IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA DEPARTMENT OF HEALTH & SOCIAL SERVICES, DIVISION OF PIONEER HOMES, Appellant,	)	
v.	)	
ALASKA STATE COMMISSION FOR HUMAN RIGHTS, PAULA M. *ex rel.*, DORETTA WHEELER, Appellee.	)	Case No. 3AN-16-05727 CI

ORDER AND DECISION

In this case the State of Alaska, Department of Health and Social Services, Division of Pioneer Homes ("State") appeals a final order by the Alaska State Commission for Human Rights ("Commission"), which was issued March 7, 2016. On October 13, 2016, the Commission filed a complaint for enforcement of its final order. The court consolidated the appeal with the enforcement action on February 6, 2017. On November 7, 2016, the State filed its brief in support of its appeal. The Commission filed its brief on January 27, 2017, both arguing in support of enforcing the Commission's Final Order and responding to the State's appeal. On March 6, 2017, the State filed its reply brief. The court held oral argument on July 21, 2017.

For the reasons stated below, the court affirms the Commission's Final Order and orders its enforcement.

I. SUMMARY OF FACTS

Doretta Wheeler was a Certified Nurse Aide ("CNA") at the Palmer Pioneer Home for 18 years. On December 2, 2010, Ms. Wheeler had her left hip replaced. After surgery, Ms. Wheeler's recovery was expected to last six weeks, but instead lasted 12 weeks due to unforeseen medical complications.

Ms. Wheeler returned to work on February 23, 2011, but she suffered a complete dislocation of her artificial hip on August 17 and did not return to work. She was placed on permanent hip restrictions, preventing her from working as a CNA.

On September 19, the Division of Pioneer Homes informed Ms. Wheeler that her FMLA (Family and Medical Leave Act) leave would end on October 19. Human Resource Specialist Cindy Carte sent Ms. Wheeler a letter outlining her employment options in light of her injury. Ms. Wheeler was given the option of either reassignment as an accommodation or administrative termination,

Ms. Wheeler met with administrative officer Rafaela Wright and Ms. Carte to discuss her accommodation request. Ms. Wheeler requested light duty or reassignment. The Division decided that a reasonable accommodation would be reassignment because Ms. Wheeler's medical restrictions did not allow her to perform essential functions of her CNA position.

On November 6, Ms. Wheeler dislocated her hip again. She met with her orthopedic surgeon, Dr. Gary Benedetti on November 8 and discussed a revision surgery that might prevent the hip from unexpectedly dislocating again. The same day, Ms. Wheeler attempted to fax reassignment paperwork to Ms. Carte, but she used the wrong fax number.

Ms. Wheeler met with Dr. Benedetti on November 11 to discuss revision surgery again, and she decided to go forward with the procedure. She re-faxed the reassignment paperwork to Ms. Carte with a note asking Ms. Carte to call her because she had an update on her medical condition. Ms. Carte received Ms. Wheeler's completed reassignment application on November 14 and called Ms.

Wheeler. Ms. Wheeler informed Ms. Carte that she was having another hip surgery the next day, November 15.

The State and Ms. Wheeler dispute what Ms. Wheeler said regarding when she could return to work. Ms. Wheeler testified that she told Ms. Carte that she would be able to return to her CNA position without restrictions within a few weeks. Ms. Carte testified that Ms. Wheeler would not or could not tell her when she would return and was asking for indefinite leave. The Commission did not resolve the factual dispute.

After the phone call, Ms. Carte wrote a letter to Ms. Wheeler summarizing the relevant portions their phone call and informing Ms. Wheeler of her termination:

> On November 14, 2011 our office received your completed application with a note to contact you because your condition had changed. I spoke with you over the phone and you informed me that you injured your hip again and would be undergoing surgery on November 15, 2011. I explained that in order to locate a potential position to reassign to you, you would need to be released to perform work of some kind. You informed me that at this time you were not released to perform work of any kind and would require time to recover after your surgery.
>
> As you have not been released to return to work and you have fully exhausted your family leave entitlements, the Department has determined it is unable to continue to hold your Certified Nurse I position vacant. You will be administratively separated from your position without prejudice effective November 16, 2011. This action is not disciplinary and if in the future, you are able to return to work with a full release from a certified physician, Please contact us regarding your rehire eligibility.

Exc. 58. This is the only contemporaneous record of the disputed discussion between Ms. Wheeler and Ms. Carte. The same day, the Division posted Ms. Wheeler's position in-house.

Ms. Wheeler had her revision surgery on November 15. The next day, the State administratively terminated Ms. Wheeler. Dr. Benedetti released Ms.

Wheeler to return to work as a CNA with no restrictions on November 23. Because she was terminated, Ms. Wheeler did not contact the State to update them on her condition. Instead, she waited until a position was posted and applied on December 15. She did not receive the position.

On January 27, 2012, Ms. Wheeler filed a complaint of discrimination with the Alaska State Commission for Human Rights alleging that the State discriminated against her because of a disability when it refused to grant her leave to recover from surgery and instead terminated her employment. The Commission referred the matter to the Office of Administrative Hearings, which conducted a hearing, and heard sworn testimony from several witnesses.

The Administrative Law Judge ("ALJ") issued a proposed decision in Ms. Wheeler's favor, afterwards giving both parties the opportunity to file objections to its decision. The ALJ issued written rulings on the parties' objections and revised and finalized the proposed decision. The ALJ found that the State violated the Alaska Human Rights Act ("AHRA") by failing to provide a reasonable accommodation in the form of additional leave or reassignment to Ms. Wheeler.

The Commission reviewed the hearing record and the ALJ's Revised Recommended Decision. On February 19, 2016, the Commission issued a Revised Recommended Decision both adopting the ALJ's recommended liability decision and award of back pay and also ordering the State to reinstate Ms. Wheeler to her CNA position. The Commission gave both parties the opportunity to object to proposed revisions. The State did not object to the Commission's proposed order to reinstate Ms. Wheeler to her position.

The Commission issued a Final Order finding that the State improperly terminated Ms. Wheeler. The Commission adopted the ALJ's recommendation that Ms. Wheeler be awarded back pay and that the State receive additional anti-discrimination training. It also ordered that Ms. Wheeler "be reinstated to the position that she held prior to her dismissal, including the work shift that she was

assigned to assuming that CNAs are still assigned to that shift, at a wage rate and with seniority calculated as if she had no break in service." Exc. 96.

II. JURISDICTION

The court has jurisdiction pursuant to AS 18.80.135(a) and (b). Sub-section (a) permits judicial review of Commission orders; sub-section (b) authorizes the Commission to obtain a court order for the enforcement of its own orders.

The superior court has jurisdiction to act as an intermediate appellate court and review appeals from administrative agencies pursuant to Alaska Statute § 22.10.020(d) and Appellate Rule 601 et seq.

III. STANDARDS OF REVIEW

In an appeal from an agency decision, there are four principal standards of review: (1) questions of fact are subject to the "substantial evidence" test, (2) questions of law involving agency expertise are subject to the "reasonable basis" test, (3) questions of law where no agency expertise is involved are subject to the "substitution of judgment" test, and (4) review of administrative regulations is subject to the "reasonable and not arbitrary" test. *State v. Public Safety Employees Ass'n*, 93 P.3d 409, 413 (Alaska 2004).

The Commission made a factual finding that the State failed to satisfy the statutory requirements of the interactive process and failed to provide a reasonable accommodation to Ms. Wheeler. *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998); *Hill v. City of Phoenix*, No. CV-13-02315-PHX-DGC, 2016 WL 3457895, at *2 (D. Ariz. June 24, 2016); *Switzer v. California Dep't of Corr. & Rehab., No. B246005*, 2014 WL 4737916, at *12 (Cal. Ct. App. Sept. 24, 2014). "A determination of fact by the Human Rights Commission will stand if it is supported by substantial evidence." *Pyramid Printing Co. v. Alaska State Comm'n for Human Rights*, 153 P.3d 994, 998 (Alaska 2007). The court must

affirm the Commission's findings if "supported by such relevant evidence as a reasonable mind might accept to support a claim." *Anchorage Police Dept. Command Officers' Ass'n v. Municipality of Anchorage*, 177 P.3d 839, 841 (Alaska 2008), quoting *Collins v. Arctic Builders, Inc.*, 31 P.3d 1286, 1289 (Alaska 2001).

IV. ANALYSIS

The State appeals the Commission's Final Order, which requires the State reinstate Ms. Wheeler to her position and to pay her $84,716, plus interest, in back pay. In particular, the State contests (1) the Commission's finding that the State wrongfully dismissed Ms. Wheeler in violation of AS 18.80.220, (2) the Commission's award of interest on back pay, and (3) the Commission's reinstatement order as it relates to displacing current employees. The Commission seeks enforcement of the final agency order issued pursuant to AS 18.80.130 and requests the court: (1) direct the State to reinstate Doretta Wheeler to her position as a Certified Nurse Aide at the Palmer Pioneer Home and (2) require the State pay front pay to Doretta Wheeler until such time as she is reinstated to her position as a Certified Nurse Aide at the Palmer Pioneer Home.

A. The Commission had sufficient evidence to find the State wrongfully dismissed Ms. Wheeler in violation of AS 18.80.220.

The State requests this court find that a disabled employee's request for indefinite leave is unreasonable as a matter of law and that the Commission erred in not resolving the dispute regarding what was said during the phone call leading to Ms. Wheeler's termination, where the State claims Ms. Wheeler requested indefinite leave. The State's argument presents a principle that employers not given a definite return date and believe an employee requested indefinite leave have a right to terminate an employee without engaging in the interactive process

to ascertain the existence and feasibility of reasonable accommodations. Although it would be unreasonable to require employers to maintain a position open indefinitely while an employee receives treatment for a disability that is not what the facts indicate here.

Under the AHRA, AS 18.80, it is unlawful for an employer to discriminate against a person "in a term, condition, or privilege of employment because of the person's [disability.]" AS 18.80.220(a)(1). Because the AHRA is patterned after Title VII of the Civil Rights Act of 1964, "[t]his court examines relevant federal Title VII decisions for guidance on the parameters of our anti-discrimination statute." *Adams v. Pipeliners Union 798*, 699 P.2d 343, 347 (Alaska 1985)(internal quotations omitted). However, the court has observed that "AS 18.80.220 is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination." *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 912 (Alaska 1999) (*quoting Wondzell v. Alaska Wood Prods.*, Inc., 601 P.2d 584, 585 (Alaska 1979))(internal quotations omitted).

The AHRA imposes a duty on an employer to reasonably accommodate a disabled employee. *Moody–Herrera v. State, Dep't of Natural Res.*, 967 P.2d 79, 87 (Alaska 1998). Once an employer is aware of the employee's disability, the employer is required to engage with the employee in an interactive process to determine the appropriate accommodation. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3d Cir. 1999) ("Once the employer knows of the disability and the employee's desire for accommodations, it makes sense to place the burden on the employer to request additional information that the employer believes it needs."); *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 843 (Alaska 2010). Therefore, "[a]n employer is liable for failing to provide reasonable accommodation if it is responsible for the breakdown in the interactive process." *Smith*, 240 P.3d at 843.

Liability for failing to engage in the interactive process ensures that employers work with employees to identify effective reasonable accommodations.

"Without the possibility of liability for failure to engage in the interactive process, employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations." *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000) (vacated on other grounds, 535 U.S. 391 (2002)).

The State based its decision to fire Ms. Wheeler on one phone call where the State claims Ms. Wheeler "wasn't sure what the outcome [of her surgery] would be or how long she would be out." Br. of Appellant 8. The State argues that if Ms. Wheeler was unable to give a timeframe for her recovery from surgery scheduled for the next day, the State should be allowed to categorize this as a request for indefinite leave and unreasonable as a matter of law. The State uses Ms. Wheeler's alleged uncertainty to justify terminating her before it engaged fully in the interactive process to determine if alternative accommodations were available besides indefinite leave.

Allowing employers to prematurely terminate the interactive process the moment an employee shows any uncertainty about her prognosis would contravene the purpose of the interactive process. Employers could then escape liability by avoiding pertinent information and later claim they were unaware of any available accommodation that they could have made. Therefore, if a reasonable accommodation would have been possible at the time of the discriminatory action, an employer is liable if the employer failed to engage in the interactive process in good faith. *Id.* at 1115 ("The range of possible reasonable accommodations, for purposes of establishing liability for failure to accommodate, can extend beyond those proposed."). Even when a proposed accommodation is unreasonable, an employer is not relieved of its duty under the AHRA and is liable if reasonable accommodations were possible.

The court agrees with the State's argument to the extent that the AHRA does not require an employer to grant an employee indefinite leave; for example, in cases where employees continually request accommodations and employers do

not know when or if an employee will ever return to work.[1] However, the circumstances in this case are different—the State could have obtained definite information on Ms. Wheeler's prognosis in the immediate future and reasonable accommodations were possible. The State claims material issues of fact remain regarding what Ms. Wheeler told the State in her request for leave, but undisputed evidence shows that Ms. Wheeler was on the cusp of a major surgery that could have allowed her to return to work in a short, definite timeframe. The State didn't wait to obtain Ms. Wheeler's post-surgery report, and instead acted on information it knew was uncertain or incomplete. Moreover, the State did not show good cause to justify its failure to hold off terminating Ms. Wheeler for a few days after her request for additional leave.[2]

The Commission determined that the State failed to accommodate Ms. Wheeler's disability when it terminated her instead of continuing with the interactive process. Ms. Wheeler met her burden of demonstrating that reasonable accommodations were possible at the time the State terminated her, but the State failed to show it participated in the interactive process in good faith. The court finds substantial evidence supports the Commission's decision that the State wrongfully dismissed Ms. Wheeler in violation of AS 18.80.220.

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[1] Cases discussing indefinite leave address the unreasonableness of an employer being required to provide indefinite leave. Under the ADA, many Circuit Courts find that these employees are not qualified individuals covered by the anti-discrimination statute—"an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Nowak v. St. Rita High School, 142 F.3d 999, 1002-04 (7th Cir. 1998) ("The ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence."). *See* Walsh v. United Parcel Service, 201 F.3d 718, 727 (6th Cir. 2000) ("when the requested accommodation has no reasonable prospect of allowing the individual to work in the identifiable future, it is objectively not an accommodation that the employer should be required to provide").

[2] Employers can demonstrate good faith through cooperative behavior that helps identify appropriate accommodations: "Employers should 'meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome.' " Bernett v. U.S. Air, Inc., 228 F.3d at 1115 (*quoting* Taylor, 184 F.3d at 317.).

B. The Commission did not abuse its discretion in ordering prejudgment interest

When reviewing an award of interest by the Commission, the court determines whether the Commission abused its discretion in ordering the award. *Pyramid Printing Co.*, 153 P.3d at 1002. "It is only when such an award would do an injustice that it should be denied." *Farnsworth v. Steiner*, 638 P.2d 181, 184 (Alaska 1981) (*citing State v. Phillips*, 470 P.2d 266, 274 (Alaska 1970). "Since an award of interest is not a penalty but compensation, fault for the delay between the injuring event and payment of consequential damages is irrelevant;" "even a lengthy delay attributable to the plaintiff is not an occasion for such denial." *Id.* "The real question in awarding interest to a judgment creditor is whether the debtor has had use of money for a period of time when the creditor was actually entitled to it." *Id.* (*citing Beech Aircraft Corp. v. Harvey*, 558 P.2d 879, 888 (Alaska 1976)). "At the moment the cause of action accrued, the injured party was entitled to be left whole and become immediately entitled to be made whole. Whenever any cause of action accrues, therefore, the amount later adjudicated as damages is immediately 'due'...." *Phillips*, 470 P.2d at 274.

The State contends that it should not be responsible for the interest on back pay during the period of time "no work of any kind of Ms. Wheeler's file was documented." Br. of Appellant 32. The State's argument fails to recognize the purpose of prejudgment interest, which is to compensate for a party's loss of use of money between the date of injury and the trial. *Cole v. Bartels,* 4 P.3d 956, 959 (Alaska 2000). Ms. Wheeler became entitled to the pay the moment she was wrongfully terminated but the State, and not Ms. Wheeler, has had the use of the money since that time. The interest award compensates for that misallocation. Moreover, the State did not lose the use of the money in its possession because of any delay by the Commission. The Commission, therefore, did not abuse its discretion in awarding interest.

C. The State waived its right to challenge the Commission's Reinstatement Order.

The State requests the court to "clarify that the terms of reinstatement cannot violate collective bargaining agreements and other settled rights of other employees." Br. of Appellant i. However, the State waived its right to challenge the Commission's restatement order by failing to object during the administrative process. *Trustees for Alaska v. State, Dep't of Nat. Res.*, 865 P.2d 745, 748 (Alaska 1993)("a party must raise an issue during the administrative proceedings to reserve the issue for appeal."); *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Com'n*, 711 P.2d 1170, 1181 n.22 (Alaska 1986) (the court will not consider arguments never presented to an agency whose decision is appealed provided appellee had "an opportunity to present objections to the agency before a decision is rendered by that agency.").

The Commission disagreed with the ALJ's decision to not order reinstatement and gave notice to the parties that it intended to order Ms. Wheeler's reinstatement. The Commission provided the parties an opportunity to submit objections to the modification in accordance with 6 AAC 30.480(a) but the State did not contest the reinstatement order. Therefore, the State waived its right to challenge the Commission's reinstatement order.

Anti-discrimination statutes aim to make the victims of unlawful discrimination whole by putting an injured party in as near a place as she would have been without the discriminatory action. The Commission has broad authority when granting relief that reasonably compensates for losses incurred as a result unlawful conduct under the AHRA. *See* AS 18.80.130; 6 AAC 30.480. The State has not shown that the Commission's reinstatement order exceeded its authority.[3]

[3] The State cites two Title VII cases, one limiting reassignment under the ADA, not reinstatement, and one recognizing compromises made by Congress enacting Title VII to not displace incumbent workers in favor of those wrongfully terminated, U.S. Airways, Inc. v. Barnett, 535 U.S. at 403; Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 120 (4th Cir. 1983),

Furthermore, the State has not alleged facts that demonstrate the Commission's reinstatement order would actually bump any innocent third parties or violate collective bargaining or any other settled rights. Courts may take into account whether reinstatement would displace an innocent employee, but the fact must be weighed against the fact that Ms. Wheeler was wrongfully terminated and has a right to be made whole. Without evidence of an innocent incumbent employee that would be displaced if the State is required to reinstate Ms. Wheeler, the court cannot make the requested determination. *See Fuhr v. Sch. Dist. of City of Hazel Park*, 364 F.3d 753, 761 (6th Cir. 2004) (affirming reinstatement when lower court weighed the relative hardships of both parties and innocent third party); *and see Barachkov v. Lucido*, 151 F. Supp. 3d 745, 761 (E.D. Mich. 2015) (finding reinstatement appropriate despite displacing employees under a collective bargaining agreement), appeal dismissed (Sept. 28, 2016).

V. CONCLUSION

The Commission had substantial evidence that the State wrongfully dismissed Ms. Wheeler in violation of AS 18.80.220. The Commission did not abuse its discretion by making the award for prejudgment interest. Lastly, the State failed to reserve the right to contest the reinstatement order. Accordingly, the court AFFIRMS the Commission's Final Order and GRANTS the Commission's request that the order be enforced. The State is ORDERED (1) to reinstate Doretta Wheeler to her position as a Certified Nurse Aid at the Palmer Pioneer Home and (2) to pay her until such time as she is reinstated.

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neither of which provides strong guidance for remedial reinstatement under the AHRA, especially in light of AS 18.80's strong purpose and the Alaska Supreme Court's corresponding interpretation that the AHRA be interpreted broadly and with intent "to put as many teeth into the law as possible." Wondzell v. Alaska Wood Prod., Inc., 601 P.2d 584, 585 (Alaska 1979); Loomis Electronics Protection, Inc. v. Schaefer, 549 P.2d 1341, 1343 (Alaska 1976). Moreover, even under Title VII, claimants are presumptively entitled to reinstatement, and it should be granted in all but unusual cases. Nord v. U.S. Steel Corp, 758 F.2d 1462, 1473 (11th Cir. 1985).

ORDERED this 2nd day of August, 2017, at Anchorage, Alaska.

[redacted]

ANDREW GUIDI
Superior Court Judge

I certify that on 8/2/17
a copy of the above was mailed to
each of the following at their
addresses of record:

R. Botstein
S. Koteff

[redacted]

Chris McNeese, Judicial Assistant