BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON APPOINTMENT BY THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

Marti Buscaglia, Executive Director, Alaska State Commission for Human Rights, ex rel. JULIA ECHEVERRIA Complainant, v. CARIBOU CORPORATION, d/b/a CARIBOU FAMILY RESTAURANT; CARIBOU'S TOOTH, INC.; JACKIE RAY MORRELL; and ELIZABETH C. JOHNSON, Respondents.	)	OAH No. 15-0658-HRC ASCHR Nos. J-12-211 J-14-186

RECOMMENDED DECISION

I. Introduction

Julia Echeverria alleges that she was subjected to a sexually hostile working environment while working as a server at the Caribou Family Restaurant, that she was terminated from her position in May 2012 after complaining about offensive comments made by restaurant co-owner Jack Morrell, and that, two years after her termination, Mr. Morrell attempted to persuade another employer to fire her. Based on these events, the Executive Director referred this matter to a hearing before the Alaska State Commission on Human Rights, alleging on Ms. Echeverria's behalf: (1) hostile work environment sexual discrimination, (2) termination in retaliation for opposing sexual discrimination, (3) retaliation for having filed a complaint with the Commission, and (4) an attempt to coerce another to terminate her employment in retaliation for the foregoing complaints, all in violation of the Alaska Human Rights Act.

After a full hearing and based on the evidence presented, the Executive Director has met the burden of proving that Respondents violated the Alaska Human Rights Act. Accordingly, this proposed decision concludes that Ms. Echeverria should receive "make whole" relief as described below, and, further, recommends that the Commission require Respondents to receive training, and to provide training to their employees, on the laws prohibiting gender-based discrimination in employment.

II. Facts

A. Ms. Echeverria's employment at Caribou Family Restaurant

Respondents Jack Morrell and Elizabeth (Sally) Johnson, a married couple, own and operate the Caribou Family Restaurant in Soldotna, Alaska.[1] Ms. Echeverria worked for the Caribou as a waitress from October 2010 until May 31, 2012. Ms. Echeverria, who had twenty years of waitressing experience, was popular with her customers at the Caribou, and enjoyed "the social aspect" of waitressing. She also enjoyed the above-average earnings the position afforded her due to the Caribou's excellent location and busy pace.[2]

However, Mr. Morrell and Ms. Echeverria had a difficult, conflict-filled working relationship. Mr. Morrell believed that Ms. Echeverria was stubborn and argumentative. Ms. Echeverria believed that Mr. Morrell was unreasonable, and unfairly blamed her for things she did not do, including things that happened when she was not working. Mr. Morrell also often called Ms. Echeverria "stupid" and "dumb," and belittled her in front of customers.[3]

There is ample evidence that Mr. Morrell is generally difficult with staff. There is also ample evidence that he and Ms. Echeverria had a particularly antagonistic relationship. According to Mr. Morrell, their frequent conflicts occurred because Ms. Echeverria would refuse to do things she was asked to do, and made frequent mistakes when cashiering. Ms. Johnson generally agreed with this recounting. But other staff members found that Mr. Morrell singled Ms. Echeverria out for unfair treatment, including blaming her for things she did not do.

Former kitchen manager Joseph Conte testified that Mr. Morrell was basically "mean to everybody," but treated Ms. Echeverria with the "utmost disrespect," yelling at her and accusing her of doing things that she did not do.[4] Likewise, former kitchen manager Brenda Godwin agreed that Mr. Morrell would frequently blame Ms. Echeverria for things that happened in the restaurant, including things for which she was not responsible.[5] Ms. Godwin specifically

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1 Paragraph 1 of Respondents' Answer; Morrell testimony; E. Johnson testimony. The restaurant is wholly owned by "Caribou Corp.," which, in turn, is wholly owned by Caribou's Tooth, Inc. Mr. Morrell and Ms. Johnson wholly own Caribou's Tooth, Inc. Mr. Morell is a named director and president of Caribou's Tooth, Inc., and owns 51 percent of that corporation; Ms. Johnson is a named director as well as secretary and treasurer and has a 49-percent ownership interest. The Executive Director presented significant evidence that the Respondents have not observed corporate formalities with either corporation, comingling assets, under-funding the corporation, not holding regular corporate meetings, and using corporate resources for personal use. Morrell testimony; E. Johnson testimony.

2 Echeverria testimony.

3 Echeverria testimony.

4 Conte testimony.

5 Godwin testimony.

remembered Mr. Morrell's negative comments because he was "very specific and rude," and recalls hearing Mr. Morrell yell across the restaurant at Ms. Echeverria on at least two occasions.

At least some customers were also aware of Mr. Morrell's animosity towards Ms. Echeverria. Cristen Roehl and her family dined at the Caribou once or twice a week during Ms. Echeverria's employment, and Ms. Echeverria was their regular server. Ms. Roehl observed Mr. Morrell to be "somewhat malcontent" with staff generally, but most hostile to Ms. Echeverria.[6]

B. Offensive comments

During the time that Ms. Echeverria was employed at the Caribou, Mr. Morrell sometimes made comments about female employees' physical appearance. At least some female employees, such as waitress LaDonna Jensen, avoided Mr. Morrell because they found him offensive.[7] Ms. Echeverria "tried to avoid any contact with him at all."[8] Mr. Morrell did not make similar comments about male employees' physical appearance.[9]

Ms. Echeverria testified credibly that Mr. Morrell made offensive comments to her about her physique and appearance. He told her "on a regular basis" that she was "fat," she had a "fat ass," or that her "ass was fat." He also called her ugly, told her that she "stunk," told her she needed to "visit a beauty salon" before coming to work, and, on one occasion, used a racial slur to insult her hair.[10] Ms. Echeverria felt that Mr. Morrell "singled her out" for insults and derogatory comments.[11] These comments made Ms. Echeverria feel "degraded, belittled, [and] horrible."[12]

Multiple witnesses corroborated Ms. Echeverria's account of Mr. Morrell's conduct. Brenda Godwin, the former kitchen manager, heard Mr. Morrell call Ms. Echeverria "stinky and lazy and fat a couple of different times."[13] Ms. Jensen, the former waitress, heard Mr. Morrell comment about the body parts of female employees, including commenting about Ms. Echeverria's body.[14] Ms. Roehl, the customer, heard Mr. Morrell make "derogatory comments" towards Ms. Echeverria "quite a few times," chiefly with regard to Ms. Echeverria's weight,

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6 Roehl testimony.

7 Jensen testimony. Ms. Jensen testified that Mr. Morrell "said a lot of derogatory things about everybody," and "could get verbally mean." She stated that he had a particular dislike for Ms. Echeverria, but that she did not think he treated Ms. Echeverria any worse than he treated any other employee.

8 Echeverria testimony.

9 Echeverria testimony.

10 Echeverria testimony.

11 Echeverria testimony.

12 Echeverria testimony.

13 Godwin testimony.

14 Jensen testimony.

including at least one occasion where Mr. Morrell "called her a fat heifer."[15] Multiple witnesses testified that, on at least one occasion, Mr. Morrell told Ms. Echeverria that she "stunk," and that, another time, Mr. Morrell used a racial slur to describe Ms. Echeverria's hair.[16]

In addition to generalized commentary about female employees' bodies, Mr. Morrell also occasionally made sexually explicit statements to, and about, Ms. Echeverria. Ms. Echeverria credibly testified that on three or four occasions in May 2012, Mr. Morrell made comments in the workplace suggesting that she would perform oral sex for money. In one instance, Mr. Morrell, while discussing a news article about the Nenana Ice Classic prize, stated that Ms. Echeverria "would get on her knees for that kind of money."[17] This comment was made in front of restaurant guests and coworkers. On several other occasions Mr. Morrell called Ms. Echeverria over to a table of male customers and made a comment "that he could make [Ms. Echeverria] get on her knees and wash the floor" because she needed her job.[18]

Other witnesses testified to hearing Mr. Morrell make these statements. Former kitchen manager Godwin heard Mr. Morrell make a statement "to the effect that [Ms. Echeverria] would get on her knees for money."[19] Ms. Roehl, the former customer, testified that she observed Mr. Morrell talking to a table of young male patrons, gesture towards Ms. Echeverria and state, "I can make her get down on her knees for any man."[20]

Mr. Morell did not deny making these comments. Instead, he testified that he would not have made such comments without a prompt or someone else saying it first. Also, he asserted that if he did say it, it was not intended to be sexual, but rather was intended to be funny.[21]

But Ms. Echeverria did not find the statements funny; she found them both offensive and distressing. Mr. Morrell's comments and disparaging treatment sometimes made her cry,

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15 Roehl testimony.

16 Godwin testimony; Roehl testimony; Echeverria testimony. As with virtually all aspects of this case, other witnesses gave conflicting testimony. Mr. Conte, the former manager, never heard gender- or sex-based comments, and never heard Mr. Morrell make comments about Ms. Echeverria's physical appearance. Conte testimony. Mr. Morrell stated that he considers himself "old and fat," and would never call someone else fat. He denied making any of the comments attributed to him. While it is possible that Mr. Conte did not hear the statements made outside his presence, Mr. Morrell's blanket denials were, as discussed further below, not credible.

17 Echeverria testimony.

18 Echeverria testimony.

19 Godwin testimony.

20 Roehl testimony. Ms. Roehl testified that her minor children also heard the comment, and that a teenaged son asked her whether Mr. Morrell had been referencing oral sex.

21 Morell testimony.

requiring her to leave the room to compose herself.[22] She was particularly upset and offended by the explicit sexual references, and by the sense that these were worsening over time.[23]

C. Events of May 30-31, 2012

Ms. Echeverria's employment at the restaurant ended in late May 2012. As described below, the parties offered starkly competing versions of these events, with several witnesses testifying in support of each of the competing versions.

Ms. Echeverria testified that on May 30, 2012, Mr. Morell had been "riding [her] all night," and that, when she went to turn in her credit card slips at the end of the night, he falsely told her that customers had complained about her. She and Mr. Morrell argued about whether there had actually been a customer complaint. Upset by what she believed to be continued false accusations, as well as an escalating pattern of rude and offensive behavior, she told him, "I'm out of here," left the office, and walked out of the restaurant in tears.[24]

Respondents agree that Mr. Morrell and Ms. Echeverria had an argument on May 30, but claim that Ms. Echeverria walked out in the middle of her shift,[25] announcing as she left that she was quitting.[26] Citing the disruptive effect of a server leaving mid-shift, Respondents then rely on this narrative to justify terminating Ms. Echeverria's employment.[27]

There is testimony supporting both versions of events. However, Ms. Echeverria's version of these events was more credible. In addition to the overall credibility issues with Respondents' witnesses, discussed further below, Ms. Echeverria's testimony is supported by the documentary evidence in this case. Specifically, her May 30, 2012 timecard reflects that she clocked out shortly after 10:00 p.m.[28] Respondents offered nothing but unsupported speculation to reconcile their timeline with the timeline presented by the timecard, and Ms. Echeverria credibly testified that the incident occurred while getting her credit card slips at the end of her shift. A preponderance of the evidence thus supports the conclusion that the events in dispute on May 30, 2012 occurred after Ms. Echeverria's shift ended at 10:00 p.m.

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22 Roehl testimony; Echeverria testimony; Conte testimony; Jensen testimony.

23 Echeverria testimony.

24 Echeverria testimony.

25 Respondents contend this occurred between 3 and 4 p.m – although, during her rebuttal testimony, Ms. Johnson conceded that she did not actually know what time the events occurred.

26 Mr. Morrell contends that he told Ms. Echeverria that, if she walked out the door, she would no longer have a job. Ms. Johnson asserts that Ms. Echeverria said, "I'm out of here, I quit," and "stormed out the door." This version of events is also supported by Ms. Mansfield's testimony.

27 Morrell testimony; Mansfield testimony.

28 Ex. 1.

It is undisputed that Ms. Echeverria was visibly upset after her exchange with Mr. Morrell, and spent the next hour or so crying at her car in the Caribou's parking lot.[29] Ms. Jensen came outside to join Ms. Echeverria, staying with her until Ms. Echeverria left an hour or so later. Waitress Michelle Mitchell, who was off-shift but living in an RV in the restaurant parking lot, joined them as well.[30] Ms. Echeverria felt upset about what she viewed as false accusations by Mr. Morrell, and about the escalation of Mr. Morrell's derogatory, often offensive treatment.[31]

At some point, Ms. Johnson came out to the parking lot and talked to Ms. Echeverria. Ms. Johnson testified that that she tried to talk Ms. Echeverria into not quitting, but that she could not recall how Ms. Echeverria responded or any other details of that conversation.[32] Ms. Echeverria reports telling Ms. Johnson that she was upset by Mr. Morrell's treatment of her, including the comments about "getting on her knees," that Mr. Morrell's inappropriate and derogatory comments were out of control, and that she was "done taking stuff from Jack."[33] Ms. Johnson was generally unable to recall the content of the conversation, but agrees that it may have been during this conversation that Ms. Echeverria told her about Mr. Morell's comments that Ms. Echeverria "would get on her knees for money."[34]

While they were outside talking, Ms. Echeverria told her coworkers (Ms. Jensen and Ms. Mitchell) that she was very upset and tired of dealing with Mr. Morrell, and that she might quit.[35] Ms. Jensen advised Ms. Echeverria to "just go home and calm down."[36] Ms. Jensen did not believe that Ms. Echeverria had, in fact, resigned.[37] Indeed, from Ms. Echeverria's perspective, while the situation at the restaurant was distressing, she could not financially afford to quit, so she did not seriously contemplate doing so.[38] When she left the parking lot, she told Ms. Jensen she was not going to quit, and that she would see her at work tomorrow.[39]

On May 31, 2012, Ms. Echeverria returned to the restaurant and clocked in around 3:00 p.m. Her shift started at 2:00 p.m., but she had made arrangements to have a coworker, Carol

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29 Echeverria testimony; Jensen testimony; Mitchell testimony; E. Johnson testimony.

30 Jensen testimony. For reasons described further below, Ms. Mitchell's testimony about these events was generally not helpful.

31 Echeverria testimony.

32 Ms. Echeverria testified that while she could not remember every word said in the conversation, she never told Ms. Johnson that she was quitting, although she did say that she "was done dealing with Jack" and "done taking stuff from Jack."

33 Echeverria testimony ("That's when I let Sally know the truth about what happened with Jack").

34 E. Johnson testimony.

35 Echeverria testimony; Jensen testimony; Mitchell testimony.

36 Jensen testimony.

37 Jensen testimony.

38 Echeverria testimony.

39 Echeverria testimony.

Dawson, cover for her.[40] Ms. Dawson worked for Ms. Echeverria from the start of her shift until 3:00 p.m.[41]

After Ms. Echeverria clocked in, Mr. Morell asked her what she was doing there, and told her that she no longer had a position at the Caribou. Ms. Jensen testified that when Ms. Echeverria returned to the restaurant on May 31, "she came in and Jack told her 'you're fired, you quit, you're out of here,'" to which Ms. Echeverria responded that she had not said anything to Mr. Morrell about quitting.[42] According to Ms. Echeverria, when she asked Mr. Morrell why she was fired, he said that she was "causing too many problems."[43]

Respondents contend that Ms. Echeverria was not fired on May 31, but was simply reminded of having quit the previous evening. Respondents also contend that they had already replaced Ms. Echeverria with another employee. Mr. Morrell and waitress Victoria Mansfield testified that, after Ms. Echeverria left the Caribou on May 30, a lucky job seeker named "Samantha" or "Sam" happened to walk in off the street and be hired on the spot by Mr. Morrell.[44]

When confronted with Caribou records showing that the employee he identified as Ms. Echeverria's instantaneous replacement did not start until September 2012, however, Mr. Morell testified that the records are probably inaccurate due to the restaurant's bookkeeper having dyslexia.[45] Ms. Johnson also testified that Mr. Morrell hired someone to replace Ms. Echeverria. In her version, however, that person – whose name she could not recall – was hired the morning of May 31.[46]

Ms. Echeverria testified that this "new waitress" story was a fabrication. She was not told about a new hire on May 31, and that no new replacement waitress was present in the Caribou that day.[47]

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[40] Echeverria testimony. Ms. Echeverria testified that it was common practice to make such arrangements when an employee knew she was going to be late; Mr. Morrell denies that this was permissible, but does not deny that Ms. Dawson worked the first hour of Ms. Echeverria's shift that day.

[41] Echeverria testimony; Rehmann testimony. Ms. Dawson did not testify. Mr. Rehmann, the HRC investigator, testified to statements made by Ms. Dawson that Ms. Echeverria had asked her to come in an hour early on May 31st to cover the first hour of Ms. Echeverria's shift, and that Ms. Dawson had done so. These statements are hearsay as to which there is no applicable exception. However, the testimony corroborates other admissible evidence – Ms. Echeverria's testimony – and so is admissible in this proceeding pursuant to AS 44.62.460(d).

[42] *See also*, Johnson testimony (that Mr. Morrell told her, "you don't work here; you quit"); Morrell testimony (that he told her that she didn't work there anymore and had "been replaced").

[43] Echeverria testimony.

[44] Morrell testimony; Mansfield testimony.

[45] Morrell testimony.

[46] E. Johnson testimony.

[47] Echeverria testimony.

The testimony of Mr. Morrell, Ms. Johnson and Ms. Mansfield about having hired a replacement waitress between the events of May 30th and Ms. Echeverria's return on May 31st is not credible. First, the story of a qualified job-seeker happening by immediately after these events and agreeing to start the next day is implausible on its face. Second, the story is even more implausible given the strong evidence that the argument between Mr. Morrell and Ms. Echeverria occurred around 10:00 p.m., at the end of Ms. Echeverria's shift, and not mid-day as Respondents have alleged. Third, the documentary evidence supports Ms. Echeverria's version of events over that offered by Respondents. Fourth, Caribou did not call the alleged replacement waitress as a witness. Fifth, Mr. Morrell's story about the bookkeeper's dyslexia is outlandish and not supported by other evidence. In sum, the evidence shows that Mr. Morrell had not hired a replacement for Ms. Echeverria by the time she arrived on May 31st.

D. Initial complaint to the Commission

Ms. Echeverria filed a complaint with the Commission on June 19, 2012.[48] She had previously contacted the Commission several months earlier, but had been afraid to file a complaint while still employed.[49] After her termination, she contacted the Commission again. In her June 2012 complaint, Ms. Echeverria alleged that she had been subjected to discriminatory conduct based on her age, subjected to "unwelcome comments and conduct of a sexual nature," and terminated "because of [her] sex, age, or because [she] complained of discrimination."[50] The Executive Director served the complaint on Ms. Johnson on August 3, 2012.[51]

E. May 2014 events (Aspen Hotel incident)

After several months of job searching, Ms. Echeverria eventually found part-time employment at the Aspen Hotel in Soldotna. She began working there in October 2012, and, with a few short breaks discussed further below, has continued working there since that time.

Mr. Morrell and Ms. Johnson periodically stay at the Aspen Hotel. They also display advertising there for the Caribou. But they apparently did not know that Ms. Echeverria was working there until May 2014, when Mr. Morrell claims he heard second- or third-hand reports that Ms. Echeverria was making disparaging remarks about the Caribou – reports Ms. Echeverria denies.[52]

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48 Ex. 7.
49 Echeverria testimony.
50 Ex. 7.
51 Ex. 8.
52 Morrell testimony; Echeverria testimony.

In May 2014, Mr. Morrell called the Aspen Hotel to complain about Ms. Echeverria. He first spoke with front desk clerk Johnny Sanchez, who described Mr. Morrell as being "very upset." After being told no manager was available to speak with him, Mr. Morrell made a series of disparaging comments to Mr. Sanchez about Ms. Echeverria. He told Mr. Sanchez that the Aspen should fire Ms. Echeverria, that she was "a thief, and a very bad person," and that the Aspen "could get better help from a bum." Mr. Morrell told Mr. Sanchez that, if Ms. Echeverria was not fired, he would never stay at the Aspen again.[53]

Mr. Sanchez told Aspen general manager Danny DeBruin that Mr. Morrell had requested they call him back. Mr. DeBruin and assistant manager Kelli Johnson (who is not related to Sally Johnson) returned Mr. Morrell's call. During that call, Mr. Morrell made disparaging comments about Ms. Echeverria to Mr. DeBruin and Ms. Johnson, told them they should fire her, and said he would stop supporting the Aspen – personally and professionally – unless they did so. Mr. Morrell accused Ms. Echeverria of stealing from him, and said she had "done a lot of bad things behind his back." He did not mention Ms. Echeverria's Human Rights Commission complaint, or any protected activity, or make gender-related comments; he just told them that Ms. Echeverria was a "low life" and that they should fire her.[54] The Aspen Hotel did not take any adverse employment action against Ms. Echeverria in response to Mr. Morrell's phone calls.[55]

Ms. Echeverria's supervisors at the Aspen informed her of Mr. Morrell's call, and she reported these events to the Commission's staff.[56] On June 1, 2015, the Executive Director referred the case to the Commission for hearing.

F. Credibility of witnesses

1. Ms. Echeverria

Ms. Echeverria was a credible witness. She testified in a forthright and confident manner. Her version of events was, as a general matter, internally consistent and more believable than testimony given by Respondents and their witnesses.

2. Respondents

Ms. Johnson was credible in her admissions that she is not sure about exactly what happened. She was credible, for example, in admitting – even under questioning by Mr. Morrell – that she is not sure when Ms. Echeverria left the restaurant on May 30. Her testimony about

53 Sanchez testimony.
54 K. Johnson testimony.
55 K. Johnson testimony.
56 Echeverria testimony.

specific events was less credible. In particular, she testified under oath that the replacement waitress was on the job on May 31, when the evidence is that was not true.

Mr. Morrell's testimony was not credible. Mr. Morrell blamed others or invoked conspiracy theories to explain the contradictions between his version of events and the documentary evidence. For example, he suggested that Ms. Echeverria's May 30 timecard was falsified, and speculated that other employees conspired with Ms. Echeverria to clock her back in hours after she left. He alleged without credible supporting evidence that Ms. Echeverria engaged in various forms of unproven criminal conduct. He testified that he hired a new waitress who miraculously appeared immediately after his conflict with Ms. Echeverria, and that this new employee's absence from the restaurant's employment records must be due to "dyslexia" by the business's bookkeeper. Mr. Morrell also gave testimony that was inconsistent with his actions during the hearing. For example, he testified that he would never tell someone to "shut up." But during the hearing, the Administrative Law Judge had to admonish him after an outburst during which he told Ms. Johnson to "shut up." More generally, Mr. Morrell also displayed a lack of self-awareness and flippancy about the allegations in this matter, all of which made his testimony lack credibility.

3. Victoria Mansfield

Victoria Mansfield, a current waitress at the Caribou, offered testimony that strongly supported Respondents' version of events – including claims about problems with Ms. Echeverria's work and about the events of May 30. It was Ms. Mansfield who first introduced the idea that Mr. Morrell had replaced Ms. Echeverria on May 30 with another waitress who happened to have walked in off the street after Ms. Echeverria left.[57] This testimony, and Ms. Mansfield's testimony generally, was not credible.

A number of factors support the conclusion that Ms. Mansfield is biased. She is a current employee of the restaurant; she has a close personal relationship with the Respondents (including calling Ms. Johnson "Mom"); she socializes with them; and her strong affection for them was apparent during and after her testimony. In addition, her credibility was significantly undermined because she has multiple convictions for crimes of dishonesty, and her testimony about those

[57] Ms. Mansfield originally testified that Ms. Echeverria left on May 30 and never came back. When informed that other witnesses had testified – and it appeared undisputed – that Ms. Echeverria had come back the next day, Ms. Mansfield then indicated that she now remembered that, after Ms. Echeverria left on May 30, a woman named "Samantha" walked in off the street to apply for a job, and was hired on the spot. Ms. Mansfield further recalled that "Samantha" was trained the day she was hired. Ms. Mansfield's testimony about these events was not credible.

convictions was itself inconsistent and unbelievable.[58] Finally, Ms. Mansfield's demeanor when testifying made her testimony valueless. Her responses to questions on cross examination, and the overall hostile and defensive tone taken with opposing counsel and with the Administrative Law Judge, significantly diminished her credibility. She gave testimony that was internally inconsistent, flippant, and factually incredible. For all of these reasons, I have not credited her testimony on any material issue in dispute.

4. Michelle Mitchell

Respondents called another current employee, Michelle Mitchell, to testify about the events of May 30. Ms. Mitchell's testimony is clouded by her having signed a statement about these events under penalty of perjury in September 2012. Ms. Mitchell admits to signing the statement, which was prepared and notarized by the Respondents' former attorney, but testified that she did not read the statement before she signed it, and, when she read it during cross-examination, she disavowed many of its contents. In addition to her signed notarized prior inconsistent statement, Ms. Mitchell has an understandable desire to testify in a manner favorable to her current employers, expressing reluctance and concern about being asked to testify about whether she got along with Mr. Morrell. She has relied on Respondents for not only employment but for her housing, further enhancing the nature of her conflict. There is good reason to believe she is was motivated to understate any problems in order to preserve her current employment situation. These factors, as well as Ms. Mitchell's admissions about signing a prior notarized statement about these events at Respondents' request without even reading it, render her testimony unreliable.

5. Kelli Johnson and Johnny Sanchez

The Aspen hotel employees who testified about their May 2014 phone conversations with Mr. Morrell were credible witnesses. Neither had any reason to fabricate stories about their discussions with Mr. Morrell, and both testified firmly, credibly, and consistently about the content of those conversations.

III. Procedural History

The matter was referred to the Office of Administrative Hearings on June 4, 2015. At that time, Respondents were represented by counsel, who filed a response to the accusation on July

[58] Alaska R. Evid. 609. Evidence of Ms. Mansfield's convictions, which are more than five years old, were admitted under Evidence Rule 609(b).

17, 2015.[59] The parties, through counsel, participated in a case planning conference and a scheduling order was entered setting a four-day hearing to begin in December 2015.

On November 25, 2015, Respondents' counsel filed a motion to withdraw as counsel for cause. At a status conference held on November 30, 2015, the parties agreed to reschedule the hearing for March 2016, and to set new prehearing deadlines. Respondents indicated they expected to retain new counsel, and were advised that the proceeding would go forward whether or not they retained substitute counsel. A notice of hearing and prehearing scheduling order was issued January 22, 2016.

After several prehearing status conferences in March 2016, the hearing began on March 31, 2016, with additional hearing days on April 1, 2016, April 28, 2016, and May 12, 2016.[60] The Executive Director was represented by counsel. Respondents appeared in person and represented themselves, with Jack Morrell also representing the corporate entity Respondents. Testimony was taken from Julia Echeverria, Joseph Conte, LaDonna Jenson, Jon Sanchez, Victoria Mansfield, Cristen Roehl, James Rehmann, Brenda Godwin, Elizabeth ("Sally") Johnson, Kelli Johnson, Jack Morrell, and Michelle Mitchell.

IV. Discussion

A. Governing legal principles

The opportunity to obtain employment without discrimination because of sex or other protected characteristics "is a civil right."[61] The legislature has determined that discrimination based on sex or on the basis of other protected characteristics is a matter of public concern, and that such conduct is detrimental to the general welfare of the state and its inhabitants.[62]

Accordingly, Alaska law prohibits employers from discriminating against an employee because of the employee's gender.[63] It is also unlawful for an employer

> [T]o discharge, expel or otherwise discriminate against a person because the person has opposed any practices forbidden under AS 18.80.200-18.80.280, or

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59 To the extent that Mr. Morrell now raises objections about the corporate entities being appropriately named as Respondents, those objections were waived in the filing of the July 2015 response on behalf of all Respondents.

60 *See* Order Denying Mr. Morrell's Motion for Stay, issued May 10, 2016.

61 AS 18.80.210. Although the Accusation also alleges discrimination based on age, the Executive Director put on no evidence regarding alleged age discrimination, and did not assert age discrimination as a basis for relief during the hearing.

62 AS 18.80.200 ("[T]his discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety, and general welfare of the state and its inhabitants").

63 AS 18.80.220(a)(1).

because the person has filed a complaint, testified, or assisted in a proceeding under [AS 18.80].[64]

"The commission considers instructive, but not binding, relevant federal case law, statutes, regulations, and guidelines if they do not limit the commission's obligation to construe AS 18.80 liberally."[65] Likewise, Alaska courts construing AS 18.80 "look to federal discrimination law jurisprudence generally," yet recognize that "AS 18.80.220 'is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination.'"[66]

B. Respondents subjected Ms. Echeverria to hostile work environment sexual harassment in violation of AS 18.80

The Executive Director alleges Ms. Echeverria was subject to a hostile work environment in violation of AS 18.80.220(a)(1). So-called "hostile work environment" sexual harassment occurs when there is a pattern of ongoing and persistent harassment that occurs because of the claimant's sex, and that is sufficiently severe to alter the conditions of employment.[67] The Alaska Supreme Court has adopted the *Harris v. Forklift Systems, Inc.* rule that "the challenged conduct must be severe or pervasive 'enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.'"[68] The challenged conduct must also be perceived by the complainant as subjectively offensive.[69]

a. Mr. Morrell's conduct towards Ms. Echeverria was based on her sex for purposes of a discrimination claim under AS 18.80

It is clear that Ms. Echeverria experienced a hostile and abusive workplace at the Caribou. Less clear, at the outset, is whether that hostile work environment was "because of" Ms. Echeverria's sex, as opposed to being the result of either mere personal animus or a more widespread, non-discriminatory incivility on the part of Mr. Morrell. Plainly, Mr. Morrell and Ms. Echeverria had a strong personality conflict and often clashed in the workplace. And plainly, Mr. Morrell was a difficult employer for many employees. The question, then, is whether the conduct at issue in this case implicates the Human Rights Act.

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64 AS 18.80.220(a)(4).

65 6 AAC 30.910(b).

66 *Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 842 (Alaska 2010) (quoting *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 912–13 (Alaska 1999); *Wondzell v. Alaska Wood Prods., Inc*., 601 P.2d 584, 585 (Alaska 1979)); *see also Alaska State Comm'n for Human Rights v. Yellow Cab*, 611 P.2d 487, 490 (Alaska 1980) (using Title VII decisions for guidance in interpreting Alaska anti-discrimination law).

67 See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

68 *Peterson v. State, Dep't of Nat. Res*., 236 P.3d 355, 363-64 (Alaska 2010) (quoting *Harris*, 510 U.S. at 21, 114 S.Ct. 367).

69 *French*, 911 P.2d at 30.

The starting point for this analysis is whether Mr. Morrell's conduct was "based on" Ms. Echeverria's sex. It is well established that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[70] Additionally, the Ninth Circuit has explained "that it is error to conclude that harassing conduct is not because of sex merely because the abuser 'consistently abused men and women alike.'"[71]

Federal courts have held that some of the other comments alleged here – specifically, the use of terms like "fat heifer" – are fairly viewed as being "based on" sex. It is reasonable to conclude that Mr. Morrell would not have made those comments to a male employee, and courts have appropriately recognized similar phrases to be indicative of gender-based animus.[72] Further, "facially neutral incidents may be included in a hostile-work-environment analysis of the totality of the circumstances when there is some circumstantial or other basis for inferring that incidents sex-neutral on their face were in fact discriminatory."[73] While a good deal of Mr. Morrell's name-calling took the form of insults that are facially gender-neutral – for example, terms like lazy, stupid, or fat – courts have also recognized that the totality of the circumstances may support a finding that facially neutral comments or actions were part of a pattern of discrimination based on sex.[74]

Moreover, as a threshold matter, the liberal standards applicable to AS 18.80 support a finding that Mr. Morrell's "constant" derogatory insults about Ms. Echeverria's physical appearance and "regular" references to her "ass," even standing alone, constitute gender-based harassment.[75] These were not and are not comments that get directed towards male employees, and a reasonable inference thus exists that the comments are "because of" gender.

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70 *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 80-81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

71 *Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1463 (9th Cir.1994) (quoting *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845 (9th Cir. 2005)).

72 See, e.g., *Pollard v. E.I. Dupont de Nemours* 16 F.Supp.2d 913 (WD TN 1998) (vacated on other grounds, *Pollard v. E.I. DuPont*, 121 S.Ct. 1946 (U.S. 2001). On the one hand, insults such as "ignorant, stupid, lazy, and worthless" are gender-neutral and not automatically considered to implicate gender-based discrimination. *Wiseman v. Whayne Supply Co.*, 359 F.Supp.2d 579 (W.D. KY 2004). But, as the Ninth Circuit has recognized, a difference exists between calling "a woman 'worthless,' and [calling] her a 'worthless broad'" – in that the latter attaches gender to the insult. *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994).

73 *Waldo v. Consumers Energy Co*., 726 F.3d 802, 815 (6th Cir. 2013); see also *Berry v. Delta Airlines, Inc.,* 260 F.3d 803, 811 (7th Cir.2001) (observing that sex harassment "may include ridicule, ostracism, and other forms of hostility motivated by anti-female animus").

74 See, e.g., *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997).

75 Some federal courts have rejected sexual harassment claims surrounding the use of this term standing alone and without other evidence that comments were gender-based. See, e.g., *Stone-Clark v. Blackhawk, Inc*., 460 F.Supp.2d 91 (D.C. 2006); *Willis v. City of Chicago*, 2005 WL 1838342 (N.D. Ill. 2005).

Additionally, Mr. Morrell's comments about Ms. Echeverria "get[ting] on her knees" were unquestionably "based on" her gender.[76] Ms. Echeverria and others who heard these statements believed that Mr. Morrell was referring to oral sex.[77] Mr. Morrell's suggestions now to the contrary – such as his observation during closing arguments that people "get on their knees to do a lot of things, like pray" – insult the common sense of the fact-finder. On at least one occasion – the Nenana Ice Classic incident – Mr. Morrell's use of this expression was unambiguously a sexual reference. Mr. Morrell's having used this expression as a crude sexual reference in that incident, in turn, supports a finding that his use of a similar expression on other occasions – stating that he could make Ms. Echeverria "get on her knees" and "do anything he wanted"— was also gender-based.

In short, Mr. Morrell's derogatory comments about Ms. Echeverria "getting on her knees" were plainly "based on" Ms. Echeverria's gender. The overt sexual nature of these comments, in turn, supports an inference that at least some of Mr. Morrell's other insulting comments to Ms. Echeverria were likewise based on her gender. The Executive Director has thus satisfied the burden of proving that Mr. Morrell's derogatory comments were "based on" sex for purposes of AS 18.80.

b. Mr. Morrell's discriminatory conduct towards Ms. Echeverria was sufficiently "severe and pervasive" to state a claim under AS 18.80

Having determined that Mr. Morrell's conduct was "based on" Ms. Echeverria's sex, the next question is whether this conduct was sufficiently severe and pervasive to give rise to a claim under the Human Rights Act. This determination requires an inquiry into "the totality of the circumstances, including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"[78] The Alaska Supreme Court has also quoted with approval the United States Supreme Court's holdings that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory

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[76] Other courts considering this question have concluded that denigrating comments insinuating a woman does or should prostitute herself are evidence of gender-based discrimination. See *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997) (supervisor "suggested that [a female employee] was in the habit of performing oral sex for money"); *Scott v. Pizza Hut of America, Inc.*, 92 F.Supp.2d 1320 (M.D. Fla. 2000) (harassment was "based on sex" where coworker frequently referred to employee's "other job on the street," and told her "she needed to 'go out and get some sex'").

[77] Echeverria testimony; Roehl testimony.

[78] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

changes in the 'terms and conditions of employment'" and that anti-discrimination laws are not intended to be a "general civility code."[79]

"[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."[80] The Alaska Supreme Court has also suggested that even where a single incident would not be sufficiently severe, a pattern of recurrent harassment may be regarded as severe or pervasive.[81] Additionally, conduct that is neither sexually motivated nor physically threatening may still be severe if it is sufficiently humiliating. Although it is clear that "[n]ot every insult or harassing comment will constitute a hostile work environment," "[r]epeated derogatory or humiliating statements . . . can constitute a hostile work environment."[82]

Of particular relevance here, the Ninth Circuit found a single instance of verbal conduct to be sufficiently severe where it involved public sexual derogation. In *Steiner*, the court found actionable harassment in a supervisor's crude, sarcastic remark that a casino employee who had "comped" breakfast to two players at her blackjack table should engage in sex acts with those patrons.[83] Here, Mr. Morrell's statements were not as explicit and crude as those in *Steiner*, but his comments were more frequent than those in *Steiner* – and they were amply offensive.

Although some federal courts have rejected hostile work environment claims that rest on crude, inappropriate, and even degrading statements,[84] the conduct at issue here meets the requisite severity threshold. Moreover, the Commission is not bound by these narrower federal rulings and, to the contrary, is mandated to favor an expansive reading of AS 18.80. A supervisor's suggestion that an employee would prostitute herself for money is patently offensive. Additionally, the manner in which Mr. Morrell made these comments – calling Ms. Echeverria over to a table of men before making the statement – suggests that Mr. Morrell intended to humiliate and degrade Ms. Echeverria.

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79 *Peterson v. State, Dep't of Nat. Res*., 236 P.3d 355, 364 (Alaska 2010) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (internal citations omitted)).

80 *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

81 *Veco, Inc. v. Rosebrock*, 970 P.2d 906, 908-9 (Alaska 1999) (citing *e.g.*, *Ellison v. Brady*, 924 F.2d 872, 876-81 (9th Cir. 1991)).

82 *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1115 (9th Cir. 2004) (quoting *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir.2000)).

83 *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th. Cir. 1994).

84 See, e.g., *Scott v. Pizza Hut of America, Inc.*, 92 F.Supp.2d 1320 (M.D. Fla. 2000) (no hostile work environment claim where, on seven occasions, a coworker, in front of other employees, either implied that female employee was a working as a prostitute, or told her to "go out and get some sex"); *Harter v. Chillicothe Long-Term Care, Inc.*, 2012 WL 1997821 (Ct. App. Ohio) (five instances of calling plaintiff a "fat bitch" deemed insufficiently severe to state a claim for sexual harassment under Title VII).

Taken as a whole, Mr. Morrell's conduct towards Ms. Echeverria was outside the bounds of what is acceptable under the Alaska Human Rights Act. A reasonable person in Ms. Echeverria's position would have found Mr. Morrell's sex-based comments hostile and/or abusive, and Ms. Echeverria reasonably found Mr. Morrell's comments sufficiently distressing to interfere with her working environment. The totality of the circumstances thus supports a finding of an actionable hostile work environment, particularly in light of the credible evidence that Mr. Morrell:

- regularly made comments about female employees' bodies and body parts;
- regularly made denigrating comments about Ms. Echeverria's physical appearance and attributes;
- regularly yelled at and criticized Ms. Echeverria beyond anything necessary to accomplish business goals – in a manner that was qualitatively distinct from his treatment of male employees and that would not have occurred but for her gender; and
- made repeated, sexually offensive statements towards Ms. Echeverria – conduct that was offensive in its own right but even more so because it was purposefully done in a public and humiliating manner.

The Human Rights Act does not obligate Mr. Morrell to be kind to his employees, or easy to work for. But it does prohibit him from engaging in abusive, sexually offensive conduct towards his employees.[85] The totality of the circumstances supports the Executive Director's position that Mr. Morrell subjected Ms. Echeverria to a hostile work environment in violation of AS 18.80.

C. The circumstances under which Ms. Echeverria's employment ended violated the Human Rights Act

Just as Alaska law prohibits employers from discriminating against employees on the basis of gender – including prohibiting the creation or maintenance of a sexually hostile work environment – Alaska law also prohibits an employer from retaliating against an employee for complaining about discriminatory conduct. Count II of the Accusation alleges that Ms. Echeverria was fired in retaliation for complaining about Mr. Morrell's sexual harassment.[86]

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[85] Of note, too, the Ninth Circuit has explained that anti-discrimination laws are "aimed at the consequences or effects of an employment practice and not at the . . . motivation of co-workers or employers." *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir.1991) (internal quotations omitted). Thus, "conduct may be 'unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.'" *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 844-45 (9th Cir. 2005) (quoting *Ellison*, 924 F.2d at 880). Mr. Morrell may very well be unaware of the inappropriate nature of his conduct. But the conduct still constitutes sexual harassment against Ms. Echeverria in violation of AS 18.80.

[86] Count I alleges that Ms. Echeverria's discharge was also an act of gender discrimination. Accusation, ¶ 39. At closing argument, counsel for the Executive Director elaborated: "the theory is that Ms. Echeverria would not

Under Alaska law, retaliation claims alleging an adverse employment action can be analyzed in two different ways – one looking at whether the employer's proffered reason for an adverse employment action was mere pretext for the improper motivation ("pretext" analysis), and the other inquiring whether the prohibited factor (be it the employee's gender, or the employee having engaged in a protected activity) was a motivating factor in the adverse employment action ("mixed motive" analysis). Because the Executive Director asserts that Respondents' proffered justification for their actions is a fabrication, this decision uses a "pretext" analysis.

To prevail in a retaliation claim, the Executive Director must show a causal connection between the adverse employment action and the employee's protected activity.[87] Once this prima facie case has been made, the employer must show a legitimate non-discriminatory/non-retaliatory reason for the adverse employment action. "To satisfy this burden, the employer need only produce admissible evidence which would allow a trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[88] If the prima facie case is successfully rebutted, the burden shifts back to the Executive Director to prove that the employer's explanation is a mere pretext for discrimination or retaliation.

I have previously found that Respondents terminated Ms. Echeverria's employment.[89] Having found an adverse employment action occurred, I further find that the Executive Director presented a prima facie case that the adverse employment action was retaliatory. "Causation sufficient to establish a prima facie case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge."[90] Ms. Echeverria complained to both Mr. Morrell and Ms. Johnson about Mr. Morrell's inappropriate conduct and comments – including, but not limited to, complaining to Ms. Johnson on May 30, 2012 about Mr. Morrell's most egregious statements. This is protected activity under AS 18.80.

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have been terminated for complaining about this had she not been a woman." Because the gravamen of the discharge claim is retaliation (for opposing gender-based discrimination), the discharge is analyzed here in terms of the law of retaliatory discharge.

87 *Veco v. Rosebrock*, 970 P.2d 906, 919 (Alaska 1999); *Miller v. Fairchild Industries*, 797 F.2d 727, 730-731 (9th Cir. 1986).

88 *Miller*, 797 F.2d at 731 (quoting *Texas, Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

89 Even if this were not the case, the evidence also sufficiently establishes that that Respondents subjected Ms. Echeverria to "constructive discharge" by creating a work environment so hostile that a reasonable person would be compelled to quit. I do not find that Ms. Echeverria quit. Had she done so, however, the circumstances of her employment at the Caribou were sufficiently intolerable to support a finding of constructive discharge. *See Cameron v. Beard*, 864 P.2d 538, 547 (Alaska 1994) (Constructive discharge occurs "[w]here an employer makes working conditions so intolerable" that "a reasonable person in the employee's position would have felt compelled to resign").

90 *Veco*, 970 P.2d at 919.

Respondents' allegedly retaliatory act – the termination – followed immediately on the heels of the protected activity. On the evening of May 30, Ms. Echeverria complained directly to Mr. Morrell about his unfair treatment of her (treatment found above to have been motivated by discriminatory animus), as well as complaining to Ms. Johnson about his escalating inappropriate remarks. She was fired at the start of her shift the following day. The Executive Director has presented a prima facie case that the discharge was retaliatory.

Once a prima facie case has been established, the burden shifts to the Respondents to demonstrate a legitimate, non-retaliatory reason for their actions. Respondents claim that Ms. Echeverria was not allowed to return to work on May 31 because had she quit, mid-shift the day before. In making this claim, Respondents have articulated a legitimate non-discriminatory reason for taking adverse employment action against Ms. Echeverria. And they have presented evidence – their direct testimony – that, if believed, would override the prima facie case.

Under the *McDonnell-Douglas* burden-shifting framework, the burden thus shifts back to the Executive Director to prove that Respondents' explanation is "mere pretext" for an illegal motivation.[91] The Executive Director met that burden. The evidence supports a conclusion that Respondents' proffered explanation for Ms. Echeverria's termination was mere pretext, and that they in fact terminated Ms. Echeverria because of her opposition to gender-based harassment by Mr. Morrell. As noted, Respondents contend that Ms. Echeverria's employment ended because she walked out of the restaurant during her shift after being cautioned that doing so would be viewed as a resignation. While Respondents have thus articulated a legitimate non-retaliatory reason for the adverse employment action, the evidence presented supports a finding that their proffered reason was false. Ms. Echeverria did not leave during her shift (and Respondents did not hire a phantom replacement waitress the evening of May 30). Ms. Echeverria left after a disagreement with Mr. Morrell about credit card slips – an end-of-shift activity – and clocked out after 10:00 p.m. Thus, Respondents' proffered "legitimate non-discriminatory reason" is not only "mere pretext," but it is a fabrication out of whole cloth.

Having found Respondents' version of events not credible, the remaining evidence in the record supports a strong inference of retaliatory discharge. Ms. Echeverria's very last contact with her employers before being terminated was the conversation with Ms. Johnson in which she complained about Mr. Morrell's derogatory and offensive statements. The next day, Mr. Morrell

[91] *Veco*, 970 P.2d at 919 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)).

told her she was causing too much trouble, and fired her. It is more likely true than not true that the Respondents terminated Ms. Echeverria because she engaged in protected activity – namely, complaining to her supervisors about gender-based harassment. The Executive Director has thus proven wrongful discharge in violation of the Human Rights Act.[92]

D. Mr. Morrell's May 2014 contacts with the Aspen Hotel violated AS 18.80.220(a)(4)

In addition to the counts arising from Ms. Echeverria's employment at the restaurant and the end of that employment, the Executive Director has brought two counts relating to Mr. Morrell's May 2014 contacts with the Aspen Hotel.

1. Retaliation for Participation in a Proceeding Under AS 18.80 (Count III)

Count III of the Accusation alleges that Mr. Morrell's May 2014 contacts with the Aspen – specifically, what the Accusation terms his attempts "to incite, compel or coerce the employer to terminate Ms. Echeverria's employment" – violated AS 18.80.220(a)(4).[93] That provision makes it illegal for "an employer . . . to . . . discriminate against a person because the person has opposed any practices forbidden under AS 18.80.200 - 18.80.280 or because the person has filed a complaint, testified, or assisted in a proceeding under" the Human Rights Act.

There is a threshold question of whether this statute applies here, when the events in question occurred two years after Ms. Echeverria's employment at Caribou ended. Mr. Morrell was not Ms. Echeverria's "employer" in May 2014 – and had not been her employer for two years. But the language of the statute does not turn on an existing employment relationship. Rather, it prohibits an employer from discriminating against "a person" who has opposed forbidden practices or participated in a proceeding under the Act. As counsel noted during closing arguments, had Mr. Morrell made the same series of phone calls to the employer of a witness in this proceeding, even one who had not been his employee, that would have violated the statute.

Mr. Morrell is "an employer" under the Act because his involvement in this proceeding arises out of his employment practices. The prohibition on retaliation is not limited to his employees. Public policy and statutory construction both compel a broader reading to the prohibition on retaliation against "a person" who participates in a proceeding under the Act.

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[92] Because this case is resolved under the pretext analysis, it is not necessary to also perform a "mixed-motive" analysis. *See Kinzel v. Discovery Drilling*, 93 P.3d 427 (Alaska 2004).

[93] Accusation, ¶ 54.

Having determined that the Act applies, the next question is whether the Executive Director proved a violation. The answer is yes. Mr. Morrell's May 2014 phone calls to the Aspen were related to Ms. Echeverria having filed a complaint with the Commission after her employment ended. The Aspen hotel employees who testified were credible and consistent in their descriptions of Mr. Morrell's statements, and Mr. Morrell's denials about the content of those calls were not credible. Mr. Morrell called the Aspen Hotel to attempt to convince management to fire Ms. Echeverria, and he did so because he was angry at her for pursuing a complaint under the Human Rights Act. This is blatant retaliation for protected conduct, and a violation AS 18.80.220(a)(4).

2. "Aiding, Abetting, or Coercing a Violation of AS 18.80" (Count IV)

The Executive Director also alleges that Mr. Morrell's May 2014 contact with the Aspen Hotel constitutes an attempt to "aide, abet, or coerce a violation" of the Human Rights Act. Alaska Statute 18.80.260 makes it "unlawful for a person to aid, abet, incite, compel, or coerce the doing of an act forbidden under this chapter or to attempt to do so." This claim fails as a matter of law, because Mr. Morrell was not attempting to incite an act that is itself forbidden by the Human Rights Act.

The evidence supports a finding that Mr. Morrell called the Aspen Hotel and tried to convince them to fire Ms. Echeverria. However, this conduct does not constitute an attempt to coerce someone else to violate the Human Rights Act. Mr. Morrell attempted to coerce a termination of Ms. Echeverria. But the argued basis for that termination was that, per Mr. Morrell, Ms. Echeverria is a bad employee. While Mr. Morrell's actions may have been motivated by his own discriminatory or retaliatory animus, he is not alleged to have shared this animus with the hotel. For example, he did not say "you should fire her because she is a woman," or "you should fire her because she files complaints with the Human Rights Commission." Rather, he gave the hotel other, purportedly business-based justifications to terminate Ms. Echeverria. If the hotel had relied on Mr. Morrell's assertions to fire Ms. Echeverria, the hotel would not have been violating the Human Rights Act. Thus, while Mr. Morrell may have harbored discriminatory or retaliatory motivations for his phone call, the phone call did not encourage "a violation of AS 18.80." As such, he cannot be said to have attempted to "aide, abet or coerce" such a violation. Accordingly, Count IV is dismissed.

V. Remedy Issues

When a party is found to have engaged in a discriminatory practice, the Commission is required to order that the party refrain from engaging in that practice in the future.[94] The Commission may also order other appropriate relief, including, *inter alia*, requirements for training, posting notices, and awards of back pay or front pay to employees harmed by the discriminatory practice.[95] "The Commission has broad discretion to 'order any appropriate relief" to remedy employment discrimination."[96]

A. Monetary relief

In considering an award of monetary relief, the Executive Director has the burden of proving Ms. Echeverria's lost income due to the wrongful termination, and Respondents then have the burden of proving that Ms. Echeverria failed to mitigate her damages. Whether to award "make whole" monetary relief, and the determination of such relief, are equitable questions within the Commission's sound discretion.[97]

1. Evidence about employment history and earnings

Because the Accusation seeks an award of monetary damages, the following summary of Ms. Echeverria's wage and employment history is provided. While working at the Caribou, Ms. Echeverria worked full time and earned minimum wage plus tips. Because of the high volume of business the restaurant enjoyed, particularly during the busy tourist season, Ms. Echeverria earned more than she would have in a server position elsewhere in Soldotna.[98]

Ms. Echeverria's W-2 for 2012 shows a total income (from January 1, 2012 through May 31, 2012) of $6,793.[99] But that amount does not reflect or include Ms. Echeverria's tip income. Rather, the amounts shown are the total number of hours worked, multiplied by the minimum wage.[100] For unknown reasons, tips are not included in those figures.

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94 AS 18.80.130(a).

95 AS 18.80.130(a)(1).

96 *Pyramid Printing Co. v. Alaska State Comm'n for Human Rights*, 153 P3d 994, 1000 (Alaska 2007) (quoting AS 18.80.130(a)(1).

97 See generally, *Lussier v. Runyon*, 50 F.3d 1103, 1108 (1st Cir. 1995) ("It follows *a fortiori* from the equitable nature of the remedy that the decision to award or withhold front pay is, at the outset, within the equitable discretion of the trial court"); *Shore v. Federal Express Corp.*, 42 F.3d 373, 377–78 (6th Cir.1994) (front pay is generally equitable in nature); *Townsend v. Grey Line Bus Co*., 597 F.Supp. 1287, 1293 (D.Mass.1984) ("The better view . . . is that the recovery of back pay under Title VII is an equitable remedy intended primarily to make the victim of discrimination whole").

98 Echeverria testimony.

99 Ex. 3, p. 1.

100 Echeverria testimony. $6,795, divided by the hourly wage of $7.75, equals 876. The 2012 W2 covers a period of 21 weeks, 3 days. 876 (the total earnings divided by minimum wage) divided by 21.5 (the number of

To estimate the tips Ms. Echeverria earned during her employment at the Caribou, the Executive Director produced Ms. Echeverria's daily cash register slips from the 12-month period prior to her termination.[101] Each slip represents one shift of work at the restaurant, and lists each individual check for that day, with separate columns for "sale," "tip," and "total" amounts for each check.[102] The year's worth of daily slips reflect a total of 2,678 separate checks, of which 2,040 included a tip added to the "sale" amount. For those 2,040 checks, Ms. Echeverria received a total of $13,620 in tips. The other 618 checks listed no tip – a practice typically reflecting the customer has left a cash tip. By extrapolating the amount tipped on the 2,040 checks to the other 618 checks, the Executive Director estimates an additional $3,133 in cash tips during this 12-month period. This calculation suggests that Ms. Echeverria's total tip income at the Caribou was $16,753, or $4,188 per quarter.[103] Her total quarterly income, with tips included, was approximately $4,076 in wages, and $4,188 in tips.[104]

Once Respondents terminated her employment, Ms. Echeverria immediately began looking for employment elsewhere. She did not apply for unemployment because she expected to obtain another job quickly. However, she had difficulty finding a job after the area's busy tourist season had already begun.

In October 2012, Ms. Echeverria was hired by the Aspen Hotel to work as a breakfast attendant. The position was initially part-time. In 2012 she obtained a second job working at another restaurant, Don Jose's, and also briefly worked as a home health aide. The total income reflected on Ms. Echeverria's 2012 W-2s was $16,305, consisting of $6,793 from the Caribou, and $9,512 from other employers – specifically, $6,814 from Don Jose's, $2,248 from the Aspen Hotel, and $450 from the Home Health Aide position.[105] As discussed above, however, Ms. Echeverria's W-2s from the Caribou did not accurately reflect her tips. Including tips from the restaurant, Ms. Echeverria's 2012 income was approximately $23,285.[106]

During 2013, Ms. Echeverria continued to work at the Aspen Hotel and at Don Jose's, and briefly worked part-time at a chiropractic clinic. At one point she left the Aspen to try a position

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weeks) yields 40.6. In other words, $6,795 is the amount earned at minimum wage ($7.75/hour) over 21.5 weeks of roughly 40 hours per week.

101 Ex. 2; Affidavit of Carolyn Thomas, Ex. A.

102 Ex. 2; Echeverria testimony.

103 Ex. 2; Thomas Affidavit, Ex. A; Echeverria testimony; Executive Director's demonstrative exhibit (Appendix A).

104 Ex. 2; Thomas Affidavit, Ex. A; Appendix A.

105 Ex. 3, pp. 1, 2.

106 This amount is calculated as follows: $16,305 (W-2s) + $4,188 (Q1 tips) + $2,792 (tips for two-thirds of Q2).

in insurance sales, but returned to the Aspen. Ms. Echeverria's total 2013 income was $23,884. This consisted of $4,659 from the Aspen Hotel, $5,135 from Don Jose's, $2,187 from the Soldotna Chiropractic Clinic, and $8,413 in insurance commissions.[107]

Ms. Echeverria took the first two months of 2014 off to care for her adult son after he had major surgery. She returned to the Aspen in early 2014. She also continued to work in insurance for part of the year, and briefly worked at two other local restaurants – PJs, and Golden International. Her total 2014 income was $20,800, consisting of $15,685 from the Aspen, $1,060 from PJ's Diner, $1,649 from Golden International Cuisine, and $2,406 in insurance commissions.[108]

Since 2015, Ms. Echeverria has worked full-time at the Aspen, while also working two nights per week at Golden International. She was promoted to a position as Housekeeping Manager in July 2015, but she still does not receive any employment benefits.[109] Ms. Echeverria earned $30,091 in her full-time job at the Aspen in 2015, and earned an additional $4,067 "moonlighting" at Golden International.[110]

2. Back Pay

Back pay damages are intended to restore the claimant to the position she would have been in but for the illegal treatment.[111] Back pay need not be determined with "absolute precision," and instead may be based on "reasonable inference."[112] Numerous federal courts, and prior decisions by the Commission, have held that ambiguities in determining the amount of back pay "should be resolved against the discriminating employer."[113]

An award of back pay here is clearly appropriate. Ms. Echeverria lost income in 2012 due to the sudden loss of her job in May 2012, and was unable to immediately find replacement employment. Even when she did eventually find reemployment, it was at a significantly lower

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107 Ex. 4, pp. 3-4.

108 Ex. 5.

109 Echeverria testimony.

110 Ex. 9.

111 *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Ex Rel Anderson*, OAH Case No. 09-0233-HRC at p. 32 (Alaska State Commission for Human Rights 2009).

112 See *Akouri v. State of Florida Dept. of Transp*., 408 F.3d 1338, 1343 (11th Cir. 2005); *Bianchi v. City of Philadelphia*, 80 F.App'x 232, 238 (3d Cir. 2003).

113 *See, e.g., Horn v. Duke Homes*, 755 F.2d 599, 607 (7th Cir. 1985); *Pettway v. American Cast Iron Pipe*, 494 F.2d 211 (5th Cir. 1974); Ex. Rel Anderson, OAH Case No. 09-0233-HRC, at 36 (citing *Webb v. Veco*¸ No. C-88-295 at 13 (Alaska State Commission for Human Rights 1993).

wage. While Ms. Echeverria's employment situation has stabilized in the last year or so, she still earns less in her full-time position at the Aspen than while working full-time at the Caribou.[114]

The Executive Director has calculated Ms. Echeverria's back pay in the amount of $36,623 as of March 31, 2016. This amount was generally calculated using Ms. Echeverria's actual earnings, estimated tips at Caribou, less offsets for back pay, plus interest. Specifically, for each quarter since Ms. Echeverria was terminated, the Executive Director identified the income Ms. Echeverria would have made at the Caribou (using her average hours, the applicable minimum wage, and the estimated tips calculation based on her credit card slips), offset that amount by her actual income during that quarter, and applied the statutory interest amount across the applicable number of years.[115]

However, the Executive Director's calculation of Ms. Echeverria's "actual income" did not include Ms. Echeverria's income from two nights per week "moonlighting" at Golden International restaurant while working at the Aspen Hotel.[116] At least some federal courts – most notably, the Eight Circuit Court of Appeals – have upheld the exclusion of so-called "moonlighting earnings," that is, income from a second job the employee could have held simultaneously with the original job.[117] The exclusion of this income from the back pay offsets is reasonable.[118] Ms. Echeverria's duty to mitigate the damages from losing her full-time job at the Caribou does not include a duty to work both a full-time job and an additional job in order to make up the lost income. The loss of her higher income position at the Caribou has required Ms. Echeverria to work not only her full-time job at the Aspen, but also the additional shifts at Golden International. Deducting the amount of the "moonlighting" earnings from the back pay award would unfairly penalize Ms. Echeverria while rewarding Respondents for creating a situation in which Ms. Echeverria is forced to work multiple jobs to compensate for their illegal acts. Just as

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114 Ex. 2, 3, 4, 5, 9; Echeverria testimony.

115 The Executive Director's calculations are attached hereto as Appendix A.

116 Ms. Echeverria earned $1,649 from Golden International in 2014, and $4,067 in 2015. Ex. 5, p. 5; Ex. 9, p. 2.

117 *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1111-1112 (8th Cir. 1994); *Belhar v. Smith*, 719 F.2d 950, 954 (8th Cir. 1984), cert denied, 466 U.S. 958 (1984).

118 Respondents had the burden of proving that this amount should have been deducted. *Gaworski*, 17 F.3d at 1111-1112; *Velez v. Roche*, 335 F.Supp.2d 1022, 1042 (N.D. Cal. 2004).

back pay awards are not offset by unemployment compensation,[119] neither is it appropriate to offset such awards by "moonlighting" income.[120]

The Executive Director's general approach to the calculation of back pay – including the estimate of tips earned at the restaurant, and a quarterly breakdown of earnings and offsets – is reasonable. This decision recommends an award of back pay in the amount of $36,623, with interest continuing to accrue until the Commission enters its final judgment.

3. Front pay

The Executive Director has also requested an order awarding front pay. The Commission may award up to one year of front pay in lieu of reinstatement where the relationship between the parties is such that reinstatement would not be an appropriate remedy. Both Alaska and federal courts have found that front pay may be an appropriate alternative to reinstatement in cases involving hostile work environments.[121] Given the toxic nature of the parties' relationship, this is plainly a case in which reinstatement would not be appropriate. The current difference between Ms. Echeverria's annual earnings at the Aspen and her earnings at the Caribou (adjusted to account for the increase in minimum wage) is $7,180. The Commission is recommended to make an award of front pay in that amount.

B. Non-monetary relief

The Human Rights Act authorizes the Commission to order Respondents to undergo remedial training.[122] The Executive Director has requested that Respondents undergo training, and such training is clearly needed. It is recommended that the Commission order that:

- Within 60 days of its final decision in this matter, Respondents undergo at least 6 hours of training on the prohibitions against gender-based harassment, and against retaliating against employees who engage in protected activity; and
- Within 90 days of its final decision in this matter, Respondents arrange to provide at least two hours of approved training on these topics to their employees.

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119 *See generally, Kaufman v. Sidereal Corp*., 695 F.2d 343, 346-347 (9th Cir. 1982); *Sam Teague, Ltd. V. Hawai'i Civil Rights Commission*, 971 P.2d 1104 (Hawaii 1999).

120 *Cf. Gaworski*, 17 F.3d at 1113 ("the reduction of a back pay award by unemployment benefits, which are not paid by the employer, "makes it less costly for the employer to wrongfully terminate a protected employee and thus dilutes the prophylactic purposes of a back pay award"); *Sam Teague, Ltd. V. Hawai'i Civil Rights Commission*, 971 P.2d 1104 (Hawaii 1999) ("Although collateral source payments represent additional benefits to [the employee], 'as between the employer, whose action caused the discharge, and the employee, who may have experienced other noncompensable losses, it is fitting that the burden be placed on the employer'") (quoting *Promisel v. First Am. Artificial Flowers*, 943 F.2d 251, 258 (2d Cir.1991)).

121 See *Pyramid Printing Co.*, 153 P.3d 994 at 998-999 and n. 10 (collecting federal cases).

122 AS 18.80.130(a)(1); *Pyramid Printing Co.*, 153 P3d at 1000.

It is further recommended that the Executive Director and her staff be directed to assist Respondents in identifying an appropriate trainer, that Respondents be required to identify a proposed trainer for approval by Executive Director or her staff within 45 days of the decision, and that the trainer should submit the proposed training curriculum and materials no more than two weeks prior to the scheduled training.

VI. Recommendation

I recommend that the Alaska State Commission for Human Rights enter an order finding that Respondents discriminated against Ms. Echeverria during her employment and when they terminated her in retaliation for complaining about that discrimination, and that Mr. Morrell further violated the Human Rights Act when he engaged in a retaliatory attempt to negatively influence her current employment. I recommend that the Commission:

- Order Respondents to refrain from engaging in future violations of AS 18.80;
- Award Ms. Echeverria back pay in the amount owing of $36,623, with interest accruing until the Commission enters its final order;
- Award Ms. Echeverria front pay in the amount of $7,180;
- Order Respondents to undergo approved training on the prevention of sexual harassment, sex discrimination, and illegal retaliation; and
- Order Respondents to provide approved training to their employees on the right to a discrimination-free workplace.

DATED: July 27, 2016.

By: *Signed*
Cheryl Mandala
Administrative Law Judge

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

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION FOR HUMAN RIGHTS, MARTI BUSCAGLIA, EXECUTIVE DIRECTOR, *ex rel.* JULIA ECHEVERRIA, Complainant, v. CARIBOU CORP., d/b/a CARIBOU FAMILY RESTAURANT, CARIBOU'S TOOTH, INC., JACKIE RAY MORRELL, and ELIZABETH C. JOHNSON, Respondents.	ASCHR Nos. J-12-211 J-14-186 OAH No. 15-0658-HRC

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, now ORDER that the Administrative Law Judge's Recommended Decision of July 28, 2016 is ADOPTED in the entirety.[1]

Accordingly, the Hearing Commissioners find that Respondents discriminated against Julia Echeverria by subjecting her to a hostile work environment in violation of AS 18.80.220(a)(1); unlawfully terminated her

[1] In addition to the findings and remedial relief directed above, the Hearing Commissioners adopt the ALJ's dismissal of Count IV of the complaint; the ALJ's denial of Respondent's motion for stay; and the ALJ's order declining to reconsider the Recommended Decision and denying the request for a new hearing.

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employment in retaliation for complaining to her supervisors about sex discrimination in violation of AS 18.80.220(a)(4); and unlawfully attempted to have Ms. Echeverria's subsequent employer terminate her in retaliation for pursuing a complaint under the Alaska Human Rights Act in violation of AS 18.80.220(a)(4).

The Commission further adopts the monetary remedial relief recommended by the ALJ as follows: (a) Ms. Echeverria is awarded back pay in the amount of $36,623, with prejudgment interest at the rate of 4.0%[2] accruing from the date of the Recommended Decision of July 28, 2016 to the date of this Final Order; (b) Ms. Echeverria is awarded front pay of $7,180.

Interest shall accrue at the rate of 4.0%[3] on the sum of the back pay with prejudgment interest and the front pay award of $7,180 from the date of this Final Order.

Additionally, the Commission adopts the ALJ's following equitable relief to ensure that a hostile work environment or other illegal discrimination or retaliation does not occur in the future at Respondents' place of business: (a) Respondents shall undergo training approved by the Executive Director regarding sexual harassment, sex discrimination, and illegal retaliation; (b) Respondents shall provide training approved by the Executive Director to their employees regarding the right to a

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2 *See* AS 9.30.070(a); 6 AAC 30.480(b).

3 *Id.*

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discrimination-free workplace; and (c) Respondents shall refrain from engaging in future violations of AS 18.80.

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.

IT IS SO ORDERED.

DATED: December 30, 2016

[redacted]

Christa Bruce, Commissioner

DATED: December 30, 2016

[redacted]

Kathryn Dodge, Commissioner

DATED: December 30, 2016

[redacted]

Jason Hart, Commissioner

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CERTIFICATE OF SERVICE

I certify that on December 30, 2016, a true and correct copy of the **FINAL ORDER** was mailed or delivered to the following parties:

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

Respondent or Respondent's Representative
Caribou Corp.
[redacted]

Caribou's Tooth, Inc.
[redacted]

Jack Morrell
Elizabeth Johnson
[redacted]

and a courtesy copy to:

✓ Kathleen A. Frederick, Chief Administrative Law Judge
State of Alaska
Office of Administrative Hearings
550 W. 7th Avenue, Suite 1940
Anchorage, AK 99501

[redacted]
Shari Ketchum
Commission Secretary