

that Alaska Sales discriminated against Ms. Bozine because of her gender. Accordingly, the single count of discrimination alleged in the Executive Director's Accusation against Alaska Sales should be dismissed.

II. Facts

A. Alaska Sales

Alaska Sales is a local car and truck dealership, in business since 1944, with offices in Anchorage and Wasilla.² Diana Pfeiffer is the majority shareholder, a director, and the president of the company. Her son, Shaun Pfeiffer, is also a shareholder and director, and holds the offices of vice-president, secretary, and treasurer. Alaska Sales' body and paint shop manager, Kevin Pfeiffer, is related to Diana Pfeiffer and Kevin Pfeiffer.

B. The Reorganization

Shaun Pfeiffer, general manager of Alaska Sales, had begun planning a reorganization of Alaska Sales body and paint shop in 2008. Handwritten notes and computer-generated meeting minutes by Alaska Sales' personnel, dating back to November 2010, confirm that Alaska Sales was losing body and paint shop clients, and had begun trying to reorganize its operations to do something about it.³ By 2011 the body and paint shop was losing money. Alaska Sales management analyzed every position in the body and paint shop in order to determine how to make the shop more efficient and cost effective.⁴

Alaska Sales formed a body/paint shop "management transition team" composed of Kevin Pfeiffer, Wayne Spencer, and Tony Glenn.⁵ In formulating its paint shop reorganization plan, Alaska Sales consulted its lead painter, Lawrence Armstrong, about the way paint shop employees were compensated. Depending on experience, shop employees were either paid a "flat rate" based on productivity, or an hourly rate based on the amount of time worked.⁶

As part of the reorganization, Alaska Sales decided the change the way paint preppers were compensated. Instead of being paid directly by Alaska Sales, paint preppers would be paid

² All factual findings in this paragraph are based on Ex. NN or are undisputed facts.

³ Ex. II pp. 8 - 27.

⁴ All factual findings in this paragraph are based on Shaun Pfeiffer's testimony unless otherwise stated.

⁵ Diana Pfeiffer's hearing testimony.

⁶ All factual findings in this paragraph are based on Shaun Pfeiffer's testimony unless otherwise stated.

by the painter they worked for. This compensation arrangement became effective in about April 2012, but by then Alaska Sales painters were basically performing their own prep work.⁷

Prior to the beginning of Alaska Sales' reorganization (prior to September 1, 2011), the Anchorage body/paint shop's personnel consisted of Wayne Spencer (manager), Aaron Jackson (shop foreman), Lori Moritz (estimator), Dale Olson (dispatcher), Lawrence Armstrong and Bonifacio Sangalang (both flat-rate auto painters), Jennifer Bozine (paint prepper), Nicholas Dismukes (apprentice paint prepper), and Curtis Young and Kyle Leary (detailers).⁸ There were an additional six auto body repairers, two accessory installers, and one parts person who were also within the body shop, but who were not within the paint shop and office where the above-named ten employees worked.⁹ Thus, prior to Alaska Sales' reorganization, the body shop (including the paint shop) consisted of 19 employees.

After Alaska Sales' reorganization (after December 15, 2011), the Anchorage body/paint shop's personnel consisted of Kevin Pfeiffer (manager), Aaron Jackson (shop foreman), Lori Moritz (estimator), Rodrigo ("Ray") Gonzalez (estimator), Tina Ray (office clerk), Ryan Benham and Bonifacio Sangalang (auto painters), and Nicholas Dismukes (detailer/buffer).¹⁰ There were an additional five auto body repairers, one accessory installer, and one parts person who were also within the body shop, but who were not within the paint shop and office where the above-named eight employees worked.¹¹ Thus, after Alaska Sales' reorganization, the body shop (including the paint shop) consisted of 15 employees, four less than before.¹²

C. Jennifer Bozine

Ms. Bozine graduated from high school in 2006, and began working at Alaska Sales in April 2006. She signed an employment agreement providing that her employment was at-will.¹³ There were also provisions in the agreement concerning dispute resolution.¹⁴

⁷ All factual findings in this paragraph are based on the testimony of Diana Pfeiffer, Shaun Pfeiffer, Kevin Pfeiffer, and Lawrence Armstrong.

⁸ Ex. 8; Ex. AA; Ex. FF p. 235.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Ms. Bozine acknowledged on cross-examination that these personnel transfers occurred and that her position was not the only one affected by Alaska Sales' reorganization.

¹³ All factual findings in this paragraph are based on the deposition of Jennifer Bozine (Ex. 20) at pp. 7 - 11. The employment agreement provided, *inter alia*, that all disputes between the employer and the employee, specifically including discrimination and sexual harassment claims, were to be resolved by binding arbitration. Ex. E pp. 146 - 147; Ex. FF pp. 156 - 157 (admitted by stipulation). However, neither party sought dismissal of this case based on the arbitration clause.

Ms. Bozine's original position at Alaska Sales was a combination customer service agent/rental car agent/cashier/telephone switchboard operator position.¹⁵ However, at the time she was hired, she made it known that her goal was to work in the paint and body shop. After about three months in the office, Ms. Bozine was able to transfer to a "paint prepper" position in the body shop. Alaska Sales' description of the Body Shop Paint Prep Technician ("paint prepper") position stated in relevant part:¹⁶

II. Responsibilities and Authority . . .

1. Cut in or edge parts, making sure all parts are done and with the vehicle.
2. Analyzes repair order and vehicle for missed damage and possible supplemental refinish times. Report to the shop foreman when necessary with information.
3. Operate all equipment in the paint department applicable to job assignment in a professional and safe manner.
4. Advise the shop foreman if additional work is needed, or if work assigned cannot be completed in the time allotted.
5. Maintain a neat, clean, and orderly work area.
6. Attend all training sessions and meetings as required.
7. Insures all work accomplished is with the objective of the customer's total satisfaction regarding services performed.
8. Cleans, feathers repair area, quick mask, applies primer filler.
9. Responsible for applying heat to vehicle for drying primer.
10. Block and finish sanding of primer filler, prep blend panels clean and final masking.

III. Relationships:

- A. Shop foreman: reports to the shop foreman.
- B. Body shop manager: reports to the body shop manager in the absence of the body shop foreman.

Ms. Bozine's normal work hours as a paint prepper were 7:30 a.m. to 5:30 p.m.¹⁷ From the time she was hired until 2011, Ms. Bozine worked under journeyman painter Lawrence Armstrong,¹⁸ body shop foreman Aaron Jackson, and body shop manager Wayne Spencer.¹⁹ She

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¹⁵ All factual findings in this paragraph are based on Jennifer Bozine's hearing testimony; on Ex. E pp. 129 - 136; and on Ex. FF pp. 139 - 146.

¹⁶ Ex. 1; Ex. FF pp. 124 - 125.

¹⁷ Ex. 19 pp. 80 - 81. Ms. Bozine worked the same hours after being transferred to the receptionist position.

¹⁸ Ms. Bozine testified at hearing that Mr. Armstrong was her friend and she looked to him as a father figure.

would also perform tasks at the request of estimator Lori Moritz and dispatcher Dale Olson, although they were technically not supervisory personnel.

Ms. Bozine's annual reviews for 2006, 2007, and 2008 graded her performance as being satisfactory or fair as to the various aspects of her job.²⁰ Her annual review for 2010 graded her performance as being good or satisfactory as to the various aspects of her job, but also indicated that she had some attendance problems.²¹ Her 2011 annual review was not as good, grading Ms. Bozine's performance as only "fair" as to most aspects of her job; Ms. Bozine was going through some difficulties in her personal life at this time.²²

Ms. Bozine's impression was that Alaska Sales' body / paint shop was busier in the winter than in the summer. She did not notice any over-all decline in the body shop's business during the period that she worked there.²³

Ms. Bozine thought that her paint prepper position was "safe" when Alaska Sales' reorganization first began.²⁴ This turned out not to be the case. According to Ms. Bozine, it was Ray Gonzalez who first told her she was going to be transferred out of the body shop and into a receptionist position²⁵ as a result of Alaska Sales' reorganization.²⁶ Ms. Bozine was very angry when Mr. Gonzalez told her she was being transferred.²⁷ Ms. Bozine testified that, at the time he informed her of this, Mr. Gonzalez also stated that she was being transferred "because he was concerned about me being a woman and my reproductive organs," and that the receptionist position would be better for her. Ms. Bozine recalled this occurred on September 27 or 28, 2011. Ms. Bozine testified that, following the above encounter with Mr. Gonzalez, she complained to Kevin Pfeiffer; she testified that she was not aware of what action (if any) Mr. Pfeiffer took with

¹⁹ All factual findings in this paragraph are based on Jennifer Bozine's hearing testimony and on Ex. 20, pp. 11- 12 unless otherwise stated.

²⁰ Ex. E pp. 93-94, 106-107, 116- 117; Ex. FF pp. 103-103, 116-117, 126- 127 (admitted by stipulation).

²¹ Ex. 20, pp. 16 - 20, Ex. E, pp. 32 - 33, Ex. Q, pp. 1 - 2, and Ex. FF pp. 42 - 43.

²² Jennifer Bozine's hearing testimony, Ex. Q pp. 3 - 4, Ex. W, and Ex. FF pp. 11 - 12 (exhibits admitted by stipulation). Ex. Q is Ms. Bozine's performance evaluation dated September 19, 2011, prepared about eight days before Ms. Bozine was transferred to the office position. At hearing Ms. Bozine testified that she was never given a copy of this evaluation and inferred that it was made-up by Alaska Sales after the fact. However, the evaluation appears to have been signed by Ms. Bozine on September 19th, (Ex. Q p. 4), indicating that the evaluation was in fact shown or given to her.

²³ All factual findings in this paragraph are based on Ex. 20 pp. 27 - 28 unless otherwise stated.

²⁴ Jennifer Bozine's hearing testimony.

²⁵ Ms. Bozine testified that the receptionist position was still within the paint / body shop, but was in the office area rather than the vehicle work area.

²⁶ At hearing, Ms. Bozine acknowledged that, before Mr. Gonzalez spoke to her, Mr. Armstrong had asked her if she would want to go work in the office.

²⁷ Jennifer Bozine's hearing testimony.

regard to Mr. Gonzalez.²⁸ Ms. Bozine testified that Kevin Pfeiffer did tell her, however, that there was no other position for her at Alaska Sales other than the receptionist position.²⁹

At the time she was transferred, Ms. Bozine was not aware that Alaska Sales was changing from a system in which Alaska Sales paid the paint prepper, to a system in which the painter would pay the paint prepper out of his or her earnings.³⁰ She was aware, however, that Alaska Sales was in the process of changing to water-borne paints, and that she would have needed training to learn how to apply water-borne paints.

Ms. Bozine was a better and more experienced paint prepper than Mr. Dismukes was in September 2011.³¹ She testified that although she had no formal buffing training, Mr. Armstrong taught her how to do it informally.³² She testified that it would typically only take about two weeks to learn how to buff a car, and that "anyone can detail a car."³³

Ms. Bozine also had more seniority and professional certifications than Mr. Dismukes, and she owned her own tools.³⁴ She had spent a lot of money on her training and her tools, and was in the body and paint trade "for the long haul."³⁵ She considered her transfer to the receptionist position a demotion.³⁶ Ms. Bozine estimated that her average biweekly paycheck, while working as a paint prepper, was about \$1,100 - \$1,200, but that after she was transferred to the receptionist position, her biweekly net pay dropped to about \$900.00.³⁷

Ms. Bozine gave notice of resignation to Alaska Sales on November 5, 2011, and her last day of employment there was November 15, 2011.³⁸ She started a new job at Worthington Ford the next day.³⁹ After leaving Alaska Sales, Ms. Bozine was subsequently employed by

²⁸ Ex. 20 p. 55. Mr. Armstrong testified that Kevin Pfeiffer was away attending training when the conversation between Ms. Bozine, Mr. Armstrong, and Mr. Gonzales occurred.

²⁹ All material in this paragraph is based on Jennifer Bozine's hearing testimony and Ex. 20 pp. 40 - 42 unless otherwise stated. On cross-examination, Ms. Bozine acknowledged that she did not talk to Kevin Pfeiffer or Diana Pfeiffer about her transfer to the receptionist position prior to filing her complaint with HRC.

³⁰ Jennifer Bozine's hearing testimony on cross-examination.

³¹ Jennifer Bozine's hearing testimony and Ex. 19 p. 71.

³² Ms. Bozine's testimony was inconsistent with Lawrence Armstrong's hearing testimony.

³³ Ms. Bozine's testimony regarding the ease with which a person can learn to buff a paintjob was inconsistent with Mr. Armstrong's hearing testimony and Kevin Pfeiffer's deposition testimony.

³⁴ Jennifer Bozine's hearing testimony, Ex. 11, and Ex. 20, pp. 8 - 9. Ms. Bozine testified at hearing that she had "tens of thousands of dollars" worth of tools.

³⁵ Jennifer Bozine's hearing testimony and Ex. 20 p. 45.

³⁶ Jennifer Bozine's hearing testimony and Ex. 20 pp. 56 - 58.

³⁷ Jennifer Bozine's hearing testimony, deposition, and Ex. 11. Ms. Bozine acknowledged on cross-examination that her pay fluctuated while she was a flat-rate paint-prepper.

³⁸ Ex. 20 p. 34; Ex. E p. 7. She tendered her resignation to Kevin Pfeiffer, not Ray Gonzalez (Ex. 20 p. 73).

³⁹ Ex. 20 p. 74.

Worthington Ford, Spruce Park Auto Body, Lithia Motors, Continental Motors, Kendall Dealership Holdings, Guardian Life Insurance, and Tebow Financial Group.⁴⁰ Ms. Bozine testified at hearing that she did the same work at Spruce Park that she had performed at Alaska Sales, except that she also learned to buff and to apply water-borne paint. She testified that it took her about two weeks to learn buffing, and about two weeks to learn water-borne painting. She became a journeyman painter while employed at Spruce Park. She was hired at Spruce Park at a wage of \$12.00 - \$13.00 dollars per hour, and progressed to about \$25.00 per hour flat-rate. She eventually had to leave Spruce Park due to lack of work.

On Ms. Bozine's last day with Alaska Sales, she participated in an exit interview with Diana Pfeiffer, who questioned her about her allegations of discrimination and harassment.⁴¹ In the ensuing weeks, Ms. Pfeiffer conducted an investigation of the matter which included interviews with at least seven Alaska Sales employees.⁴²

D. Nicholas Dismukes

Nicholas Dismukes was hired by Alaska Sales in September 2007. He was originally hired as a "utility person." Mr. Dismukes' 2008 evaluation rated his performance as good in four areas and satisfactory in the four remaining areas. Mr. Dismukes' 2010 evaluation rated his performance as good in six areas and satisfactory in the two remaining areas.⁴³ Mr. Dismukes was made an apprentice paint prepper as of December 10, 2010, about nine months before Alaska Sales began to implement its reorganization.⁴⁴

Mr. Dismukes received another performance evaluation on September 19, 2011.⁴⁵ That review described his job position as "paint prep," and listed his responsibilities as including detailing, cleaning, and delivering vehicles and paperwork and general shop and grounds maintenance, but also stated that his paint prepping skills had improved, and that "paint prepping is now main duty."⁴⁶ The evaluation stated that Mr. Dismukes' job knowledge, job performance, job productivity, initiative, workplace safety, and overall performance were "fair," and that his

⁴⁰ Ex. 17.

⁴¹ Ex. E pp. 192 - 195 and Ex. V .

⁴² Ex. E pp. 195 - 198 and Ex. V.

⁴³ All factual findings in this paragraph are based on Ex. 13 and Ex. FF. The record does not appear to include Mr. Dismukes 2009 annual review.

⁴⁴ Wayne Spencer's hearing testimony.

⁴⁵ All factual findings in this paragraph are based on Ex. W (admitted by stipulation).

⁴⁶ Mr. Dismukes old and new positions were more inclusive than Ms. Bozine's paint prepper position; Mr. Dismukes was more a "jack of all trades."

dependability and cooperation were "satisfactory." Finally, the review stated that Mr. Dismukes needed "continued supervision on prepping duties."

One of the main differences between the position held by Ms. Bozine prior to September 2011, and the position as held by Mr. Dismukes beginning in September 2011,⁴⁷ was that Mr. Dismukes' position included buffing.⁴⁸ This difference had evolved simply because Mr. Dismukes had experience buffing, while Ms. Bozine did not.⁴⁹ Another important difference was that Ms. Bozine's position had been a flat-rate position, whereas Mr. Dismukes position was an hourly wage position. Also, the buffing and detailing work performed by Mr. Dismukes as part of his position was considered less skilled work compared to the paint prepping work performed by Ms. Bozine. For this reason Mr. Dismukes' position paid less than Ms. Bozine's position.⁵⁰ Even when, on October 30, 2012, Mr. Dismukes' hourly wage was raised from \$13.00 per hour to \$14.00 per hour, he was still being paid about \$3.00 per hour less than Ms. Bozine had been earning in 2011.⁵¹

Because of other personnel changes at Alaska Sales during the fall of 2011, Mr. Dismukes' position evolved such that, after December 2011, he was no longer responsible for paint prepping.⁵² Mr. Dismukes testified at hearing that he did do some paint prepping at Alaska Sales' Anchorage and Wasilla locations, but that his primary duties were as a buffer / detailer.⁵³ This was primarily because Lawrence Armstrong, the painter for whom Mr. Dismukes was originally intended to do prep work, left Alaska Sales in December 2011. After that, Mr. Dismukes became a detailer / buffer, the paint prepper position was eliminated, and the painters did their own prep work.⁵⁴ Mr. Dismukes was transferred from Alaska Sales' Anchorage shop to its Wasilla shop on November 29, 2012.⁵⁵

⁴⁷ The position in which Mr. Dismukes worked prior to September 2011 was eliminated as part of the reorganization; the mix of his duties following the reorganization was somewhat different than it had been previously (Ex. 19 p. 38).

⁴⁸ All factual findings in this paragraph are based on Ex. 19, pp. 29 - 41 unless otherwise stated.

⁴⁹ Kevin Pfeiffer testified that Mr. Dismukes had personally watched Mr. Dismukes buff, that he buffed daily, and that "he is a good buffer" (Ex. 19 pp. 45, 51).

⁵⁰ Ms. Bozine testified that in 2011 she was earning \$17.25 flat rate, while Mr. Dismukes was being paid \$12.00 - \$13.00 on an hourly basis (Ex. 20 p. 51).

⁵¹ Ex. X p. 2.

⁵² All factual findings in this paragraph are based on Ex. 19, pp. 83 - 85.

⁵³ Wayne Spencer also testified at hearing that, in 2012, Mr. Dismukes' position description was changed from paint prepper to detailer.

⁵⁴ See also Ex. 20 pp. 39 - 40; see also Ex. X, p. 1 (admitted by stipulation), a personnel change notice dated March 7, 2012 which reclassified Mr. Dismukes as a detailer.

⁵⁵ Ex Y (admitted at the Executive Director's request over Alaska Sales' objection).

E. Lawrence Armstrong's Written Statements and Hearing Testimony

Sometime during the first quarter of 2012, (by which time he was no longer employed by Alaska Sales), journeyman painter Lawrence Armstrong prepared a written statement concerning the dispute between Ms. Bozine and Alaska Sales. The statement is consistent with Mr. Armstrong's statements in later interviews and his testimony at hearing. Accordingly, I find his statement to be credible and persuasive. The statement provides in relevant part:⁵⁶

I Lawrence Armstrong was the painter at Alaska Sales and Service and while I had no official management powers, I did "supervise" apprentices and some employees on the paint side of the bodyshop. The person in question here is Jen Bozine. She started at the body shop as an hourly helper and with training and a natural born skill set had managed to get to the level of journeyman prepper. With the old bodyshop manager, Wayne Spencer, moving to a new position in the company and a new manager coming in, Kevin Pfeiffer, we knew changes . . . might also come. One of those changes was Ray [Gonzalez]. Ray was hired as an estimator and office employee. Another change was I was losing the head painters position, which I had for around 14 years, to put the shop in a dual co-painter position. From a business standpoint the theory is sound . . . My new co-painter was Kevin [Pfeiffer's] old apprentice Ryan. Ryan's position eliminated Jens position in the paintshop. Jen had been working up to a back-up painters position and had been the best prepper / helper I have ever had or seen in my almost 18 years at Alaska Sales and Service . . . My back-up painter, J.R., had said he wanted to retire soon and Jen was set to take his place. Ryan's position moved J.R. and Jen out of the paintshop. After his arrival, Kevin called me in for a meeting to discuss the changes in the paintshop and which of the [personnel] I wanted to continue with as my helper. The choice was between Nick [Dismukes] or Jen. Jen has the general knowledge and training needed but Nick at the time was more dependable and could buff and polish paint. Jen had no buffing experience since her old position did not require it. On the down side, Jen also brings along a lot of personal problems, injuries and undependable time schedule. But she required NO [emphasis in original] extra guidance or training on prepping. Nick was very dependable but was going to require much, much more work in training and guidance. As for wage, as the painter I was going to be assuming one of them as my helper and was going to have to pay the wages of the individual I chose. I believe [Mr. Dismukes'] wages [were] around \$12 to \$13 an hour but Jen had gone to \$17+ flat rate. I could and cannot afford to pay anything more than \$13 at the max. Kevin told me to pick one if any to take along. I was leaning towards Nick due to his buffing skill and his wage was coverable but thought on it for a day or so and [then] Kevin [came] to me to suggest that Jen could be offered a position in the office. I thanked him for making the choice for me, took Nick and thought that it was a relief Jen still had a job. Jen was not

⁵⁶ See Ex. I and Ex. FF pp. 236 – 237. Because I find Mr. Armstrong's version of the events at issue to be more reliable than those of other witnesses, and because his written statement tracks his hearing testimony, his statement is quoted here at length.

happy. She did not want the position and took it reluctantly I believe I was aware of 3 incidents where Jen was involved that may have . . . had questionable things said. First was after Jen took the office position and had come to me to complain about how much she hated it and hoped it was going to be a temp position. I brought up to her a conversation we had had in the past about what we do in the paintshop and [that] some of the chemicals we use are DNA mutagens and she had once said she might want to have children. I tried to shed a new light on moving out of the field for that sake. At this time Ray had walked up and was listening in and offered up his version of how Jen with her "female bits" would be better off to not be in the paint business if she wanted kids Maybe Ray tried to be kind but it just didn't go over well

Mr. Armstrong was subsequently interviewed twice by an HRC investigator (on June 27 and July 23, 2012).⁵⁷ Mr. Armstrong's interview statements, as recorded by the HRC investigator, are consistent with his prior written statement, quoted above.

Mr. Armstrong testified at hearing. Because Mr. Armstrong was not aligned with either Ms. Bozine or Alaska Sales, his testimony was particularly credible. He testified that:

1. His memory of the events at issue is still good.
2. Wayne Spencer told everybody in September 2011 that he was being transferred to another position due to the reorganization; that he would be leaving the body shop; and that Kevin Pfeiffer would be replacing him as body shop manager. Mr. Spencer was not happy about his transfer.
3. As a result of the reorganization, he (Mr. Armstrong) lost his prior status as head-painter, and another painter, Ryan Benham, became "co-painter." The combination of two painters, along with Alaska Sales' new production model in which the painters would perform their own prep work, effectively eliminated Ms. Bozine's paint prepper position.
4. In the fall of 2011 Mr. Dismukes' duties consisted of about 50% paint prepping, and 50% performing maintenance and other non-revenue-generating tasks.
5. It takes more training to be a paint prepper than it does to be a buffer or detailer. It would have taken more than six months for Mr. Dismukes to be trained to be a paint prepper. In contrast, Ms. Bozine could have been trained to be a buffer in two months, and learning detailing would have taken her "minimal" time.
6. Ms. Bozine was the best paint prepper that he has ever had, and he has had many. She was clearly a better paint prepper than Mr. Dismukes. Ms. Bozine required very little supervision as paint prepper, while Mr. Dismukes, being new to the job, would have required much more supervision. However, Ms. Bozine would have cost more to retain

⁵⁷ Ex. J; Ex. DD pp. 37 - 42 (admitted by stipulation).

as a paint prepper than he (Mr. Armstrong) could really afford. Although Mr. Dismukes would have needed more training, he was a significantly less expensive employee.

7. Kevin Pfeiffer asked his opinion on whether to retain Ms. Bozine or Mr. Dismukes within the paint shop. Under Alaska Sales' new system, painters would do their own prepping. At the time of the reorganization, Mr. Armstrong had just enough work to allow him to pay one helper. He recommend to Mr. Pfeiffer that Alaska Sales retain Mr. Dismukes within the paint shop, primarily because Mr. Dismukes could both prep and buff, and because Mr. Dismukes would be a less expensive employee.⁵⁸

F. Kevin Pfeiffer's Written Statements and Deposition Testimony

Kevin Pfeiffer was interviewed by HRC investigator Andrew Sundboom on April 19, 2012.⁵⁹ The interview was not lengthy,⁶⁰ but Mr. Pfeiffer's statements during the interview were not inconsistent with his subsequent deposition testimony.

Alaska Sales conducted a videotaped perpetuation deposition of Kevin Pfeiffer on December 17, 2014.⁶¹ Unless otherwise stated, the findings in this section are based on his deposition testimony.

Kevin Pfeiffer is related to Alaska Sales' shareholders Diana Pfeiffer and Shaun Pfeiffer.⁶² He became employed by Alaska Sales, as its new body shop manager, on September 19, 2011.⁶³ His prior employment included 18 years' as a lead painter at two other Anchorage body shops.⁶⁴

Mr. Pfeiffer was hired by Alaska Sales because the body shop portion of the business had become unprofitable and was losing money.⁶⁵ Mr. Pfeiffer was given the task of reorganizing the body shop to make it profitable again.

⁵⁸ Wayne Spencer also told Kevin Pfeiffer, prior to Mr. Pfeiffer's decision on which employee to retain in the paint shop, that Mr. Dismukes would be a better buffer than Ms. Bozine (Wayne Spencer's hearing testimony).

⁵⁹ Ex. K, Ex. DD pp. 33 - 36.

⁶⁰ Mr. Sundboom testified at hearing that he did not seek information about any other positions affected by Alaska Sales' reorganization, and did not really consider or put much weight on the comparative attributes of Ms. Bozine and Mr. Dismukes as employees (pay differential, dependability, etc.).

⁶¹ Mr. Pfeiffer's deposition transcript was submitted by Alaska Sales as its Ex. 19. The Executive Director objected to admission of Mr. Pfeiffer's deposition transcript in its totality (see stipulation regarding exhibits dated February 27, 2015), and also objected to specific questions asked during the deposition. The objection to the admission of the deposition as a whole was dealt with through rulings on numerous discovery and pre-hearing evidentiary motions, most specifically by an order dated February 17, 2013. The net result was that the deposition was admitted, subject to the specific objections raised during the deposition. The specific objections raised during the deposition were ruled on through two orders dated February 24 and February 25, 2015.

⁶² Ex. 19 p. 55.

⁶³ Ex. 19 p. 6.

⁶⁴ Ex. 19 p. 6.

⁶⁵ All factual findings in this paragraph are based on Ex. 19, p. 7.

When Mr. Pfeiffer first arrived at Alaska Sales, there was already a reorganization plan for the body shop partially in place, but it had not yet been finalized and implemented.⁶⁶ In finalizing the reorganization plan, Mr. Pfeiffer talked to Shaun Pfeiffer, Wayne Spencer (the former body shop manager), and current employees, and then analyzed the skills of the various employees. Once this analysis was completed, the former body shop manager, Wayne Spencer, became the maintenance manager; the dispatcher, Dale Olson, was transferred to another Alaska Sales' location to work as a lot attendant; Curtis Young, a detailer, was transferred to the service department; and another detailer was terminated based on dependability issues.

As part of the reorganization, Mr. Pfeiffer made the decision to eliminate the paint prepper position held by Ms. Bozine.⁶⁷ Importantly, Mr. Pfeiffer was completely responsible for the decision to eliminate Ms. Bozine's position; although he had gathered information and recommendations from others, no one else (including Mr. Gonzalez) had a say in the ultimate decision.⁶⁸ His decision was based in part on the fact that Ms. Bozine was a comparatively expensive flat-rate prepper, and the intent under the reorganization was to replace that position with a less expensive hourly-rate prepper.⁶⁹ His decision was also based on information indicating that Mr. Dismukes was more dependable in a shop setting, and that his skill set would fit in with the reorganized shop better than would Ms. Bozine's.⁷⁰ Specifically, Mr. Pfeiffer had discussed the decision with Wayne Spencer and Lawrence Armstrong, the painter under whom Ms. Bozine worked, and Mr. Armstrong told Mr. Pfeiffer that he would prefer Mr. Dismukes because of dependability and other issues.⁷¹ Finally, his decision was based in part on prior conversations with Mr. Spencer and Tony Glenn, the parts department manager, who told him that Ms. Bozine had previously expressed an interest in doing front counter / receptionist work.⁷²

Based on the foregoing input, Mr. Pfeiffer told Ms. Bozine that her paint prepper position was being eliminated. He testified that Ms. Bozine's gender had nothing to do with his decision to eliminate the paint prepper position. In an effort to keep Ms. Bozine employed with Alaska

⁶⁶ All factual findings in this paragraph are based on Ex. 19, pp. 7 - 11, 14 and Ex. 20, pp. 32 - 36.

⁶⁷ Ex. 19 pp. 33 - 34.)

⁶⁸ Ex. 19 p. 71.

⁶⁹ Ex. 19 pp. 65 - 66 ("[s]he just made too much money").

⁷⁰ Ex. 19 p. 44.

⁷¹ Ex. 19 pp. 59 - 60.

⁷² Ex. 19 p. 61; *see also* Ex. 20 pp. 21 - 23 (Ms. Bozine testified that she told Wayne Spencer in 2009 or 2010 that she might be interested in becoming an estimator); but *see* Ex. 20 p. 23 (Ms. Bozine stated that she only inquired about the parts position after she was transferred to the receptionist position in September 2011).

Sales, Mr. Pfeiffer offered Ms. Bozine a receptionist position, which she accepted. Alaska Sales' intent in setting Ms. Bozine's wage rate for the receptionist position was to make it slightly higher than what she had been making in the shop.⁷³

Mr. Pfeiffer testified that, during the two months between the time Ms. Bozine accepted the receptionist position and the time she left Alaska Sales, she had one or more conversations with him in which she expressed her dislike of the receptionist position and stated that she did not like working with customers. Mr. Pfeiffer responded that the receptionist position was the only position currently available to her at Alaska Sales, and that for the present she should just do the best she could with the position.⁷⁴

Mr. Pfeiffer was out of state on the day Ms. Bozine turned in her resignation notice. For this reason, Ms. Bozine gave her notice to Ray Gonzalez.⁷⁵

G. Evidence Regarding Mr. Gonzalez' Supervisory Authority

Shaun Pfeiffer testified that Mr. Gonzales was hired in August or September 2011 because it was thought he would be a good estimator.⁷⁶ Wayne Spencer was the person who actually hired Mr. Gonzales.⁷⁷ Mr. Gonzalez was not promoted to production manager / assistant body shop manager until 2013. In 2011 both estimators had keys to the body shop, and many people who were not supervisors had keys to the building.

Ms. Bozine worked with Mr. Gonzalez from about September 27, 2011 - November 15, 2011.⁷⁸ In an interview with an HRC investigator on June 27, 2012, Ms. Bozine stated that although Mr. Gonzalez was officially an estimator, he could tell her what to do.⁷⁹ As examples, she stated that he told her what her hours were, when she could take a break, and how he wanted her to answer the phones. Ms. Bozine believed he was the person who initially told her that her paint prepper position was being eliminated and that she was being transferred to an office

⁷³ All factual findings in this paragraph are based on Ex. 19, pp. 15 – 21 and (Diana Pfeiffer's hearing testimony).

⁷⁴ All factual findings in this paragraph are based on Ex. 19, pp. 22 - 25 unless otherwise stated. At hearing, Ms. Bozine testified that, although she did not like the receptionist position, she never told anyone that she did not like working with customers. However, on cross-examination, she admitted that she did tell Alaska Sales that she did not like working with customers.

⁷⁵ All factual findings in this paragraph are based on Ex. 19, p. 25.

⁷⁶ All factual findings in this paragraph are based on Shaun Pfeiffer's testimony unless otherwise stated.

⁷⁷ Diana Pfeiffer's hearing testimony.

⁷⁸ Jennifer Bozine's deposition and hearing testimony.

⁷⁹ All factual findings in this paragraph are based on Jennifer Bozine's hearing testimony, Ex. 11, and Ex. L (admitted by stipulation).

position.⁸⁰ At the same time, however, Ms. Bozine also stated that the direction Mr. Gonzalez gave her was an "occasional thing" rather than a "day to day thing," and that "whenever she got confused about what to do she would go to him." Ms. Bozine testified that she thought Mr. Gonzalez had been delegated some amount of managerial authority by Kevin Pfeiffer, the new shop manager, and he had a set of keys to the shop.⁸¹ Later, however, she stated that she was not really sure whether Mr. Gonzalez had managerial authority over her or not.⁸²

At hearing, Ms. Bozine acknowledged that Wayne Spencer was her supervisor during the entire time she was employed as a paint prepper in Alaska Sales' body shop.⁸³ Diana Pfeiffer testified that, when Kevin Pfeiffer was not in, Tony Glenn (Alaska Sales' general service manager) was in charge of the body shop, although Mr. Glenn's office was not physically located work in the body shop. However, Mr. Armstrong testified at hearing that both Kevin Pfeiffer and Ray Gonzales had come to Alaska Sales from another body shop, and that it was common knowledge that, if Kevin Pfeiffer was not around, Mr. Gonzales was in charge of the body shop.

H. Evidence of Alleged Sexual Harassment

Alaska Sales has never had a Human Resources (HR) department, per se, but in past times it has had a single employee, titled "HR manager" or "HR assistant," whose job was to deal with personnel issues. During the reorganization this HR position was eliminated, but its functions were absorbed by other people, primarily Alaska Sales' management.⁸⁴

Wayne Spencer, manager of the paint shop during the period Ms. Bozine was working as a paint prepper, testified that Alaska Sales has "zero tolerance" for sexual harassment and other forms of harassment. Alaska Sales has a written policy, prohibiting sexual harassment, which its employees are required to sign.⁸⁵ Alaska Sales' body / paint shop has held staff meetings to reinforce its anti-harassment policy.⁸⁶ Mr. Gonzales and Kevin Pfeiffer were required to take online classes concerning harassment in early 2012.

⁸⁰ Kevin Pfeiffer remembered this differently; he recalled that he was the person who initially told Ms. Bozine that she was being transferred to a new position (Ex. 19 pp. 36 - 37).

⁸¹ Ex. 20 pp. 43 - 44.

⁸² Ex. 20 p. 68.

⁸³ Jennifer Bozine's hearing testimony on cross-examination.

⁸⁴ All factual findings in this paragraph are based on Shaun Pfeiffer's testimony.

⁸⁵ Ex. E pp. 79, 80, 177, 178, 189, 190; Ex. FF pp. 89, 90 356, 357, and 402; Wayne Spencer's hearing testimony.

⁸⁶ Ex. E pp. 183, 184, 186, and 187; Ex. FF p. 355; Wayne Spencer's hearing testimony.

Ms. Bozine testified that a Snap-On tool dealer who serviced Alaska Sales, would routinely make sexist comments during his sales visits.⁸⁷ She also testified that co-worker Karl Nelson made inappropriate comments and gestures. However, she brought this to body/paint shop manager Wayne Spencer's attention, and Mr. Spencer spoke to Mr. Nelson. This appeared to be effective, because afterward Mr. Nelson ceased the behavior at issue.⁸⁸

Ms. Bozine also testified regarding some "violent behavior" which occurred in the Alaska Sales paint/body shop during her time there. However, there was no evidence that the behavior at issue was directed against women in particular.

Ms. Bozine credibly testified that Mr. Gonzalez would sometimes make inappropriate statements in the presence of Ms. Bozine and other female employees. She stated that on one occasion Mr. Gonzalez talked about how he was unfaithful to his wife and how he would make women cry as a result of his extramarital affairs.⁸⁹ She further stated that, on another occasion, at about the time Ms. Bozine received the news that she was being transferred to an office position, Mr. Gonzalez told her that she should not be working in a body/paint shop because she was a woman and such work might be dangerous to her reproductive organs.⁹⁰ Mr. Gonzalez had worked for Alaska Sales for about two weeks at the time he made this comment.⁹¹

Alaska Sales has protocols about investigating harassment claims, and those protocols include conducting interviews.⁹² Kevin Pfeiffer interviewed Mr. Gonzalez regarding the comment he had made to Ms. Bozine.⁹³ Mr. Gonzalez admitted that he had entered into an existing conversation between Mr. Armstrong and Ms. Bozine, and admitted making the remark, but stated that he had not meant his remark to be construed as sexual or harassing. Mr. Pfeiffer also interviewed Lawrence Armstrong about the incident. Mr. Armstrong told him that Mr. Gonzalez had made such a remark, but that he (Mr. Armstrong) also believed that Mr. Gonzalez had not intended his comment to be construed as sexual.

⁸⁷ There is no evidence in the record to indicate that the tool dealer was an agent of Alaska Sales.

⁸⁸ All factual findings in this paragraph are based on Jennifer Bozine's hearing testimony.

⁸⁹ Alaska Sales did not contest that Mr. Gonzalez may occasionally have inappropriately discussed his extramarital adventures in the workplace. However, the Executive Director dropped the allegation of sexual harassment during the pre-Accusation phase of this case, and Mr. Gonzalez' alleged statements are not particularly probative as to the remaining gender discrimination claim.

⁹⁰ Ms. Bozine testified at hearing that she had told Mr. Armstrong that she had previously been diagnosed with cervical cancer. The record does not reflect whether this information had been passed-on to Mr. Gonzalez, but his comment could be construed as an acknowledgment and response to that information.

⁹¹ Jennifer Bozine's hearing testimony on cross-examination.

⁹² Diana Pfeiffer's hearing testimony.

⁹³ All factual findings in this paragraph are based Diana Pfeiffer's hearing testimony and Ex. 19 pp. 74 - 77.

I. Relevant Procedural History

On November 9, 2011 Ms. Bozine filed a complaint with the HRC; the complaint was served on Alaska Sales on the same date.⁹⁴ In her complaint, Ms. Bozine asserted that:

1. During my employment, respondent's supervisor and male employees subjected me to offensive comments of a sexual nature. Respondent's supervisor also made negative comments about my sex, implying that I should not be working in the body shop.
2. In October 2011, respondent's supervisor demoted and placed me in a lesser paying position which I opposed but did not demote any male employees.
3. On November 4, 2011, I felt I had no choice but to resign. I believe respondent subjected me to offensive comments of a sexual nature, demoted and discriminated against me because of my sex.

The Executive Director began the investigation of Ms. Bozine's complaint on January 10, 2012.⁹⁵ About two and a half years later, on June 12, 2014, the Executive Director issued a determination.⁹⁶ The determination found that "[i]nvestigation did not produce substantial evidence that complainant was subjected to a hostile work environment because of comments of a sexual nature," but that "there is substantial evidence that respondent discriminated against complainant because of her sex when it reassigned her to a receptionist position" and that the "complainant was constructively discharged."

On September 29, 2014 the Executive Director filed the Accusation which resulted in this case.⁹⁷ The Accusation, consisting of a single cause of action, alleged that Alaska Sales violated AS 18.80.220(a)(1) by removing Ms. Bozine from her paint prepper position, while retaining a less qualified, less experienced male employee as a paint prepper.⁹⁸ The Accusation was referred to the Office of Administrative Hearings (OAH) on October 15, 2014.

⁹⁴ All factual findings in this paragraph are based on Ex. 9, Ex. A, and Ex. B (admitted by stipulation). At hearing, however, Ms. Bozine testified that she had never planned to "sue" Alaska Sales.

⁹⁵ Ex. D (admitted by stipulation).

⁹⁶ Ex. O.

⁹⁷ Ex. P pp 1 - 5 (admitted by stipulation).

⁹⁸ Importantly, the Accusation did not assert any claim of sexual harassment / hostile work environment against Alaska Sales. While the Accusation could, if desired, have been amended to assert a hostile work environment claim, the Executive Director did not do so. Under Alaska's Administrative Procedure Act, Alaska Sales may not be held liable for any violation of AS 18.80.220 that was not alleged in the Accusation. *See* AS 44.62.360(1) (requirement that Accusation place respondent on sufficient notice to prepare a defense).

On October 21, 2014 Alaska Sales filed its answer to the Executive Director's Accusation.⁹⁹ Alaska Sales admitted that it had eliminated Ms. Bozine's paint prepper position. However, Alaska Sales asserted that the elimination of the paint prepper position was incident to a company reorganization, and that the employment actions taken due to the reorganization were based on legitimate business considerations rather than gender discrimination.

During a prehearing conference held in this case, I requested that the parties provide a written document listing those exhibits as to which the parties had no objection, and which could thus be admitted by stipulation. The parties responded by filing a document titled *Stipulated Admission of Exhibits* dated February 27, 2015. Pursuant to this document, the parties stipulated to the admission of most of the exhibits offered in this case. The parties stated, by number or letter, the specific exhibits to be admitted by stipulation. The parties also listed those exhibits *not* admitted by stipulation, as to which all objections were reserved.

At hearing, the Executive Director objected to certain exhibits previously admitted by stipulation. The Executive Director essentially asserted that the stipulation dispensed with the need to authenticate or lay a foundation for admission of the exhibits, but that the stipulation did not waive objections to consideration of the exhibits as proof of the matters asserted therein. The Executive Director's objection was overruled at hearing. Because of the importance of the stipulated exhibits in this case, it is appropriate to address the effect of the parties' stipulation.

Evidentiary stipulations are a valuable and integral part of everyday trial practice.¹⁰⁰ A party who stipulates to the admissibility of an evidentiary exhibit at hearing or trial waives any opportunity to object to its admission later.¹⁰¹ When an exhibit is admitted by stipulation without specific reservations, the exhibit is useable as substantive evidence in the absence of any pretrial ruling providing otherwise.¹⁰² In this case, no restriction on the use of the exhibits was stated in the parties' stipulation, and there were no rulings, before or during the hearing, limiting the use of

⁹⁹ All factual findings in this paragraph are based on Ex. E, pp. 1 - 2 and Ex. P, pp. 6 - 9 unless otherwise stated.

¹⁰⁰ *United States v. Mezzanatto*, 513 U.S. 196, 203 (1995).

¹⁰¹ *Id.* at 202.

¹⁰² *Ameranth, Inc. v. Menusoft Systems Corp.*, 2011 WL 2110384 (E.D. Tex. 2011); *see also United States v. Gresham*, 585 F.2d 103, 106 (5th Cir. 1978) (once the parties stipulate to an exhibit's admission, and neither party requests a restriction, the exhibit "has the same value as any other exhibit entered into evidence [and can] be used as both substantive and impeachment evidence"); *Daniel v. United States*, 234 F.2d 102, 107 (5th Cir. 1956); *United States v. Aptt*, 354 F.3d 1269, 1280 (10th Cir. 2004) ("admission of a stipulated exhibit is not error at all, even if it would not be admissible in the absence of such a stipulation").

the exhibits admitted by stipulation. Accordingly, the exhibits admitted by stipulation in this case may properly be considered as substantive evidence without any use restriction.

III. Discussion

A. *Applicable Anti-Discrimination Laws*

Alaska Statute 18.80.220 defines unlawful or discriminatory practices in the employment context. It states in relevant part:

(a) Except as provided in (c) of this section [inapplicable here], it is unlawful for: (1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's . . . sex . . . when the reasonable demands of the position do not require distinction on the basis of . . . sex....

The HRC considers relevant federal case law, statutes, regulations, and guidelines to be instructive (but not binding) if they do not limit the commission's obligation to construe AS 18.80 liberally.¹⁰³ Determinations by the HRC's staff, recommendations by administrative law judges, and adjudications by hearing commissioners are to be consistent with state court decisions construing AS 18.80 and with HRC's regulations, policy statements, guidelines, and prior decisions.¹⁰⁴

1. "Disparate Treatment" Cases versus "Disparate Impact" Cases

The Federal courts have identified two major theories for proving employment discrimination under Title VII of the Civil Rights Act of 1964, the federal analogue to AS 18.80.220: disparate treatment and disparate impact. The United States Supreme Court has explained that disparate treatment:

is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.^[105]

This is a *disparate treatment* case.¹⁰⁶

¹⁰³ 6 AAC 30.910(b).

¹⁰⁴ 6 AAC 30.910 (a).

¹⁰⁵ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (citations omitted).

¹⁰⁶ Disparate impact cases, on the other hand, "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity". *Int'l Brotherhood, supra*, 431 U.S. at 335 n.15.

2. The Difference Between "Pretext" Cases and "Mixed-Motive" Cases

There are two types of disparate treatment discrimination claims: "pretext" claims and "mixed motive" claims. The "pretext" claim stems from the use of the term "pretext" in the seminal Title VII discrimination case *McDonnell Douglas Corp. v. Green*.¹⁰⁷ In that case, the U.S. Supreme Court established a framework by which a claimant may establish the crucial "because of" element in an employment discrimination case. The *McDonnell Douglas* court held that a claimant in a suit alleging employment discrimination must first establish a prima facie case of discrimination, after which the burden shifts to the defendant-employer "to articulate some legitimate, non-discriminatory reason" for its action. Should the defendant articulate a valid business reason, the claimant must then prove that the employer's articulated reason is actually "a *pretext* for the sort of discrimination prohibited" (emphasis added).¹⁰⁸ Stated differently, in a pretext case, the claimant is asserting that the alleged discriminatory reason for the employment action at issue is *the sole reason* for the employer's action, and that any other reason stated by the employer is a mere pretext.

"Mixed motive" claims, on the other hand, stem from the U.S. Supreme Court's decision in the Title VII discrimination case *Price Waterhouse v. Hopkins*.¹⁰⁹ That case confirmed that Title VII prohibits employment decisions "based on a *mixture* of legitimate and illegitimate considerations," as well as employment decisions based *solely* on discriminatory reasons (emphasis added).¹¹⁰ In a mixed-motive case, if the claimant shows that gender was a "motivating part in an employment decision," the defendant may avoid a finding of liability only by proving that it would have made the same decision even had gender played no role in the employment decision.¹¹¹

In *Haroldsen v. Omni Enterprises, Inc.*,¹¹² the Alaska Supreme Court first indicated that Alaska's anti-discrimination laws condemn employment decisions based on a mixture of legitimate and illegitimate considerations. Later, in *VECO, Inc. v. Rosebrock*,¹¹³ the Alaska Supreme Court adopted the distinction between pretext and mixed-motive frameworks followed by the federal courts.

¹⁰⁷ 411 U.S. 792 (1973).

¹⁰⁸ *Id.*

¹⁰⁹ 490 U.S. 228, 240 (1989).

¹¹⁰ *Id.*, 490 U.S. at 241.

¹¹¹ *Id.*, 490 U.S. at 244 - 245 (footnote omitted).

¹¹² *Haroldsen v. Omni Enterprises, Inc.*, 901 P.2d 426, 430 – 432 & n.12 (Alaska 1995).

¹¹³ *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 920 - 921 (Alaska 1999).

In Alaska, a claimant may pursue mixed-motive and pretext theories of employment discrimination simultaneously.¹¹⁴ The Executive Director did not indicate in her Accusation or prehearing brief whether her case is based on a pretext theory or a mixed-motive theory; she seems to assert both.¹¹⁵ This decision will analyze Ms. Bozine's case under both theories.

3. The Analytical Framework for "Pretext" Cases

The Alaska Supreme Court has adopted the three step *McDonnell Douglas* test for pretext discrimination cases brought under AS 18.80.220.¹¹⁶ In *McDonnell Douglas*, the U.S. Supreme Court stated that, in order to establish a prima facie case of discrimination by a private employer under Title VII (at step one), the claimant must show:

(i) that he belongs to a . . . [class protected by the statute]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.^[117]

More specifically, in order to establish a prima facie case of pretextual discrimination in a situation involving a business reorganization like that asserted by Alaska Sales in this case, the employee must prove (1) that she is a member of a protected class; (2) that she was qualified for the job and performing according to the employer's legitimate expectations; (3) that she was adversely affected by an employment decision; and (4) that other persons, not within the protected class, were treated more favorably.¹¹⁸

If the employee succeeds at making out a prima facie case of discrimination at step one, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."¹¹⁹ To satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the

¹¹⁴ *Smith v. Anchorage School District*, 240 P.3d 834, 839 - 840 (Alaska 2010).

¹¹⁵ See Executive Director's Prehearing Brief at page 9.

¹¹⁶ *Alaska State Commission for Human Rights v. Yellow Cab*, 611 P.2d 487, 488, 490 (Alaska 1980); *see also VECO, Inc. v. Rosebrock*, 970 P.2d 906, 918 (Alaska, 1999) ("[i]n determining whether an employer has violated AS 18.80.220 when there is no direct evidence of discriminatory intent, we have adopted the three-part framework used in Title VII cases."

¹¹⁷ *McDonnell-Douglas, supra*, 411 U.S. at 802.

¹¹⁸ *Haroldsen v. Omni Enterprises, Inc.*, 901 P.2d 426 (Alaska 1995); *see also Alaska State Commission for Human Rights v. Yellow Cab Company*, 611 P.2d 487 (Alaska 1980).

¹¹⁹ *McDonnell-Douglas, supra*, 411 U.S. at 802; *see also Haroldsen v. Omni Enterprises, Inc.*, 901 P.2d 426 (Alaska 1995); *Alaska State Commission for Human Rights v. Yellow Cab Company*, 611 P.2d 487 (Alaska 1980).

employment decision was not motivated by discriminatory animus. Also, the employer's lawful reasons for any disparate treatment must have existed at the time the decision was made.¹²⁰

If the employer carries its burden at step two, above, the burden of proof shifts back to the employee, who must then demonstrate that the employer's alleged nondiscriminatory reason, for taking the action at issue, was a mere pretext.¹²¹ However, under a pretext theory, it is not enough for the complainant to show that gender was merely "a factor" in an employer's decision.¹²² Rather, the employee must demonstrate that an impermissible factor "played a role in the employer's decision-making process and that it had a *determinative effect* on the outcome of that process" (emphasis added).¹²³

4. The Analytical Framework for "Mixed-Motive" Cases

In *Era Aviation, Inc. v. Lindfors*,¹²⁴ the Alaska Supreme Court explained the application of the mixed-motive analysis:

In cases where there is direct evidence of discrimination, we . . . apply a mixed-motive analysis, which recognizes that discriminatory employment decisions may not be motivated solely by a prohibited characteristic such as race or sex, but may be “based on a mixture of legitimate and illegitimate considerations.” Under the mixed-motive framework, once the plaintiff has cleared the initial hurdle of presenting direct evidence of discriminatory intent, the plaintiff's ultimate burden of proof is somewhat relaxed: the jury is instructed that the plaintiff can prevail in a claim of discrimination by showing that gender was simply “a motivating factor,” as opposed to the determinative factor, in the adverse employment decision. Still, gender must be a determinative cause, but the burden shifts to the employer on this point. The employer must show that it would have made the same decision even absent considerations of gender. Although the plaintiff may pursue mixed-motive and pretext claims simultaneously, if the jury finds no direct evidence of discrimination, it must find the defendant liable, if at all, under a pretext framework. [Citations and footnotes omitted].

Under Alaska case law, a claimant must first present direct evidence of discriminatory intent in order to pursue a mixed-motive theory of discrimination under the Alaska Human

¹²⁰ *Thomas v. Anchorage Telephone Utility*, 741 P.2d 618 (Alaska 1987).

¹²¹ *McDonnell-Douglas, supra*, 411 U.S. at 802; *see also Haroldsen, supra*, 901 P.2d 426 (Alaska 1995); *Yellow Cab Company, supra*, 611 P.2d 487. The employee may succeed in this either directly by persuading the trier of fact that a discriminatory reason more likely than not motivated the employer, or indirectly by showing that the employer's explanation is unworthy of credence. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

¹²² 17 P.3d 40 (Alaska 2000); *see also Miller v. CIGNA Corp.*, 47 F.3d 586, 588 (3d Cir. 1995); *Woodson v. Scott Paper Company*, 109 F.3d 913, 932 (3d Cir. 1997); *Watson v. Southeastern Pa. Trans. Authority*, 207 F.3d 207, 215, 220 (3d Cir. 2000).

¹²³ *Id.*

¹²⁴ *Era Aviation, Inc. v. Lindfors*, 17 P.3d 40, 44 (Alaska 2000).

Rights Act.¹²⁵ Once the claimant satisfies the threshold direct evidence requirement, she can prevail by showing that her protected status was a “motivating factor” in the adverse employment decision.¹²⁶ In the mixed-motive context, the term “direct evidence” is used to refer to the quantum of proof and should not be construed as the opposite of “circumstantial evidence.”¹²⁷ In order to show “direct evidence,” the claimant must “at least offer either direct evidence of prohibited motivation or circumstantial evidence strong enough to be functionally equivalent to direct proof.”¹²⁸ If the claimant does this, then the “employer may not meet its burden in [a mixed-motives] case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason . . . [t]he employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.”¹²⁹ In contrast, plaintiffs pursuing a pretext theory need not provide direct evidence.¹³⁰

B. *Has Ms. Bozine Proven Discrimination Under a "Mixed-Motive" Theory?*

As noted above, the threshold element in discrimination cases asserting a mixed-motive theory is that the claimant must present direct evidence of the employer's discriminatory intent (i.e. the claimant must prove that gender was “a motivating factor” (but not necessarily a determinative factor) in the adverse employment decision. In this case, the Executive Director has simply not shown that Ms. Bozine's gender was a motivating factor in Alaska Sales decision to eliminate Ms. Bozine's paint prepper position, transfer her to a receptionist position, and retain Mr. Dismukes within the paint shop. Mr. Armstrong's testimony, all of which I find credible, and Kevin Pfeiffer's testimony, which I find credible as to this issue, was that Mr. Dismukes was

¹²⁵ *Smith v. Anchorage School District*, 240 P.3d 834, 840 (Alaska 2010) (paraphrasing the court).

¹²⁶ *Id.* (paraphrasing the court).

¹²⁷ *Id.* (paraphrasing the court). Inherently ambiguous statements cannot supply the “direct evidence” prerequisite to the use of a mixed-motive analysis. See *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580, 582 - 583 (1st Cir.1999). Likewise, statistical evidence would not warrant a mixed-motive charge, “nor would ‘stray’ remarks in the workplace by persons who are not involved in the pertinent decision-making process.” See *Ostrowski v. Atlantic Mutual Insurance Companies*, 968 F.2d 171, 181 - 182 (2d Cir. 1992) (quoting *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1185 (2d Cir. 1992)); see also *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 435 (Alaska 2004).

¹²⁸ *Id.* To meet this burden, the plaintiff in a mixed-motive case must present evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting on the discriminatory attitude. *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 662-663 (Alaska 2006). If that evidence is sufficient to permit the factfinder to infer that the discrimination was more likely than not a motivating factor in the employer's decision, then the plaintiff may recover unless the employer can establish, by a preponderance of the evidence, that it would have taken the same action even absent consideration of the impermissible discriminatory factor. *Id.*

¹²⁹ *Price Waterhouse, supra*, 490 U.S. at 252.

¹³⁰ *Id.*

retained in the paint shop primarily because (1) he was a less expensive employee than Ms. Bozine, and (2) he was a more reliable employee than Ms. Bozine. At hearing and in her deposition, Ms. Bozine admitted that she was having some personal problems in 2011 which were affecting her attendance at work. While it is a legitimate factual issue as to which employee was more dependable, I resolve the issue in favor of Mr. Dismukes, based primarily on Mr. Armstrong's testimony and on Ms. Bozine's own testimony. As to which employee was least expensive, there was really no genuine factual issue; it was undisputed that Ms. Bozine's wage was \$3.00 to \$4.00 per hour more than Ms. Dismukes wage during the period at issue. Based on Mr. Armstrong's and Mr. Pfeiffer's testimony, the issue of which employee was the better paint prepper, and the issue of whether Ms. Bozine could buff, had little relevance to Alaska Sales' decision as to which employee should remain working in the paint shop.

Throughout the case, the Executive Director focused much attention on the actions and statements of Ray Gonzales. However, I find that Mr. Gonzales had nothing to do with Alaska Sales decision to retain Mr. Dismukes within the paint shop and transfer Ms. Bozine to a secretarial position. First, with regard to management authority, I find, based on Mr. Armstrong and Ms. Bozine's testimony, that Mr. Gonzalez exercised *some* degree of informal supervisory authority within the paint shop. However, there was little evidence, and no persuasive evidence, that Mr. Gonzalez influenced Alaska Sales' decision as to who would remain in the shop and who would be transferred to the office.¹³¹ Mr. Armstrong, Mr. Spencer, and Kevin Pfeiffer all testified that Kevin Pfeiffer made the decision himself based on the recommendations of Mr. Armstrong and Mr. Spencer.¹³² The timeline of events in this case also indicates that Mr. Gonzales played no part in the decision to eliminate the paint prepper position and move Ms. Bozine to an office position. Ms. Bozine testified that she worked with Mr. Gonzalez from about September 27, 2011 - November 15, 2011. Ms. Bozine also testified that the incident with Mr. Gonzales occurred on September 27 or 28, 2011. It seems highly unlikely that a person who began working at Alaska Sales only a day or so before the employment decision at issue was

¹³¹ It is *possible* that Mr. Gonzalez may have been the person who *communicated* Mr. Pfeiffer's decision to Ms. Bozine. She testified that this was the case, while Mr. Armstrong and Kevin Pfeiffer both stated it was Mr. Pfeiffer who conveyed the news. I find the preponderance of the evidence indicates that it was Kevin Pfeiffer who delivered the news regarding Ms. Bozine's transfer. However, even were this not the case, Mr. Gonzalez could certainly have communicated the decision without having had any part in actually making the decision.

¹³²

communicated to Ms. Bozine, and who had never previously worked with Ms. Bozine, would have had anything to do with the actual making of the decision.

In contrast, there was no testimony, and virtually no circumstantial evidence, indicating that Mr. Gonzalez played any part in the employment decisions at issue.¹³³ There was only conjecture by the Executive Director's counsel that Mr. Gonzalez was involved, and that conjecture was dispelled by credible and persuasive testimony at hearing.

In summary, the preponderance of the evidence indicates that Ms. Bozine's gender was not a motivating factor in Alaska Sales' decision to eliminate Ms. Bozine's paint prepper position, transfer her to a receptionist position, and retain Mr. Dismukes within the paint shop. Accordingly, the Executive Director cannot prevail here based on a mixed-motive theory of gender-based discrimination. The remaining issue is whether the Executive Director has proven gender-based discrimination under a "pretext" theory.

C. Has Ms. Bozine Proven Discrimination Under a "Pretext" Theory?

As discussed in Section III(A), above, in order to establish a prima facie case of pretextual discrimination in this case, the Executive Director must prove (1) that Ms. Bozine is a member of a protected class (*i.e.* is female); (2) that she was qualified for the job and performing according to the employer's legitimate expectations; (3) that she was adversely affected by an employment decision; and (4) that other persons, not within the protected class, were treated more favorably. In its answer, Alaska Sales did not contest the assertions on which Ms. Bozine's prima-facie case is based. Instead, Alaska Sales asserted (among other defenses) that the employment action at issue was taken based on legitimate, non-discriminatory reasons and corporate reorganization. Accordingly, the elements of Ms. Bozine's prima-facie case are established.

¹³³ The evidence indicates that Mr. Gonzalez may have made some statements which were misguided at best, and which, viewed in the light most favorable to Ms. Bozine, could be construed as harassment toward Alaska Sales' female employees in general. However, HRC concluded that its own "[i]nvestigation did not produce substantial evidence that complainant was subjected to a hostile work environment because of comments of a sexual nature," and it did not assert a claim of sexual harassment or a hostile work environment in its Accusation. Stray remarks in the workplace, by persons who (like Mr. Gonzalez) are not involved in the pertinent decision-making process, cannot support a mixed-motive claim. See *Ostrowski*, 968 F.2d at 181 - 182; *Tyler*, 958 F.2d at 1185; and *Kinzel*, 93 P.3d at 435.

Where (as here) the employee succeeds at making out a prima facie case of discrimination, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment action.¹³⁴

Alaska Sales both articulated and proved that its decisions to eliminate Ms. Bozine's paint prep position, transfer her to a receptionist position, and retain Mr. Dismukes within the paint shop, were based on legitimate considerations related to Alaska Sales' reorganization, and were not motivated by any intent to discriminate against Ms. Bozine based on her gender. First, no real evidence of any discriminatory intent on the part of Alaska Sales was ever presented in this case. Second, there was persuasive testimony by Shaun Pfeiffer and Kevin Pfeiffer that Alaska Sales' paint shop's profitability had been deteriorating for three years or more, and that a reorganization was necessary to put the paint shop back on a firm financial footing. Third, the testimony by Shaun Pfeiffer, Kevin Pfeiffer, and Lawrence Armstrong showed that a bona-fide reorganization was implemented, and that Ms. Bozine's transfer to the office position was part of that reorganization. Finally, Mr. Armstrong provided extremely convincing testimony that the decision to keep Mr. Dismukes in the paint shop and transfer Ms. Bozine to an office position was based on the legitimate business considerations of employee cost and dependability, and was not based on gender.

If the employer carries its burden of production at step two of the pretext analysis, the burden of proof shifts back to the employee, who must then demonstrate that the employer's alleged nondiscriminatory reason for taking the action at issue was a mere pretext, and that an impermissible factor (in this case gender) had a determinative effect in the making of the employer's decision.¹³⁵ Here, as discussed above, Alaska Sales proved—indeed, by far more than a preponderance of the evidence—that it took the employment action at issue solely based on legitimate, nondiscriminatory reasons (*i.e.* a reorganization of the paint shop to improve profitability). It necessarily follows that Ms. Bozine's gender played no part in Alaska Sales' employment decision.

In summary, the Executive Director failed to prove that Alaska Sales' paint shop reorganization was a mere pretext for discrimination, or that Ms. Bozine's gender had a

¹³⁴ See discussion of legal authorities in Section III(A), above.

¹³⁵ See discussion of legal authorities in Section III(A), above.

determinative effect on the personnel action at issue. Accordingly, the Executive Director cannot prevail here based on a "pretext" theory of gender-based discrimination.

IV. Conclusion

The Executive Director failed to prove, under either a "pretext" theory or a "mixed motive" theory, that Alaska Sales discriminated against Ms. Bozine because of her gender. Therefore, the single count of discrimination alleged in the Executive Director's Accusation against Alaska Sales should be dismissed.

DATED this 31st day of August, 2015.


Signed _____
Jay D. Durych
Administrative Law Judge

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

800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

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ALASKA STATE COMMISSION)
FOR HUMAN RIGHTS, PAULA M.)
HALEY, EXECUTIVE DIRECTOR,)
ex rel. JENNIFER BOZINE nka)
JENNIFER THORNE,)
Complainant,)
v.)
ALASKA SALES AND SERVICE, INC.)
Respondent.)

ASCHR No. J-11-289
OAH No. 14-1783-HRC


FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, now ORDER that the Administrative Law Judge's Decision of August 31, 2015 is hereby ADOPTED by the Commission in its entirety. Accordingly, the complaint is DISMISSED.

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: February 29, 2016


Michele Christiansen, Commissioner

DATED: February 29, 2016


Kathryn Dodge, Commissioner

DATED: February 29, 2016


Lester Lunceford, Commissioner

800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

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This is to certify that on March 1, 2016,
A copy of the foregoing was hand-delivered to:

Stephen Koteff, Human Rights Advocate
Alaska State Commission for Human Rights
800 A Street Suite 204
Anchorage, AK 99501

And mailed by first-class U.S. mail, postage prepaid,
to:

Liz Farley, Esq.
Farley & Graves, PC
807 G Street Suite 250
Anchorage AK 99501

ALJ Jay D. Durych
Office of Administrative Hearings
State of Alaska, Department of Administration
550 W. 7th Avenue, Suite 1940
Anchorage, AK 99501



Margaret Taylor
ASCHR Staff