car had to be moved to accommodate deliveries and other business involving the loading dock.<sup>17</sup> Block explained that her prosthesis is at times uncomfortable and when she was sitting for long periods in the office she would remove it.<sup>18</sup> In order to put the prosthesis back

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<sup>11</sup> AHT at 29-30.

<sup>12</sup> AHT at 31.

<sup>13</sup> AHT at 32-35.

<sup>14</sup> AHT at 35 (Judge Pauli found Block's testimony claiming that she had complained about the parking situation prior to June 11, 2003, too vague to find Parelo liable for failing to accommodate Block's disability).

<sup>15</sup> AHT at 35-36.

<sup>16</sup> AHT at 37.

<sup>17</sup> AHT at 37-38.

<sup>18</sup> AHT at 36.

on Block had to pull up her skirt to her groin, something she was not comfortable doing in front of her coworkers.<sup>19</sup> Thus, when Block's car had to be moved on short notice, Parelo or other Pulse Publications employees would move Block's car.<sup>20</sup> Block testified that she became uncomfortable with other people operating her car and being in her car, and she again asked Parelo for a handicapped parking spot.<sup>21</sup> Block alleged that Parelo again denied her request.<sup>22</sup>

On June 11, 2003, Block arrived at work and could not park due to other parking lot occupants filling the spaces she normally used.<sup>23</sup> Parelo had not yet arrived at work, and she contacted the property manager for the Pulse Publications building and requested a handicapped parking spot.<sup>24</sup> The management company assured Block that a spot would be painted for handicapped parking.<sup>25</sup> When Parelo arrived at work Block informed him she had called the management company and that a spot would soon be painted for handicapped parking.<sup>26</sup> Block described Parelo as not "real happy about it" and said she knew "things weren't going to be happy in the office."<sup>27</sup> Parelo told Block she did not need a handicapped parking space and told Block not to contact the management company again.<sup>28</sup>

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<sup>19</sup> AHT at 43.

<sup>20</sup> AHT at 38-39.

<sup>21</sup> AHT at 39-40.

<sup>22</sup> AHT at 38-39.

<sup>23</sup> AHT at 45-46.

<sup>24</sup> AHT at 45.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Comp. Ex. 11; Resp. Ex. A at 1.

Block also called the Commission and reported that her employer had been unwilling to provide her a handicapped parking spot.<sup>29</sup> She filed a complaint with the Commission and reported that the management company was willing to give her a parking spot, but she was concerned for her job.<sup>30</sup>

The next day, on June 13, 2003, Parello informed Block and the two other office employees of Pulse Publications that business was slow and he no longer had a need for office personnel.<sup>31</sup> He specifically noted that the money the sales staff was bringing in through advertising sales revenue was not enough to support the salaries he paid them.<sup>32</sup> Without sales staff, he claimed he did not need Block acting as a secretary or salesperson anymore.<sup>33</sup> He said he would give them a week in case things turned around, and that they could still come into the warehouse to stuff papers once a month if they wanted to continue that work.<sup>34</sup> Parello testified that he had been thinking about making this change for “awhile” before he terminated the office staff.<sup>35</sup>

Block returned to work the following week. On June 17, 2003, Parello informed Block that he would pay her for the rest of the week but she did not need to come in anymore.<sup>36</sup> Block sought work intermittently after being let go

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<sup>29</sup> AHT at 45, 161.

<sup>30</sup> AHT at 45-46.

<sup>31</sup> AHT at 47-48.

<sup>32</sup> Comp. Ex. 2 at 2.

<sup>33</sup> AHT at 48.

<sup>34</sup> AHT at 47.

<sup>35</sup> Resp. Ex. A at 13.

<sup>36</sup> AHT at 49.

from Pulse Publications and eventually got a job with Big Brothers Big Sisters in February 2005.<sup>37</sup>

### STANDARD OF REVIEW

This court has jurisdiction over Parello's administrative appeal pursuant to AS 22.10.020(d). When reviewing the appeal, this court must determine whether the Commission's Final Order was supported by "substantial evidence."<sup>38</sup> Substantial evidence exists if, considering the record as a whole, the quantum of the evidence is substantial enough that a reasonable mind might accept the administrative agency's decision.<sup>39</sup> Accordingly,

[W]here the evidence is conflicting, the reviewing court will not reweigh the evidence and substitute its judgment for that of the trier of fact. Thus, the evidence should be reviewed in favor of the [Commission's] findings even though the reviewing court might have taken a contrary view of the facts.<sup>40</sup>

Parello argues that this court should use an "independent judgment" or "substitution of judgment" standard to review the Commission's determinations. Parello relies on a Louisiana Court of Appeal case to support the position that because Judge Pauli issued the Recommended Decision in this case after reviewing a digital recording of the initial hearing with Judge Stanley, her determinations were not based on first-hand observations, and as such require a more stringent standard of review on appeal. The Louisiana Court of Appeal's holding in *Carpenter v. State of Louisiana*, is inapposite to Parello's case in that it

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<sup>37</sup> AHT at 51.

<sup>38</sup> *State Comm'n for Human Rights v. Yellow Cab*, 611 P.2d 487, 493 (Alaska 1980).

<sup>39</sup> *Municipality of Anchorage Police and Fire Ret. Bd. v. Coffey*, 893 P.2d 722, 726 (Alaska 1975).

<sup>40</sup> *Yellow Cab*, 611 P.2d at 490.

relies on Louisiana statutes and addresses a factual scenario distinct from Parello's case.<sup>41</sup>

## DISCUSSION

Parello raises four issues on appeal: 1) Did Parello terminate Block's employment from Pulse Publications?; 2) If so, when did Parello terminate Block's employment?; 3) Did Block engage in protected activity under the relevant statutes?; 4) If so, and if Block's employment was terminated by Parello, was the termination motivated in whole or in part by Parello's desire to retaliate against her due to the protected activity she engaged in?

### Termination

Parello argues on appeal that the evidence presented to Judge Stanley and later reviewed by Judge Pauli indicated that Block was never terminated, and if she was, the date of termination was June 17, 2003, the last day she came to work at Pulse Publications.

Block testified that on June 13, 2003: "Charlie bought lunch for us, sat us down in the warehouse, and then laid-off the officer workers in front of Chuck and Mike."<sup>42</sup> Block explained further in response to questioning:

Q: And so what did Mr. Parello say when he did this?

A: He said the newspaper business is slow. You know, basically he didn't have a need for us, the three of us, Ryan, Tiffany, and myself. He said I'll give you a week, if things turn around, and –

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<sup>41</sup> *Carpenter v. State of Louisiana*, 944 So.2d 604 (La.App. 2006) (even were Parello's case analogous to *Carpenter*, it is not apparent Parello's characterization of the law in that case is accurate).

<sup>42</sup> AHT at 47.

and you can come – and once a month and work stuffing papers, you know, if you want to continue doing that.

Q: Okay. And at that point were you able to stuff papers?

A: No, I'd already told Charlie I can't manage the bundles. And then I'm having to have other employees pick them up for me, which isn't their job. You know, that's not their responsibility.<sup>43</sup>

Parello testified that Block's employment in the office was terminated on June 13, 2003, but that she could have remained employed in the warehouse of Pulse Publications.<sup>44</sup> Judge Stanley used voir dire examination of Parello to clarify this point, resulting in the following exchange:

Q: I mean listening to your testimony, in your mind do you distinguish – I mean it almost sounds like, from your testimony, that you distinguished the office from being sort of one employment center, the warehouse being another employment center, and then you've got outside people and graphic people, and those are there. So that is it your testimony [sic] that when you laid-off the three people that worked in the office, Ryan, Tiffany, and Robin, on June 13<sup>th</sup>, that even though Tiffany continued to perform some services with the brochure on an on-call basis, she was still not working in the office?

A: She was not working physically in the office at all. And yes, I do – your earlier part, designate office, with the way I have it setup, office includes sales people, graphics, clerical."

Q: Okay. But for three people physically working in the office and so forth, your testimony is that you laid them off from the office duties that they were performing..."

A: Right.

Q: ...on June 13<sup>th</sup>? And that was...

A: Yeah.

Q: ...Ms. Block, Tiffany, and Ryan?

A: Yes.<sup>45</sup>

Having heard both Parello and Block's testimony, Judge Pauli determined that when Parello took Block and the other office workers to lunch on June 13,

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<sup>43</sup> AHT at 48.

<sup>44</sup> AHT at 164-165.

<sup>45</sup> AHT at 164-65.



he “told them he was laying them off, effective in one week.”<sup>46</sup> Although Judge Pauli understood that Block’s last day of employment with Pulse Publications was June 17, 2003, the testimony of both Block and Parello made it clear that she was discharged on June 13, 2003, with the understanding that the following week would be her last week at work.

On appeal, Parello attaches significance to his offer of warehouse work when he laid off the office staff. Judge Pauli did not attach the same significance to his offer due to Block’s testimony that she could not perform the warehouse jobs due to her disability. Moreover, Parello never objected to Judge Stanley’s description of the June 13, 2003, layoff and directly testified that the layoff occurred on June 13, 2003, multiple times during the hearing.<sup>47</sup> Thus, Judge Pauli’s determination that Block was discharged on June 13, 2003, was supported by substantial evidence.

### **Protected Activity**

In order to find that Parello discharged Block in retaliation for Block’s complaint to the Commission, a determination must be made that Block’s complaint was a “protected activity” under AS 18.80.220(a)(4). AS 18.80.220(a)(4) provides:

...it is unlawful for an employer, labor organization, or employment agency 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.

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<sup>46</sup> R. at 20.

<sup>47</sup> AHT at 165, 167-169.

It is well established law that an employee's reasonable attempts to seek redress for discrimination, perceived or actual, constitute protected activity.<sup>48</sup>

Parello argues on appeal that Block's phone call to building management was not protected activity. Judge Pauli discussed in detail in her Recommended Decision which actions of Block qualified as "protected activity" for purposes of the statute. Judge Pauli noted that it is unclear whether Block's phone call to building management should be considered protected activity.<sup>49</sup> The relevant "protected activity" analysis in the Recommended Decision rested on Block's complaint to Parello the morning of June 11, 2003, after she had contacted the management company, as well as her complaint to the Commission. Thus, it is irrelevant whether Block's phone call to building management was "protected activity" under AS 18.80.220, as the Commission's determination did not rely on it as such.

Block's phone call to the Commission constituted a "protected activity" under AS 18.20.220(a)(4). She called the Commission to report that her employer refused to accommodate her disability and that her own actions to remedy the situation, i.e. calling the management company and raising the issue with Parello, had made her fearful that she would lose her job. This action was one avenue by which Block opposed what she believed to be a discriminatory practice, as well as the initiation of a complaint with the Commission. Likewise,

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<sup>48</sup> See e.g. *McAlindin v. County of San Diego*, 192 F.3d 1226, 1238 (9th Cir. 1999); *Coons v. Sec'y of U.S. Dept. of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004).

<sup>49</sup> R. at 26 n. 77.

raising the issue with Parello was another avenue of opposing what Block believed to be discrimination in the workplace.

### **Retaliation**

Alaska courts have generally adopted federal standards and modes of analysis for addressing discrimination claims under Alaska's anti-discrimination laws.<sup>50</sup> When determining whether an employer's behavior was retaliatory, Alaska law requires courts to engage in a burden-shifting analysis originally articulated by the United States Supreme Court in *McDonnell Douglas Corporation v. Green*.<sup>51</sup> Under *McDonnell Douglas*, and in the context of Block's retaliatory termination claim, the employee must establish that she engaged in a protected activity, suffered an adverse employment action, and that there was a potential causal link between the protected activity and the employer's adverse employment action.<sup>52</sup>

In order to show a potential causal link between an employee's protected activity and an employer's adverse employment action, evidence must be presented that would allow a reasonable trier of fact to conclude that the employer was aware of the protected activity, along with evidence from which causation could be inferred.

Once this *prima facie* case of retaliation is established, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for the employment

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<sup>50</sup> *Smith v. Anchorage School District*, 240 P.3d 834, 839 (Alaska 2010).

<sup>51</sup> 411 US 792 (1973).

<sup>52</sup> *Raad v. Alaska State Commission for Human Rights*, 86 P.3d 899, 905 (Alaska 2004).

action. The employer need only produce “admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by [retaliatory] animus.”<sup>53</sup> The reason must be one that existed at the time the employment decision was made.<sup>54</sup>

If the employer is successful in meeting this burden, the burden shifts again to the employee to show that the employer’s action was more likely motivated by a discriminatory reason. This is generally done by showing that the employer’s proffered reason was pretextual.<sup>55</sup> Pretext may be shown in a number of ways.<sup>56</sup> When direct evidence is not available, pretext may be established by showing “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action” that they are unworthy of credence.”<sup>57</sup>

Moreover, an employment action may be deemed retaliatory even where the employer’s motives were a mixture of proper and improper considerations. In these cases, the employee need not show that the employer’s action was entirely pretextual. The employee can prevail on a retaliation claim if the evidence as a whole indicates the improper, retaliatory motive was “a motivating factor in the decision.”<sup>58</sup> In mixed-motive cases, the employer can avoid liability by showing

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<sup>53</sup> *Raad v. ASCHR*, 86 P.3d at 905.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1250 (10th Cir. 2002); *see also Raad v. Fairbanks North Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003).

<sup>58</sup> *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 920 (Alaska 1999).

the same decision would have been made even if the improper motive had not played a role.<sup>59</sup>

Judge Pauli determined that Block's complaint to Parello on June 11, 2003, about the parking situation, as well as her complaint to the Commission on June 12, 2003, were both protected activity under AS 18.80.220. Judge Pauli also held that the layoff of Block on June 13, 2003, was an adverse employment action. Judge Pauli found that although there was a mixed motive for Parello's actions, the extremely close temporal proximity of Block's complaints and her termination indicated a causal link.

Judge Pauli held that Parello provided some evidence of a legitimate, nonretaliatory motive for the termination. He gave vague testimony about the business decision to let his office staff go, although he could not provide a concrete answer as to why he chose to terminate Block only two days after she raised the issue of handicapped parking and one day after she contacted the Commission. Judge Pauli also found it relevant that Parello had given Block a raise only two months earlier, contradicting the notion that he could not afford to staff his office or did not believe the work they did was worthy of the compensation he provided.

Parello argues on appeal that Block was required to show direct evidence of an improper motive for termination to succeed on her retaliation claim. The Alaska Supreme Court has held as much, declining to follow the federal courts in

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<sup>59</sup> *VECO*, 970 P.2d at 920-21.

eliminating the direct evidence requirement for mixed-motive cases.<sup>60</sup> The direct evidence requirement is somewhat confusing, as the court in *Smith* recognized – direct evidence is not an antonym for circumstantial evidence, but instead refers to the quantum of proof required.<sup>61</sup> Most succinctly stated, “In order to show direct evidence the plaintiff must ‘at least offer either direct evidence of prohibited motivation or circumstantial evidence strong enough to be functionally equivalent to direct proof.’”<sup>62</sup>

Judge Pauli found the temporal proximity between Block’s complaints to Parello and the Commission and her subsequent discharge so striking as to support a finding of retaliatory termination. Moreover, the timing of Parello’s decision to terminate Block seemed to contradict his previous decision to give Block a raise, only two months prior to her discharge. Judge Pauli also found Parello’s testimony explaining his decision to lay off his office staff unconvincing, noting that it was vague, and did not explain why the lay off was necessary at that time.

Significant in this case, proximity in time between the protected activity and the adverse employment action can suffice to show causation.<sup>63</sup> Parello cites a Ninth Circuit case, *Cozalter v. City of Salem*, for the proposition that “a specified time period cannot be a mechanically applied criterion,” when

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<sup>60</sup> *Smith*, 240 P.3d at 840.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (quoting *Mahan v. Arctic Catering, Inc.*, 133 P.3d 665, 662 (Alaska 2006)).

<sup>63</sup> *VECO*, 970 P.2d at 919 (Alaska 1999) (quoting *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 730-31 (9th Cir. 1986)); *Raad v. FNSBS*, 323 F.3d at 1196-97 (cited with approval in *Raad v. ASCHR*, 86 p.3d at 905 n. 25).

establishing causation.<sup>64</sup> Although Judge Pauli found the timing of Block's discharge "enormously suggestive" of a casual connection between Block's protected activity and her termination, there is no indication that she viewed the evidence "mechanically."

Judge Pauli viewed the extremely short time period in which all of the relevant activity occurred in this case, in context with Block's recent pay raise, which contradicted Parello's vague testimony indicating Pulse Publications could no longer support an office staff. Judge Pauli also considered Parello's inability to produce a specific business justification for the timing of Block's termination.

Judge Pauli recognized that Parello's case is one of mixed motives. Although Parello may have been considering reducing his staff, specifically his office staff, it appears from the whole of the evidence that Block's complaints regarding accommodations for her disability were the "catalyst" as Judge Pauli stated, for Parello's decision to terminate Block. As discussed above, Parello's retaliatory motive need only be a motivating factor in his decision to terminate Block to be considered unlawful; it need not be his entire justification for her discharge.

Parello's case illustrates the complexity facing the Commission as it determines the outcome of mixed-motive cases of discriminatory retaliation. This court, sitting as an intermediate court of appeal, may not reweigh the evidence to produce a different outcome in Parello's case. There is substantial evidence

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<sup>64</sup> 320 F.3d 968, 977-78 (9th Cir. 2003).

supporting Judge Pauli's Recommended Decision, which the Commission has adopted as its Final Order in this case.

### CONCLUSION

For the foregoing reasons, the Commission's Final Order is AFFIRMED.

DATED: August 4, 2011, at Anchorage, Alaska.

*Signed* \_\_\_\_\_

PHILIP R. VOLLAND  
SUPERIOR COURT JUDGE

*I certify that on the 5<sup>th</sup> day of AUG11  
a copy of the above was distributed  
to each of the following:*

J. Josephson | AGO Milks | ASCHR Shortell

*Signed* \_\_\_\_\_

Judicial Assistant / Clerk

[This document has been modified to conform to the technical standards for publication.]