

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS**

Paula M. Haley, Executive Director, Alaska State)	
Commission for Human Rights, <i>ex rel.</i>)	
DENNIS PHILLIPS,)	
)	
Complainant,)	
)	
v.)	
)	
TEW'S EXCAVATION, INC.,)	
)	
Respondent.)	OAH No. 09-0372-HRC
)	ASCHR No. J-08-004

ORDER DENYING MOTION FOR ATTORNEY'S FEES AND COSTS

I. Introduction

Tew's Excavation, Inc., has moved for an award of attorney's fees and costs pursuant to 6 AAC 30.492. Tew's Excavation requests a total of \$26,463.58.¹ Under 6 AAC 30.492, an award of fees and costs against the complainant is available only in special circumstances not present here. The motion, therefore, is denied.²

II. Analysis

The Alaska State Commission for Human Rights has the discretion to order payment of "reasonable expenses, including reasonable attorney fees" to private parties who appear before the commission.³ By regulation, the commission exercised that discretion, authorizing the parties to ask the "examiner to order the payment of attorney's fees or costs" incurred after conciliation fails. The "examiner" was the predecessor of the administrative law judges who now hear the cases.⁴

In exercising its statutory discretion, the commission did not give the administrative law judge authority to order payment of fees and costs to a prevailing party based on that party's prevailing status. Instead, the commission directed that "[a]n award of attorney's fees and costs will be made against a complainant" under two special circumstances, each requiring more than mere prevailing party status. The first concerns actions pursued by the complainant; the second

¹ November 21, 2011 Motion for Attorney's Fees and Costs (with affidavit and cost bill).

² Counsel for Tew's Excavation and the Human Rights Attorney who handled the case for the Executive Director submitted extensive briefing on the motion. This order denying the motion takes that briefing into account. Had the briefing appeared to support an award of fees and costs to Tew's, complainant Dennis Phillips would have been afforded an opportunity to be heard on the matter before an order was entered.

³ AS 18.80.130(e).

⁴ 6 AAC 30.410(b).

concerns actions authorized by the executive director based on information furnished by the complainant.

Tew's Excavation argues that this case fits under both the action-pursued-by-complainant and the action-by-the executive-director circumstances. Tew's also argues that the commission itself can be required to pay attorney's fees and costs under 6 AAC 30.492. Each of these arguments raises issues of regulatory interpretation that will be address below.

A. Action Pursued by Complainant

Attorney's fees and costs will be awarded if the complainant "pursued an action not authorized by the executive director that was frivolous, unreasonable, or groundless"⁵ Before it is necessary to reach questions about frivolousness, unreasonableness or groundlessness, Tew's Excavation would have to identify "an action" pursued by the "complainant" that was "not authorized by the executive director." The "complainant" is the person who filed the complaint—here, Dennis Phillips.⁶

Most often, the executive director prosecutes human rights actions *ex relatione* (*ex rel.*).⁷ That was the situation in this case. **The** action was pursued by the commission's staff, as authorized by the executive director, not by Mr. Phillips individually.

Tew's Excavation argues that the executive director's action is indistinguishable from an action pursued by the complainant because individual complainants are not allowed to pursue cases before the commission without the executive director's consent. That would be a fair point if the words "an action" in the phrase "pursued an action not authorized" were read to mean **the** action—i.e., the case as a whole. Reading "an action" to refer only to the case as a whole, however, would take the regulation out of context and would be inconsistent with its purpose of allowing fees and costs awards in special circumstances.

A more apt reading of "pursued an action," taken in context, derives from the simplest, plain meaning definition of "action": "a thing done"⁸ The regulation uses the indefinite

⁵ 6 AAC 30.492(b).

⁶ AS 18.80.300(3), defining "complainant" as "a person who is aggrieved by a discriminatory practice prohibited by this chapter and who has filed a complaint as provided in AS 18.80.100[.]" The testimony established that Mr. Phillips complained about alleged discriminatory practices at Tew's Excavation and the commission staff initiated an investigation, which led to the executive director issuing an accusation and referring the case for hearing after conciliation efforts failed. *See* July 10, 2009 Referral of Complaint to Hearing; July 10, 2009 Accusation.

⁷ Black's Law Dictionary (9th ed. 2009), defining "*ex rel.*" as an abbreviation for *ex relatione*, meaning "by or on the relation of" a private party; "[o]n the relation or information of" another; explaining that "[a] suit *ex rel.* is typically brought by the government upon the application of a private party (called a *relator*) who is interested in the matter."

⁸ Merriam-Webster's Collegiate Dictionary at 12 (11th ed. 2004).

article “an.” It likely would use the definite article “the” if the regulation had been intended to limit awards to just those situations in which the complainant somehow pursued the action, as in cause of action or case as a whole. Moreover, since an individual complainant cannot directly prosecute a complaint in a proceeding before the commission, it makes no sense to read “pursued an action” as referring to *the* action (cause of action or case). If so read, the action-pursued-by-complainant basis for an award would come into play only in rare cases in which the executive director assumes the “complainant” role.⁹ In such cases, *the* action necessarily is authorized by the executive director, as are the many specific actions taken to prosecute the case. Under such a reading, therefore, no award could ever be made, which would render the action-pursued-by-complainant part of the regulation a nullity.

Read in context with the hearing process regulations, the words “an action” in the phrase “pursued an action not authorized by the executive director” includes specific actions the complainant pursues in the course of *the* action commenced by the executive director’s issuance of the accusation. The language of 6 AAC 30.492(b) allows for the possibility that an award would be ordered if the complainant, for instance, frivolously pursued an action of some type during the executive director’s prosecution, thereby causing the respondent to incur costs or attorney’s fees beyond those necessary to defend against the executive director’s litigation strategy.

The hearing process regulations as a whole contemplate that the complainant might pursue one or more actions on his or her own with which the executive director might not agree. The executive director (or a staff member designated by the executive director) investigates a complaint and decides whether and how to prosecute the case.¹⁰ When prosecuting a case before the commission, the executive director bears the burden of proof.¹¹ This may suggest that the complainant is relegated to witness-only status, but that is not necessarily so. The complainant is

⁹ The executive director can assume the role of “complainant” in certain situations. AS 18.80.100(b) (permitting the executive director to file a complaint in the same manner as an individual aggrieved by a prohibited discriminatory practice, when a discriminatory practice has come to the executive director’s attention, even if no complaint has been filed by the aggrieved individual); 6 AAC 30.360(c) (authorizing the executive director to substitute for a withdrawing complainant).

¹⁰ AS 18.80.110 (providing for the executive director or a member of the staff designated by the director to investigate complaints); AS 18.80.112 & 6 AAC 30.340(g) (authorizing the executive director to dismiss complaints); AS 18.80.120(a) (authorizing the executive director to refer a complaint for hearing, and to issue an accusation); AS 18.80.120(e) (authorizing the executive director—not the complainant—to request summary adjudication).

¹¹ 6 AAC 30.440(a).

considered a party, as are the respondent and the executive director.¹² Though it seldom happens, a complainant can individually pursue specific actions during the hearing process such as examining witnesses and filing separate objections to the recommended decision, among other things.¹³

In a particular case, if the complainant takes such actions without the executive director's authorization, the complainant risks having to pay attorney's fees and costs to the respondent. The risk turns into an award only if the complainant's action is frivolous, unreasonable or groundless.

In this case, Mr. Phillips did not pursue an action on his own, without the executive director's authorization. He did not file objections of his own, or examine witnesses, or attempt to file motions, affidavits or other papers as the "complainant." He functioned as the complaining witness in the executive director's prosecution of the case but pursued no action on his own. The pursuit-of-action-not-authorized basis for awarding fees and costs under 6 AAC 30.492(b), therefore, does not apply in this case.¹⁴

B. Action by Executive Director Based on Complainant's Information

An award of attorney's fees and costs "will be made against a complainant" if the respondent shows that the "action authorized by the executive director was based upon information furnished in bad faith by complainant."¹⁵ The question, therefore, is whether the executive director's authorized action—issuing and prosecuting an accusation against Tew's Excavation alleging hostile work environment and constructive discharge—was "based upon information" Mr. Phillips "furnished in bad faith."

The executive director's action was based in part on information from Mr. Phillips. He made the complaint that triggered the investigation. His subjective perceptions and statements about his reasons for quitting his job factored into the hostile work environment and constructive discharge allegations. The executive director pursued relief (wages) specifically for Mr. Phillips. The challenge lies in determining whether information Mr. Phillips provided to the executive director was "furnished in bad faith."

¹² 6 AAC 30.990(a)(7) (defining "party" and "parties").

¹³ 6 AAC 30.440(b); 6 AAC 30.460(c) (allowing parties to present evidence and examine witnesses, and introduce affidavits); 6 AAC 30.470(d) (stating that "any party may file objections ...").

¹⁴ Had the situation been otherwise—for instance, if Mr. Phillips had filed his own objections—it would be necessary to afford him the opportunity to individually oppose Tew's Excavation's motion, so that he could be heard on the question of whether his action was "frivolous, unreasonable, or groundless."

¹⁵ 6 AAC 30.492(b).

“Bad faith” is not defined in the commission’s regulations. Standing alone, the two-word phrase can mean different things in different contexts, and the meaning may differ depending on whether the phrase evokes objective or subjective bad faith, or both.¹⁶ Tew’s Excavation suggests that “dishonesty of belief or purpose” is an apt definition and argues that Mr. Phillips furnished information in bad faith because he was not credible during the hearing and fabricated one part of his testimony.¹⁷ One can imagine a situation in which a dishonest person, perhaps motivated by vindictiveness or greed, fabricates allegations of discrimination to manipulate the executive director into pursuing a wholly unfounded action. That is not what the evidence in this case showed.

Not all of Mr. Phillips’ information about the work environment at the Tew’s Excavation Big Lake shop could be considered “furnished in bad faith” under the “dishonesty of belief or purpose” definition suggested by Tew’s. Other witnesses, including Mr. Tew, confirmed that profanity was common at the shop. Witness testimony also corroborated, to some extent, Mr. Phillips’ testimony about use of the bend-and-ram-it-home gesture and phrase. One instance of bantering about sexually deviant behavior (fathering the puppies) was proven.

Mr. Phillips was the complainant and a key witness, but he was not the only witness. The action also was based on information gathered during the investigation—e.g., the interview of David Bernier, who ultimately was not a helpful witness for the executive director, but whose hearsay statements to the investigator appeared to support the allegations until he recanted his interview statements under oath. The executive director (through staff) deposed Clayton Tew more than two months before the hearing. In deciding whether to proceed with the scheduled hearing, the executive director likely had some insight into Mr. Tew’s perspective on profanity and penchant for wisecracking about discrimination, as revealed in his deposition testimony.¹⁸

Mr. Phillips’ lack of credibility on key points during his hearing testimony factored in the executive director’s inability to prove hostile work environment or constructive discharge. Some

¹⁶ Typically, bad faith has both subjective and objective components. Subjective bad faith focuses on the actor’s intent or motive, and is established when the intent is to deprive another of something he or she has the right to receive. *Witt v. State, Dep’t of Corrections*, 75 P.3d 1030, 1034 (Alaska 2003); *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1223-1224 (Alaska 1992). Objective bad faith is established when the actor “fails to act in a manner that a reasonable person would consider fair...” *Witt*, 75 P.3d at 1034; *see also Pitka v. Interior Reg. Housing Auth.*, 54 P.3d 785, 789 (Alaska 2002). In the context of attorneys, bad faith can encompass conduct “that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound,” even though the attorney believes it to be permissible. *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985).

¹⁷ December 16, 2011 Reply to Opposition to Motion for Attorney’s Fees and Costs at 2-3 (quoting *Johnson v. Johnson*, 239 P.3d 393, 400 (Alaska 2010)).

¹⁸ *See* HRC Exh. 4; May 27, 2011 Recommended Decision at 13, n.77 (describing wisecrack about age discrimination in Mr. Tew’s deposition testimony).

alleged events, such as groping and crotch grabbing, were not proven. Mr. Phillips appeared to fabricate a story about what he said to Ms. Tew when he picked up his final paycheck. This undermined his credibility but did not reveal him to be dishonest in his belief or purpose as to all information he necessarily would have furnished through his complaint and during the investigation that led the executive director to issue the accusation. The evidence ultimately proved to be weak, but this was far from a case of the complainant manipulating the executive director into pursuing an action through dishonesty.

The weakness of the evidence and the limits of Mr. Phillips' credibility became apparent at the hearing. That turn of events, however, does not establish that the executive director's pursuit of the action through the hearing phase was based on information Mr. Phillips furnished to the executive director in bad faith.

Whether Tew's Excavation can be awarded attorney's fees for responding to the executive director's objections to the recommended decision raises a slightly different question. The objections were lengthy and aggressive, especially insofar as they overreached and misstated evidence, as described in the May 24, 2011 ruling. The assertion in the objections that the initial recommended decision would have set a new standard for "blue collar" workplaces was erroneous, but it prompted clarifications in the final recommended decision. No doubt Tew's Excavation spent more time responding to the objections than would have been necessary had they been more narrowly tailored and accurate. Nevertheless, casting counsel's mistaken or overzealous advocacy as Mr. Phillips' bad faith is entirely unwarranted.

The litigation strategy of the executive director cannot fairly be attributed to Mr. Phillips, the complainant against whom an award of fees and costs would be entered under 6 AAC 30.492(b). Thus, the regulation does not provide for an award of attorney's fees and costs under these circumstances, unless it can be read to render the commission itself liable for such an award.

C. Commission Liability for Attorney's Fees and Costs

In its reply brief, Tew's Excavation suggests that the commission itself could be required to pay attorney's fees and costs.¹⁹ Assuming, without deciding, that 6 AAC 30.492(b) could have that effect in a case in which the executive director is the complainant, this is not such a case. Mr. Phillips is the complainant.

¹⁹ December 16, 2011 Reply to Opposition to Motion for Attorney's Fees and Costs at 6-8.

Tew's Excavation correctly observes that section 492, the "Attorney's fees and costs" regulation, needs to be considered together with 6 AAC 30.490, the "Expenses" regulation. The last sentence of section 490 does create some confusion about how the commission has exercised its statutory discretion to order payment of expenses to private parties. It provides that the complainant and respondent may "apply for reimbursement under 6 AAC 30.492" for costs incurred at their own expense. Section 490 does not specify who would be ordered to reimburse such costs to whom, and under what standards, if an application were made. That matter is left to section 492.

At page 7 of its reply brief, Tew's Excavation argues that the expenses for which a respondent might seek reimbursement must be paid by the commission. Tew's asserts that section 490

provides that "[t]he executive director will determine what hearing expenses shall be paid by the commission ... respondent, at [its] own expense, may incur additional costs and apply for reimbursement under 6 AAC 30.492."

The reply brief misleads by cutting out critical language.

The omitted language represented by the ellipsis contains a critical phrase and an explanatory sentence that separate the first and final sentences of section 490. The first sentence reads: "The executive director will determine what hearing expenses shall be paid by the commission to present the facts in support of the complaint." (*Emphasis added.*) The first sentence is all about prosecuting the case against the respondent and not in the least about the respondent's defense. It does not commit the commission to pay any expenses at all; it merely makes clear that the executive director decides what to spend to prosecute the case. This is reinforced by the next part of Tew's omission—the second sentence of section 490—which states: "The expenses will be made in the public interest and when state money is available." This ensures that the executive director, not the individual complainant, has control over litigation strategy decisions (e.g., hiring experts, flying in witnesses and so forth) that require expenditure of state money.

The final sentence in section 490 is the one that directs complainants and respondents to section 492 if they want to apply for reimbursement of "additional costs" they incurred at their own expense. For the respondent, the sentence necessarily pertains to costs the respondent decides to incur in defense against—not support of—the complaint.

Section 492 does not set standards for awards to, rather than against, the complainant. Thus, a complainant might find the section 490 direction to apply for costs under section 492 confusing. It would be unclear whether limitations such as those imposed in section 492(b) would apply if the complainant were the moving party. When, as here, however, the moving party is the respondent, section 492(b) places very definite limits on the circumstances under which an award of fees and costs against the complainant will be made.

The administrative law judge is not empowered by the order authority in section 492(a) to change the limitations in section 492(b). The commission does not appear to have waived sovereign immunity to allow a respondent in an administrative adjudication to compel an award of commission-paid fees and costs when the complainant is a private party. Rather, the commission has provided for such an award against the private party complainant, consistent with the statutory authority in AS 18.80.130(e), but only in the limited circumstances of section 492(b). As explained above, those circumstances do not exist in this case.

The arguments by Tew's Excavation to the effect that it is unfair to have a more limited opportunity to recover attorney's fees and costs in an adjudication before the commission than in an action brought in civil court are misplaced. Such arguments may be appropriate in a petition seeking to change 6 AAC 30.492, or in legislative hearings on a bill seeking to change AS 18.80.130(e), but they are misplaced in an adjudication in which the adjudicator is bound to follow the existing law, not make new law.

In executive branch adjudications, fees and costs can be awarded only within the parameters set by the applicable law. It is unusual for such an award to be available at all, except as a sanction for misconduct by a party or the party's counsel. The commission has implemented its AS 18.80.130(e) authority by providing for private parties who appear before it to recover fees and costs under the limited circumstances in 6 AAC 30.492. It would be inappropriate to subvert the law by reading a Civil Rule 82-like fee shifting scheme into a regulation that quite clearly does not authorize awards based solely on prevailing party status.

III. Conclusion and Order

The administrative law judge declines to order an award of attorney's fees and costs to respondent Tew's Excavation. The standard for such an award in 6 AAC 30.492(b) provides for an award against the complainant only if certain special circumstances exist, not simply because the respondent prevailed. The requisite special circumstances have not been shown by Tew's Excavation to exist in this case. In particular, the argument that the executive director's action

was based on information furnished in bad faith by Mr. Phillips was unpersuasive. The Motion for Attorney's Fees and Costs, therefore, is denied.

This is the final agency order on the November 21, 2011 Motion for Attorney's Fees and Costs seeking an award under 6 AAC 30.492. It is issued on behalf of the Alaska State Commission for Human Rights pursuant to AS 18.80.102(b), AS 44.64.040 and 6 AAC 30.492. Judicial review of this order may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this order.

DATED this 22nd day of February, 2012.

By: Signed _____
Terry L. Thurbon
Chief Administrative Law Judge

Certificate of Service: The undersigned certifies that on the 22nd day of February, 2012, a true and correct copy of this order was distributed by **FACSIMILE** on this day, with a hardcopy to follow by **U.S. Mail**, to the following: Taylor McMahon/Jason Bergevin, Law Offices of Royce & Brain, counsel for Tew's Excavation, Inc.; Lauri Owen, Human Rights Attorney.

By: Signed _____
T. Thurbon

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