

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ACE DELIVERY & MOVING, INC., )

Appellant, )

vs. )

STATE OF ALASKA, HUMAN )

RIGHTS COMMISSION, Paula M. )

Haley Executive Director, *ex rel* )

Janet Wass, )

Appellees. )

Case No. 3AN-14-04688 CI

**ORDER AND DECISION**

**I. Introduction And Procedural Background**

On February 10, 2014, Ace, Delivery & Moving, Inc. (Ace) appealed an Alaska Human Rights Commission (HRC) decision denying attorney fees. In an enforcement action, the HRC determined that ACE did not create a hostile work environment and did not reach Ace's First Amendment defense. Under state and federal law civil rights plaintiffs are entitled to attorney fees. This court must decide whether under either state or federal law Ace qualifies as a civil rights plaintiff by virtue of having included a First Amendment defense in its answer.

The HRC, representing Janet Wass, brought an action against Ace for creating a hostile work environment. The HRC contended that Ace, through its

owner and operator, had endorsed several grossly offensive comments about various racial and ethnic groups. Among the more offensive items were:

- A statement that: “Muslims and Arabs should be cut up and exterminated, but that would probably foul the atmosphere.”<sup>1</sup>
- A statement that: “[T]he only problem with concentration camps was that they ended too soon.”<sup>2</sup>
- A poster about a fictitious hurricane killing two million Mexicans. The punchline of the poster was that the United States provided aid to Mexico by “sending two million Mexicans to replace the dead ones.”<sup>3</sup>

The administrative law judge determined that Ace did not subject Ms. Wass to a hostile work environment.<sup>4</sup> The problem with Ms. Wass’s claim was that she was not a member of any of the disparaged groups.<sup>5</sup> The administrative law judge did not comment on whether Ace had a constitutional right to make those

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<sup>1</sup> R. 16.

<sup>2</sup> R. 16.

<sup>3</sup> R. 14.

<sup>4</sup> R. 20.

<sup>5</sup> R. 17.

statements in the workplace. The administrative law judge's recommendation was adopted.

In its answer, Ace contended that its statements were protected speech. It requested attorney's fees citing AS 09.60.010 and 42 U.S.C. § 1988. The HRC denied an award of attorney's fees under the theory that the HRC proceeding was not a civil action, and thus not covered by either statute.

## **II. Under Alaska Law Ace Did Not Prevail As A "Counterclaimant, Cross Claimant, Or Third-Party Plaintiff"**

AS 09.60.010 allows civil rights plaintiffs to receive attorney fees. It requires the court to award "full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the [constitutional] right."<sup>6</sup> In *State v. Jacob*,<sup>7</sup> the Alaska Supreme Court refused to award attorney's fees under AS 09.60.010(c) when the court did not reach the due processes concerns the party had raised.<sup>8</sup> In *Jacob* the party had not properly raised the due process claim.<sup>9</sup>

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<sup>6</sup> AS 09.60.010(c).

<sup>7</sup> 214 P.3d 353 (Alaska 2009).

<sup>8</sup> *Id.* at 360.

<sup>9</sup> *Id.* at 360–61.

Ace did not prevail as a “counterclaimant, cross claimant, or third-party plaintiff” in the action. The HRC never reached the constitutional question and simply did not decide whether Ace had a constitutional right to make the offensive statements. The HRC did not even determine what statements were actually made. Instead, the HRC simply determined that Ms. Wass had not been subjected to a hostile work environment. AS 09.60.010(c) does not apply.

Ace confuses a First Amendment defense with a First Amendment counterclaim. Ace cites Civil Rule 8, which instructs the court to interpret a counterclaim improperly pled as a “defense” as a counterclaim when “justice so requires.” But, the problem is not the form of Ace’s pleading. The problem is that the nature of an as applied constitutional challenge and a counterclaim are entirely different. Ace contended that *if* Ace was subject to liability on a hostile work environment claim its First Amendment rights would be violated. But, the HRC did not subject Ace to liability for a hostile work environment. To properly bring a First Amendment counterclaim, Ace would have to allege that the HRC violated its First Amendment rights *by bringing the enforcement action*. Ace never properly advocated for this theory.

A contrary holding would be entirely unmanageable, and turn AS 09.60.010 into a fee shifting statute for all craftily pled answers. For example, in a fraudulent misrepresentation claim the defendant could always claim that he or she

had a right under the First Amendment to make the alleged misrepresentation. Ace's theory would entail awarding full fees and costs any time the defendant prevailed on such a claim by, for example, claiming that the statements were not misrepresentations. More generic tort claims or contract claims might also provide full fees and costs to prevailing parties who artfully crafted their pleadings.

### **III. Ace Did Not Bring A § 1983 Claim Merely By Arguing For An As Applied Constitutional Challenge**

Under federal law prevailing parties in civil rights actions are awarded attorney fees. In particular, attorney fees are available to parties who prevail on § 1983 claims.<sup>10</sup> Ace contends it prevailed under § 1983 because it claimed it had a First Amendment right to make the alleged statements.

A facial constitutional challenge to a statute is not the same as a § 1983 claim. If Ace were to proceed against the HRC on the grounds that its actions violated § 1983, the HRC would be entitled to a number of defenses that were not analyzed in this case. For example, the HRC would at least argue that it is entitled to qualified immunity. Ace in essence seeks to bypass the procedural requirements of a § 1983 action through its as applied constitutional challenge, which was not even ruled on by the HRC. This argument simply does not work.


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<sup>10</sup> 42 U.S.C. § 1988(b).

**IV. Conclusion**

Ace simply did not succeed on any constitutional claim. Instead, Ace included an as applied constitutional challenge that the HRC never reached. Because Ace did not vindicate any constitutional rights, it is not entitled to fees under either AS 09.60.010 or 42 U.S.C. § 1988. Ace's appeal is denied. The judgment of the HRC is affirmed.

Dated this 23rd day of May, 2014, at Anchorage, Alaska.

  
FRANK A. PFIFFNER  
Superior Court Judge







