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.* LYNN DOWLER, Complainant, v. PAUL KOPF, d/b/a Goldstream Store, a/k/a Goldsteam General Store, Respondent.	)	OAH No. 10-0264-HRC ASCHR No. J-09-138

RECOMMENDED DECISION

I. INTRODUCTION

Executive Director Paula Haley, acting on behalf of Lynn Dowler, filed an Accusation against Paul Kopf alleging that he is the sole proprietor of Goldstream General Store and that, as such, Mr. Kopf discriminated against Ms. Dowler based on her religion through the creation of a hostile work environment.

As discussed below, Paul Kopf did create a hostile work environment at the Goldstream General Store and the Commission should enter an order expressing that finding and providing for additional relief.

II. FACTS

Lynn Dowler was employed by the Goldstream General Store for 27 years.[1] She was originally hired as a store clerk, and was later made the store manager.[2] In July of 2008, Paul Kopf purchased the store.[3] The employees who were working at the time of this purchase all remained employed after Mr. Kopf completed the purchase. These employees were Lynn Dowler, Amber Dowler,[4] Collin Hogan, and Tomorrow Kosal. Immediately after purchasing the

1 Dowler testimony.
2 *Id.*
3 Dowler testimony; Kopf testimony.
4 Lynn Dowler's daughter, who also goes by the name "Kelly."

store, Mr. Kopf started talking about religious topics in Ms. Dowler's presence.[5] Mr. Kopf agreed that he was prone to spiritual talk; he testified "it's who I am." The undisputed testimony at the hearing was that Mr. Kopf talked to her about religious issues almost daily. Mr. Kopf agreed that most of his discussions about religion were with Ms. Dowler and not with the other employees.

There was, however, a significant dispute concerning specific statements Mr. Kopf is alleged to have made. Ms. Dowler testified that Mr. Kopf stated on several occasions that her daughter Amber would go to hell because she (Amber) is a lesbian. Ms. Dowler also testified that on three or four occasions Mr. Kopf stated that all Catholics would go to hell. Ms. Dowler testified that she is Catholic, though she also testified that Mr. Kopf would not have known what her religion was. According to Ms. Dowler, Mr. Kopf also stated at one time that Hitler is his friend and that the Holocaust never happened.

Mr. Kopf denied making any of these statements. However, both Collin Hogan and Amber Dowler testified they heard Mr. Kopf talking about Catholics. Mr. Hogan said that Mr. Kopf talked about all religions and that he discussed Catholics more often. He also recalled hearing something said about Catholics going to hell. Amber Dowler testified that he heard Mr. Kopf say that Catholics are "the root of all evil" on one occasion. She also confirmed that Mr. Kopf talked about religion often, and that Lynn Dowler complained to her that she (Lynn) was tired of hearing Mr. Kopf talk about religion.

There was nothing in the record to suggest that these witnesses should not be believed. They do not appear to have been embellishing or fabricating their testimony in any way. Instead, their testimony supports Ms. Dowler's testimony without simply parroting her allegations.[6]

In addition to denying that he made these statements, Mr. Kopf testified that he has Catholic friends. He also introduced testimony from his former mother-in-law. She testified that she was Catholic and she had never heard Mr. Kopf make disparaging remarks about Catholics. This evidence does not outweigh the direct testimony of Lynn Dowler, Amber Dowler, and Collin Hogan. It is possible to have friends of a particular religion and still make negative

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[5] Dowler testimony.

[6] Tomorrow Kosal's testimony also supports Ms. Dowler's allegations. Mr. Kopf was able, however, to call her credibility into question. He presented evidence that contradicted some of what Ms. Kosal testified to under oath. Since Amber Dowler and Collin Hogan's testimony along with the testimony of Lynn Dowler is sufficient to support a finding on this issue, it is not necessary to rule on Ms. Kosal's credibility.

remarks to others about that religion. Similarly, not making disparaging statements in front of one's mother-in-law does not preclude one from making those statements to others.

It is more likely true than not true that Mr. Kopf did state that all Catholics would go to hell, or that he made similar statements disparaging Catholics. Other witnesses besides Ms. Dowler testified to these statements, and Ms. Dowler's e-mail shortly after she left employment refers to hurtful statements about Catholics.[7]

Whether Mr. Kopf also said that Amber Dowler would go to hell is not relevant. Those statements, if made, were more about Amber Dowler's sexual orientation than about religion.[8] Sexual orientation discrimination is not within the claims of the accusation in this case.

There is also no need to make a finding of fact as to whether Mr. Kopf made statements regarding Hitler and the Holocaust. The Executive Director did not meet her burden of proving that Ms. Dowler was subjectively offended by those statements, or that they contributed to her perception that her work environment was hostile. Even if these statements were made, they are not relevant to the issues before the Commission.

Mr. Kopf and Ms. Dowler both testified about various problems that were occurring with employees not doing their jobs. This culminated in a meeting held on April 21, 2009. A list of the employees' concerns was created and presented to Mr. Kopf.[9] This list started with a concern about Mr. Kopf talking about religion.

As a direct response to the list of employee concerns, Mr. Kopf wrote a set of new rules and had those rules included with each employee's May 1st paycheck.[10] This list was admitted as Complainant's Exhibit 2. This list is inserted in its entirety below:

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[7] Respondent's Exhibit 1, page 2. This document also suggests that she did not fabricate that allegation for later, as alleged by Mr. Kopf.

[8] *Cf. Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 293 (3rd Cir. 2009) (Statements that plaintiff would burn in hell, and that he was a sinner were not made because of religion but because of plaintiff's sexual orientation).

[9] Respondent's Exhibit 7, page 1. Only page one of this document was given to Mr. Kopf at that time. He found the other pages in his store shortly before the hearing.

[10] Dowler Testimony; Kopf Testimony.

Rec'd in paycheck May 1st

The new rules hours and shift times are as follows:

- Goldstream General Store will for STARTERS open up at 8:00 AM and close its doors at 12:00 AM.
- The morning shift is from 8:00 AM to 3:00 PM Mon – Fri and 8:00 AM to 4:00 PM Sat – Sun.
- The afternoon shift is from 2:15 PM to 12:15 AM Mon – Fri and 3:15 PM to 12:15 AM Sat – Sun.
- These hours are subject to change as the OWNER sees fit according to the times of the seasons.
- This is NOT a democracy and is NOT up for vote.
- Each employee's job description is whatsoever the OWNER deems it to be. The OWNER will decide who is qualified to do what jobs according the OWNERS discretion. The OWNER may demand that a particular set of jobs are done by one employee and not another. These factors may depend on the physical attributes of different employees and or their life circumstances. These decisions are ONLY made by the OWNER as the OWNER sees fit.
- Any game playing / refusal to comply / rebelling against ORDERS AND DEMANDS DIRECTED AT THE OWNER and any other trouble-making actions or jealousy's or whatever will result in immediate TERMINATION.
- Further more employees who cannot get along with each other or the OWNER will be TERMINATED. This is a BUSINESS not a democratic club house.
- The OWNER of this BUSINESS is a very active CHRISTIAN who by nature of personality strives with lifetime goals to the benefit of humanity. The OWNER is by nature prone to religious and philosophic conversations. Anyone who thinks they can WEAR their religion / philosophy / ideology / expression of who they are and does not want to hear someone elses said state of being will be considered hypocritical and incompatible with the group. This does not mean that we must agree with the other persons BEING. It does however mean that we do not FIGHT OR ARGUE AGAINST THE OTHER. If an employee wants to strut their stuff and slam another in direct frontal combat, that person will be TERMINATIED.
- Upstarts, Smart Asses, trouble makers, disrespectful, game playing, employees will be TERMINATED.
- If an employee does not do his or her job, they will be TERMINATED.
- The TERMINATION is ENTIRELY up to the discretion of the OWNER and will be implemented according to the time and manner that the OWNER sees fit.
- The OWNER intends this to be a family and if that is not possible because of one or persons, he or she or they will be TERMINATED.

Exhibit 2
Admitted

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All four employees quit after receiving this document.[11] Ms. Dowler quit because when she received the new work rules, she knew that Mr. Kopf would not stop talking about religion.[12]

III. DISCUSSION

A. Preliminary issues

1. Character Evidence

A key factual allegation in this case is that Mr. Kopf made derogatory statements about Catholics, and that he made those statements to Ms. Dowler. Mr. Kopf introduced testimony that he had Catholic friends, and that other people had not heard him make derogatory statements about Catholics. The Executive Director objected to the admission of this character evidence. In administrative proceedings such as this one,

> [t]he hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible person are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action.[13]

The Executive Director called three witnesses to testify that they heard Mr. Kopf make statements to them about Catholics or the Catholic religion. This testimony tended to support Ms. Dowler's testimony that Mr. Kopf made similar statements to her. If Mr. Kopf made statements to one person, it is more likely that he would also have acted similarly when talking to another person.

The testimony presented by Mr. Kopf is only slightly different. It could be inferred that a person with Catholic friends is less likely to make negative statements about Catholics than a person who does not have Catholic friends. Thus, the evidence is relevant as it has a tendency to make a fact at issue – whether he made those statements to Ms. Dowler – less likely.[14] Similarly, the testimony of a witness that he or she never heard Mr. Kopf make derogatory statements is relevant, as one who does not make such statements in one setting, may be less likely to make them in another setting. The character evidence presented by Mr. Kopf is the type of evidence that reasonable people rely on in conducting serious affairs. While it would likely be

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11 Dowler Testimony; Kopf Testimony.
12 Dowler Testimony.
13 AS 44.62.460(d).
14 *See*, Evidence Rule 401.

inadmissible under the evidence rules applicable to court proceedings, it is admissible in an administrative proceeding under the Administrative Procedure Act.[15]

While this evidence is admissible, how much weight it should be given is a different question. Evidence of who Mr. Kopf's friends are and what he has said in other situations is relevant, but is entitled to much less weight than direct evidence of what Mr. Kopf said to his employees in his store. As discussed above, this evidence was not sufficient to outweigh the other evidence that indicated Mr. Kopf did make derogatory statements about Catholics.

2. Lack of Complaint by Lynn Dowler

Mr. Kopf elicited evidence that Lynn Dowler never complained to him about his practice of speaking about religion. It is possible that he would have changed his behavior around her if she had complained, but that is not a relevant area of inquiry here. Mr. Kopf has not cited, and the undersigned has not found, any legal requirement that an employee complain before the employer can be held liable for violating AS 18.80.220(a)(1). Instead, the rule is that an employer is liable for a hostile work environment created by an employee's supervisor.[16] There is no dispute in this case that Paul Kopf was Lynn Dowler's supervisor. Thus, Mr. Kopf is liable for his own actions even though Ms. Dowler did not tell him his behavior was offensive.[17]

3. Witness Oath

Mr. Kopf took video depositions of several witnesses. Depositions are a form of discovery. In Human Rights Commission cases, discovery is conducted pursuant to the rules applicable in civil actions.[18]

In taking these video depositions, Mr. Kopf's attorney operated the video camera and administered an oath to the witnesses. The Complainant objected because the oath was given by the attorney for one of the parties in this case. Civil Rule 28 says:

> No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action, except that in the

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15 The Administrative Procedure Act applies to Human Rights Commission hearings. AS 18.80.120(b).

16 *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

17 In some situations, an employer could assert an affirmative defense to liability or damages if it can show, among other things, that it exercised reasonable care to prevent harassment. *Faragher*, 524 U.S. at 807. There was no evidence in this case that Goldstream Store exercised reasonable care, and in any event this affirmative defense is not available in cases like this, where the employee has been discharged. *Faragher*, 524 U.S. at 808.

18 6 AAC 30.510(a).

> case of an audio or audio-visual deposition, an attorney involved in the case may also operate or direct the operation of the recording machinery.[19]

Civil Rule 30 discusses the procedure for taking depositions and states, in part:

> The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. For an audio or audio-visual deposition, any officer authorized by the laws of this state to administer oaths shall swear the witness. The recording machinery may be operated by such officer, or someone acting under the officer's direction and in the officer's presence, even where such officer is also an attorney in the case.[20]

Civil Rule 30.1, which authorizes video depositions, says a video deposition may be taken without a court reporter. This rule also states that the oath must be administered on the recording, but it does not say who is authorized to administer that oath. Who is authorized to administer oaths is addressed in Civil Rules 28 and 30.

Looking at these rules together, it is evident that an exception has been created for audio and audio visual depositions.[21] Rule 30 specifically states "any officer authorized by the laws of this state to administer oaths shall swear the witness." This rule goes on to say that the recording machinery may be operated by "such officer … even where such officer is also an attorney in the case." When the rule states that "such officer" may operate the recording equipment, the rule is clearly referring to the officer who administered the oath. Similarly, when the rule goes on to say that this is permitted even when "such officer" is an attorney in the case, the rule is again referring to the person who administered the oath. If this rule was not intended to permit administration of the oath by an attorney for a party, the rule would have said something like: the recording machinery may be operated by such or officer **or by** someone operating under such officer's direction even when the operator is an attorney in the case.

4. Newspaper Article

Complainant's Exhibit 6 is a newspaper article published in August of 2009. Originally, this document was used by Mr. Kopf to refresh Ms. Dowler's recollection. Complainant then offered it as an exhibit. Mr. Kopf objected to this exhibit.

This document is hearsay. It is an unsworn, out of court statement by the reporter asserting what the reporter was allegedly told by Ms. Dowler. That this document was

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19 Civil Rule 28(d).

20 Civil Rule 30(c) (emphasis added).

21 To the extent that the ALJ ruled differently at the hearing, that ruling is reconsidered.

admissible under Evidence Rule 612(a) – a writing used to refresh a witness' memory – does not change the fact that it is hearsay. Accordingly, this document is not sufficient by itself to support any finding of fact, but it may be used to supplement other evidence that supports such a finding.[22] Ultimately, this document was not relied on in reaching any factual findings in this matter. The article consists of the reporter's opinions and some alleged statements from Ms. Dowler. This particular newspaper article is not the sort of evidence on which reasonable people rely in the conduct of serious affairs.[23]

5. Notes of Employee Meeting

Ms. Dowler testified that she and the three other employees met to discuss personnel issues. She wrote a list of eight points that the employees wanted to have presented to Mr. Kopf, and she did in fact hand that list to him. There are two versions of this list. Complainant's Exhibit 1 is the original document.[24] Respondent's Exhibit 7 is a copy. The difference between these documents is in numbered paragraph 1. On the original, that paragraph reads: "Expecting employees to listen to his religion practices. We all wanted it to stop." The copy only includes the first of those two sentences.

An examination of the original document shows that each of the eight paragraphs is written in black ink. The first three letters in the sentence that says "We all wanted it to stop" are written with both blue and black ink. It is more likely true than not true that all eight paragraphs were written and then at some later time, someone added this second sentence in paragraph one. That person appears to have started writing the first three letters in blue ink, realized that the color was different, and then wrote over the blue ink with black before completing the sentence.

The first page of Respondent's Exhibit 7 is the best available evidence of what was actually handed to Mr. Kopf after the employee meeting.

Mr. Kopf asserted that Ms. Dowler added the second sentence to bolster her claim for unemployment benefits. This may be true, but there is no need to make a finding on that issue. That Mr. Kopf discussed his religious views frequently is not in dispute. That he made derogatory comments about Catholics and that Ms. Dowler was frustrated and upset by Mr. Kopf's religious talk was testified to by Lynn Dowler, Amber Dowler, and Collin Hogan.

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22 AS 44.62.460(d).

23 *Id.*

24 A copy was originally submitted, but when questions arose about whether it had been altered, the original was submitted. Counsel for the Executive Director stated that this would permit the ALJ to decide whether it had been altered.

Whether other employees also wanted the religious talk to stop is not relevant to whether Ms. Dowler was subjected to a hostile work environment.[25]

B. Hostile Work Environment

It is unlawful for an employer to discriminate against a person in a "term, condition, or privilege of employment because of the person's. . . religion."[26] The Alaska Supreme Court has held that discriminatory behavior that is sufficiently severe or pervasive such that it creates a hostile work environment violates AS 18.80.220.[27] The Commission may look to federal case law for guidance as long as those cases do not conflict with a liberal interpretation of AS 18.80.[28]

The U.S. Supreme Court has held that discriminatory harassment that creates a hostile or abusive work environment violates Title VII of the Civil Rights Act of 1964.[29] To constitute a violation, the harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.[30] This creates both an objective and a subjective test: The conduct must be such that a reasonable person would find it hostile or abusive and, in addition, the victim must actually perceive the conduct as abusive.[31]

To determine whether conduct is sufficiently severe or pervasive to create an objectively hostile or abusive work environment, the Commission should consider all of the circumstances including:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[32]

Other factors may be relevant, and no single factor is required.[33] The impact of the behavior that allegedly creates the hostile work environment must be judged based on the "constellation of surrounding circumstances, expectations, and relationships."[34]

The Alaska Supreme Court has followed this same approach, and has also noted that the required showing of severity is less as the pervasiveness of the conduct increases.[35]

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25 Mr. Kopf conceded that he spoke about religion most often to Ms. Lynn Dowler.
26 AS 18.80.220(a)(1).
27 *French v. Jadon, Inc.*, 911 P.2d 20, 28 (Alaska 1996).
28 6 AAC 30.910(b).
29 *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).
30 *Meritor Savings Bank*, 477 U.S. at 67.
31 *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 – 22 (1993).
32 *Harris*, 510 U.S. at 23.
33 *Id.*
34 *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998).
35 *Veco, Inc. v. Rosebrock*, 970 P.2d 906, 916 (Alaska 1999).

The evidence demonstrates that Lynn Dowler was subjected to a hostile work environment that altered the terms of her employment. It is true that Ms. Dowler was not being coerced into agreeing with or conforming to Mr. Kopf's religious beliefs. She was, however, required to listen to those religious beliefs almost every day – beliefs that differed from her own. Ms. Dowler testified that the conversations interfered with her work and made her uncomfortable, and several witnesses corroborated that testimony. Both Amber Dowler and Collin Hogan testified that Lynn Dowler looked frustrated and uncomfortable when Mr. Kopf was talking to her about his religion, and Amber Dowler testified that her mother had complained to her about this. It is also significant that the person making the religious statements was Mr. Kopf, the owner of this small business. Ms. Dowler could not avoid working with Mr. Kopf, and he controlled all aspects of the employment relationship.

Goldstream Store is a small business, and its owner, Mr. Kopf, lived in the apartment above the store. He would come downstairs daily, often to the backroom where Ms. Dowler was working. He would trap her in the room such that she felt she could not escape listening to him.[36] When she did try to avoid him, he would follow her, continuing to talk about religion.[37] At least a few of Mr. Kopf's comments were disparaging to Catholics. A reasonable person would find this to be sufficiently hostile or abusive to alter the terms and conditions of employment. In addition, Ms. Dowler testified that she subjectively perceived this conduct as abusive, and there is no reason to doubt her testimony on that question.

Many cases involving a hostile work environment arise from sex-based discrimination, and Mr. Kopf argues that discussion of religion is different than conversations related to sex.[38] Mr. Kopf suggests that there is a danger of prohibiting any conversation about religion which would result in only atheists being able to express their views.[39] Mr. Kopf might be correct in suggesting that religious discussions in the workplace are less likely to create a hostile work environment than discussions referring to sex, but his concern is still misplaced. First, this case does not involve a few off-hand comments, nor does it involve discussions initiated by the employee. Mr. Kopf expressed his religious views to Ms. Dowler on an almost daily basis. She had to listen. The comments about Catholics only occurred a few times, but those comments

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36 Dowler Testimony.
37 Dowler Testimony.
38 Opposition to Motion for Leave to Late-file Prehearing Brief.
39 *Id.* at 2 – 3.

were certainly offensive. Second, Mr. Kopf is wrong about only atheists being able to express views. AS 18.80 would equally prohibit discussions from an atheist owner that focused on the non-existence of God or would be reasonably viewed as offensive by people who hold religious beliefs.

C. Constructive Discharge

Ms. Dowler also claims 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.[40] It is not necessary to prove that the employer had the specific intent of causing the employee to quit.[41]

In this case, on April 21, 2009, the Mr. Kopf's employees listed as their first concern among several grievances that they were expected to listen to Mr. Kopf talk about his religion.[42] Mr. Kopf's response was, in part:

- ⊕ Any game playing/refusal to comply/rebelling against ORDERS AND DEMANDS DIRECTED AT THE OWNER and any other trouble-making actions or jealousy's or whatever will result in immediate TERMINATION.
- ⊕ Further more employees who cannot get along with each other or the OWNER will be TERMINATED. This is a BUSINESS not a democratic club house.
- ⊕ The OWNER of this BUSINESS is a very active CHRISTIAN who by nature of personality strives with lifetime goals to the benefit of humanity. The OWNER is by nature prone to religious and philosophic conversations. Anyone who thinks they can WEAR their religion/philosophy/ideology/expression of who they are and does not want to hear someone elses said state of being will be considered hypocritical and incompatible with the group. This does not mean that we must agree with the other persons BEING. It does however mean that we do not FIGHT OR ARGUE AGAINST THE OTHER. If an employee wants to strut their stuff and slam another in direct frontal combat, that person will be TERMINATED.[43]

A person reading this document after complaining about Mr. Kopf's talking about religion could reasonably conclude that a "demand" that Mr. Kopf stop would be grounds for termination and that Mr. Kopf would continue to express his religious views. Anyone who did not want to listen to him would be considered "incompatible with the group." Ms. Dowler reasonably concluded that Mr. Kopf was not going to stop talking about religion to her, and her only choice was to endure that illegal activity, or quit.

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40 *Charles v. Interior Regional Housing Authority*, 55 P.3d 57, 60 (Alaska 2002).
41 *Id.*
42 Respondent's Exhibit 7.
43 Complainant's Exhibit 2 (emphasis in original).

Ms. Dowler's situation is similar to what occurred in *Young v. Southwestern Savings and Loan Association*.[44] There, the employee worked as a bank teller. The employer required attendance at monthly meetings that began with a short religious talk and prayer.[45] There was nothing offensive about the religious discussion and prayer except that it differed from Ms. Young's views. She objected to the religious content and was told that her attendance was mandatory and that she could just not listen to the religious portion.[46] Ms. Young left her employment, claiming that she had been fired.[47] The Fifth Circuit held that she had been constructively discharged.

> The only possible reason for her resignation on September 15, 1971, was her resolution not to attend religious services which were repugnant to her conscience, coupled with the certain knowledge from Bostain, her supervisor, that attendance at the staff meetings in their entirety was mandatory and the reasonable inference that if she would not perform this condition of her employment she would be discharged. . . . This is precisely the situation in which the doctrine of constructive discharge applies, a case in which an employee involuntarily resigns in order to escape intolerable and illegal employment requirements.[48]

Ms. Dowler also involuntarily resigned to escape the intolerable and illegal requirement that she listen to Mr. Kopf's religious discussions. The only difference in this case is that Ms. Dowler may have had additional reasons for resigning. The employees' list of concerns included several complaints, and the e-mail she sent after her resignation also detailed several complaints. Ms. Dowler is not, however, required to prove that the religious discussions were the only reason she left. She should only be required to prove that they were a motivating factor in her decision.

The undersigned ALJ has not found any case law directly addressing this question, but a different interpretation would not be consistent with the Commission's obligation to construe A.S. 18.80 liberally. To hold that an employee must show that the illegal discrimination was the sole or even the most important factor in her decision to resign would place a difficult burden of proof on employees, especially in cases where the employer acts wrongfully in several different ways. For example, an employer might be violating both AS 18.80 and the Alaska Wage and

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44 509 F.2d 140 (5th Cir. 1975).
45 *Young*, 509 F.2d at 141 – 142.
46 *Young*, 509 F.2d at 142.
47 *Id.*
48 *Young*, 509 F.2d at 144.

Hour Act.[49] An employee might find both violations equally intolerable, but if she resigned she would not be able to prove that the violation of AS 18.80 was the most important factor in that decision. In that situation, the Commission would not be able to order back pay, reinstatement, or front pay to provide the employee a remedy.

This proposed ruling is also consistent with the holding in *Veco, Inc. v. Rosebrock.*[50] There the Alaska Supreme Court considered whether an employee's protected complaints about discrimination had to be the sole reason for her termination in order to prevail in her wrongful discharge action. The court determined that her cause of action would be valid even if the employer had several reasons for terminating her, as long as a motivating factor was her protected activity.

> Requiring plaintiffs in wrongful termination cases to prove that their termination was caused solely by their protected actions would unnecessarily restrict the term "because" and would hinder achieving the purpose of AS 18.80.220, eradicating discrimination. We therefore hold that a wrongful termination claim pursuant to AS 18.80.220(a)(4) can be based on mixed-motive causation.[51]

The result should be the same whether an employer fires an employee based on mixed motives, one of which is illegal, or forces an employee to resign by imposing intolerable conditions, one of which is illegal. As long as the discriminatory act is a motivating factor, the employee should be entitled to relief from the Commission unless the employer can meet its burden of proving that the employee would have quit even if the discriminatory behavior had not occurred.[52] Mr. Kopf did not meet his burden of proving that Ms. Dowler would have quit or been terminated absent the religious talk from Mr. Kopf.

D. Subsequent Participation in Boycott

In its post-hearing brief, Mr. Kopf argues that Ms. Dowler would have been terminated in any event for her post-termination conduct.[53] The evidence in this case is that on the Saturday after all four employees terminated their employment, three of them picketed the store and urged

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[49] There was evidence in this case that at least one employee, but not Ms. Dowler, was paid in laundry and shower tokens. This appears to be a violation of AS 23.10.040.

[50] 970 P.2d 906 (Alaska 1999).

[51] *Veco*, 970 P.2d at 920.

[52] *Id.* (Approving jury instruction placing burden of proof on employer to prove it would have made same decision absent absent complaint by employee.)

[53] The ALJ asked for post-hearing briefs on the question of how damages should be calculated. The Executive Director objected to consideration of issues beyond the scope of what was requested. Arguably, Goldstream Store's brief does not go beyond that because part of the calculation for damages would include whether damages should be awarded. Since Goldstream Store's argument is rejected, there is no prejudice to the Executive Director in considering that argument.

people not to shop there. On the next day, Sunday, Ms. Dowler also picketed. Mr. Kopf argues that she would have been legitimately terminated for this activity, as well as for sending an e-mail on May 5, 2009,[54] and for giving an interview to a newspaper reporter some time later.[55]

Mr. Kopf is correct that wrongful conduct of an employee discovered during litigation may be grounds to reduce or eliminate back pay and front pay awards, even if that conduct would not have been discovered but for the litigation.[56] This case is different, however, because any allegedly wrongful conduct by Ms. Dowler occurred *after* her wrongful termination. Mr. Kopf has not cited any case that allows for a reduction in damages based on wrongful conduct that occurred after the employment relationship ended. Assuming that there might be situations where a reduction for post-termination conduct is appropriate, Mr. Kopf would need to prove that the conduct would actually have occurred. Mr. Kopf has not met its burden of proving that, but for Mr. Kopf's insistence on his right to continue talking about religion, Ms. Dowler would have voluntarily quit or been fired by Goldstream. While she might have supported the other employees in their actions against the store, she might equally have decided to stick with the job she loved and had held for 27 years if only Mr. Kopf had agreed that his religious discussions were inappropriate.[57]

E. Remedies

When there is a finding that a person has engaged in a discriminatory practice, the Commission is required to order the person to refrain from that practice.[58] In addition, the Commission has the discretion to order additional appropriate relief including training of the employer and its employees, posting of signs, back pay, or front pay.[59]

Decisions by the Commission should be consistent with prior court decisions, prior Commission decisions, Commission guidelines, and policy statements.[60] Thus, to the extent the Commission has discretion to adopt remedies in this case, those remedies should be consistent with what the Commission has adopted in similar prior cases. Neither party has cited to other

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54 Respondent's Exhibit 1.
55 Complainant's Exhibit 6.
56 *Brogdon v. City of Klawock*¸ 930 P.2d 989, 992 (Alaska 1997).
57 Nor did Goldstream Store actually send Ms. Dowler a termination notice after she did participate in the boycott. *Cf. Brogdon*, 930 P.2d at 991 (supplemental termination notice issued to employee during wrongful termination lawsuit).
58 AS 18.80.130(a).
59 AS 18.80.130(a)(1).
60 6 AAC 30.910(a).

decisions, guidelines, or policy statements concerning how the Commission has exercised its discretion in the past regarding imposition of remedies. Accordingly, this recommendation is based on court rulings explaining why different remedies have been adopted.

One major purpose of statutes prohibiting discrimination is to make whole those who have suffered from unlawful discrimination.[61] To accomplish that purpose, back pay should be awarded unless denial of back would not frustrate the purpose of eradicating discrimination and making the victim whole.[62] In most situations, back pay is calculated from the date of the discriminatory act through the date of final judgment.[63] Front pay is also an available remedy, but only when reinstatement is impossible or inappropriate because of the antagonism between the parties.[64]

Ms. Dowler was discriminated against by the creation of a hostile work environment. She lost income as of the date of her constructive discharge, and has continued to lose income since that date. Back pay should be awarded to help put her in the position should would have been in but for the illegal conduct of her employer. In addition, the Commission should also award front pay. While reinstatement is the preferred remedy, that remedy is not appropriate here. Goldstream Store is a small business where the manager and owner must work together closely. It was evident at the hearing that there is still hostility and antagonism between the parties that would make it difficult, if not impossible, for Mr. Kopf and Ms. Dowler to work together in the future. In addition, a new manager has been hired, so there is no manager vacancy at the store for Ms. Dowler to fill.

Ms. Dowler testified that she was paid $20 per hour, and that she also worked various amounts of overtime. For the first four months of 2009, Ms. Dowler earned a total of $13,225, including overtime.[65] This is equal to an average of $3,306.25 per month.

Since leaving Goldstream, Ms. Dowler has earned money from other employment in mitigation of her damages. At the end of February of 2010, she found part time work for Lion's

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61 *Thorne v. City of El Segundo*, 802 F.2d 1131, 1133 (9th Cir. 1986).

62 *Thorne*, 802 F.2d at 1133 – 1134.

63 *Thorne*, 802 F.2d at 1136.

64 *Thorne*, 802 F.2d at 1137.

65 Complainant's Exhibit, page 5 (April Payroll stub). In her post hearing brief, the Executive Director uses Ms. Dowler's income as reported on her W-2 form. That includes income for four months and one day.

Choice Pull Tabs. Beginning in March, through the end of July 2010, she earned an average of $1058.81 per month.[66] These earnings in mitigation are deducted from a compensation award.[67]

Ms. Dowler is entitled to prejudgment interest on her back pay award. The interest rate is the amount provided for in AS 09.30.070.[68] That amount is 3.5% for judgments entered in 2010. Thus her back pay and front pay can be calculated as set out in Attachment A. Post judgment interest would apply on the total award at the statutory rate of 3.5% simple interest, per year.

In addition to a monetary award to make Ms. Dowler whole, it is appropriate to order additional equitable relief to help prevent the creation of a hostile work environment or other illegal discrimination at Goldstream Store in the future. The Commission should require Mr. Kopf and his managers to undergo training in the laws prohibiting discrimination. This training should be at least three hours in length and be provided by a trainer approved by the Executive Director. In addition, the Commission should require Mr. Kopf to adopt and disseminate a policy of nondiscrimination under the Alaska Human Rights Law acceptable to the Executive Director that includes a policy prohibiting retaliation based on discrimination. Finally, Mr. Kopf should be required to post a notice acceptable to the Executive Director in a location accessible to employees that informs employees of their rights under the Alaska Human Rights Law.

IV. RECOMMENDATION

Paul Kopf created a hostile work environment by repeatedly subjecting Lynn Dowler to his views on religion and by making occasional offensive comments about Catholics. When the employees complained about this practice, Mr. Kopf informed the employees that he would continue discussing his religious views. Accordingly, Ms. Dowler was faced with a situation in which she would either be required to accept the continuation of an illegal practice, or quit. This amounts to a constructive discharge.

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[66] She also earned $353.88 in 2009 working as an election official. Prior to her discharge, Ms. Dowler was able to work as an election official in addition to her duties at Goldstream Store. Since she would have earned this money had she not been discharged, it should not be deducted from her back pay award.

[67] AS 18.80.130(a)(1).

[68] AS 18.80.130(f).

Mr. Kopf violated the Alaska Human Rights Act. Because it constructively discharged Ms. Dowler, she is entitled to back pay with pre-judgment interest, front pay, and post-judgment interest on the total monetary award, as set out in Attachment A. Additional remedies as discussed in the final paragraph of the preceding section are also appropriate to ensure that Mr. Kopf does not discriminate in the future.

DATED this 5th day of November, 2010.

By: *Signed*
Jeffrey A. Friedman
Administrative Law Judge

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

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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY, EXECUTIVE DIRECTOR, ALASKA STATE COMMISSION FOR HUMAN RIGHTS *ex rel.* LYNN DOWLER,	)	
Complainant,	)	ASCHR No. J-09-138
v.	)	OAH No. 10-0264-HRC
PAUL KOPF, d/b/a Goldstream Store, a/k/a Goldstream General Store	)	
Respondent.	)	

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, are in agreement with the Recommended Decision of November 5, 2010 and find that Paul Kopf violated AS 18.80.220(a)(1) by creating a hostile work environment based on religion for Lynn Dowler and by constructively discharging her from employment.

The Commission imposes the following remedies consistent with the Recommended Decision:

(1) Monetary relief is awarded to Lynn Dowler in the form of backpay and prejudgment interest set at the rate of 3.5% per annum. *See* 6 AAC 30.480(b) (calculation of interest should be based on an application of AS 09.30.070(a)). The backpay was appropriately calculated to begin on the date of Lynn Dowler's constructive discharge (May 1, 2009). The Recommended Decision calculated the backpay and prejudgment interest through September 30, 2010 to be $49,909.78. Additional prejudgment interest from September 30, 2010 to the date of this order is $871.03. The total sum of backpay and prejudgment interest is $50,780.81.

(2) Additionally, the Commission agrees with the Recommended Decision that one year of front pay should be awarded. This is an appropriate remedy for this constructive discharge case in which Mr. Kopf continues to be the sole proprietor of the Goldstream Store. This remedy is authorized under AS 18.80.130(a)(1) which permits an award of one year of backpay in circumstances in which reinstatement is not appropriate because "the relationship between the employer and employee has so deteriorated as to make working conditions intolerable." The Recommended Decision properly calculated

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the front pay sum to be $26,072.28. The total backpay and prejudgment interest and front pay sum is $76,853.09.

(3) The Commission agrees with the Recommended Decision that post judgment interest at the rate of 3.5% should be awarded. It is noted that Alaska courts have held that post judgment interest is appropriate because it is necessary to compensate the successful party for lost use of money. *Ogard v. Ogard,* 808 P.2d 815, 817-18 (Alaska 1991); *Morris v. Morris,* 724 P.2d 527, 529 (Alaska 1986). The Commission has awarded pre and post judgment interest in this case at the rate of 3.5%, noting that is the rate recommended by the administrative law judge in the Recommended Decision and recommended by the Executive Director, and it is the rate applicable pursuant to AS 09.30.070(a) in 2010 when the Recommended Decision was issued. Accordingly, post judgment interest at the rate of 3.5% is awarded on the sum of $76,853.09.

(4) The Commission orders the following equitable relief in an effort to ensure that a hostile work environment or other illegal discrimination does not occur in the future at the Goldstream Store: (a) Mr. Kopf and his managers shall undergo training in the laws prohibiting discrimination; the training shall be at least three hours in length and shall be provided by a trainer approved by the Executive Director of the Commission; (b) Mr. Kopf shall adopt and disseminate a policy of nondiscrimination under the Alaska Human Rights Law; the policy shall be acceptable to the Executive Director and it shall include a policy prohibiting retaliation based on discrimination; (c) Mr. Kopf shall post a notice acceptable to the Executive Director in a location accessible to employees that informs employees of their rights under the Alaska Human Rights Law.

IT IS SO ORDERED.

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

DATED: April 8, 2011

[redacted]

Lester C. Lunceford, Commissioner

DATED: April 8, 2011

[redacted]

Faith Peters, Commissioner

DATED: April 8, 2011

[redacted]

Karen Rhoades, Commissioner