

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

Paula M. Haley, Executive Director, Alaska)
State Commission for Human Rights *ex rel.*)
MELISSA SCHASTEEN n/k/a)
MELISSA PARRISH,)
)
Complainant,)
)
v.)
)
AB&M ENTERPRISES, INC. d/b/a)
RUMRUNNER'S OLD TOWNE)
BAR & GRILL,)
)
Respondent.)

OAH No. 11-0064-HRC
ASCHR No. E-09-006

SANCTIONS ORDER

I. INTRODUCTION

The Executive Director has moved for sanctions for respondent's refusal to comply with a discovery order. AB&M Enterprises has not filed any opposition. Based on the evidence in the record, the Executive Director's argument, and AB&M's non-opposition, the motion for sanctions is granted.

II. PROCEDURAL BACKGROUND

The Executive Director of the Alaska State Commission for Human Rights filed an Accusation against AB&M Enterprises, alleging a violation of AS 18.80. AB&M filed its Answer, denying any violation. A case planning conference was held at which both parties appeared through counsel. The parties agreed to various prehearing dates which were incorporated in a Scheduling Order. The hearing in this matter is scheduled to begin on August 8, and continue through August 11, 2011.

The Executive Director filed a Motion to Compel dated May 6, 2011, seeking to compel responses to discovery requests and a preliminary witness list as required by the scheduling

order. AB&M did not respond to this motion.¹ The Executive Director's motion was granted on May 20, 2011.

On June 1, 2011, counsel for the Executive Director requested a status conference based on asserted difficulties in obtaining the discovery and witness list previously ordered, as well as additional discovery issues. A status conference was held on June 2, 2011.

On June 9, 2011, the Executive Director filed her second motion to compel, asserting deficiencies in the responses provided by AB&M. Expedited consideration was granted, and AB&M was ordered to respond by June 15, 2011. Again in violation of the Civil Rules, AB&M did not file an opposition or statement of non-opposition.

Counsel for the parties were ordered to appear in-person at a status conference, which was held on June 17, 2011.² An order was issued on June 20, 2011, requiring AB&M to respond to the discovery requests on or before June 28, 2011.

On June 28, AB&M filed a motion for additional time to produce documents. This motion was supported by the affidavit of the Vice President and Controller of AB&M's parent company. That motion was denied on July 1, 2011.

III. DISCUSSION

A. Legal Authority for Sanctions

Authority for imposing sanctions is available through several provisions. Civil Rule 37 [arguably made applicable by 6 AAC 30.435(a)] allows for an award of costs and attorney fees after a successful motion to compel discovery.³ This rule also authorizes sanctions when a party fails to comply with a discovery order,⁴ or engages in unreasonable, abusive, or obstructionist conduct during discovery.⁵

An award of costs and attorney fees is authorized under AS 44.64.040(b)(2) for bad faith conduct, or tactics used frivolously or solely to cause unnecessary delay. Other sanctions may also be imposed for the failure to comply with an ALJ's order.⁶

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¹ Civil Rule 77(iv) requires a written response even if the non-moving party does not oppose the motion. The Civil Rules related to the filing of motions are applicable in Human Rights Commission proceedings. 6 AAC 30.435(a).

² This conference lasted approximately 1 hour and 45 minutes.

³ Civil Rule 37(a)(4). The civil discovery rules are applicable pursuant to 6 AAC 30.510.

⁴ Civil Rule 37(b).

⁵ Civil Rule 37(g).

⁶ 2 AAC 64.360.

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B. Request for Extension of Time

The Executive Director's first basis for requesting sanctions stems from the motion for more time to respond to discovery. She asserts that this motion was made in bad faith. The support for AB&M's motion is an affidavit from Jorge Perez who states that he is the only person who can gather the requested documents. He notes that because of other scheduled events, he would not be able to provide the records before July 22, 2011.

The Executive Director points to the testimony of Ellaina Shomer, AB&M's office manager, and Michael Shomer, one of the company's owners, that contradicts Mr. Perez' affidavit.⁷ Both individuals testified that they have computer access to at least some of the records responsive to the discovery requests. Counsel for the Executive Director also submitted affidavits of a meeting they had with Mr. and Mrs. Shomer, along with counsel for AB&M. According to these affidavits, Mrs. Shomer objected to producing the requested documents because of the amount of time it would take her to gather them. During this same meeting, according to the affidavits, some requested documents of the same type subject to the current dispute were accessed by computer and printed.

C. Interrogatory 3

Interrogatory 2 asks for a list of current and prior employees of AB&M. Interrogatory 3 asks, for anyone who is no longer employed, the reason or reasons the employment ended. AB&M's response was that it had no documents showing the reason why any employee left employment.

The Executive Director asserts that this statement is false. First, Mr. Shomer previously testified that anyone who was fired or quit was told they could not come back to AB&M's business. He testified that he would need to review the company's records to determine who those people were. This at least suggests that there are some records that would say which employees quit and which were fired. In addition, the interrogatory does not ask whether there are documents that indicate this, it asks for a narrative answer. During his deposition, Mr. Shomer was able to list a few people who quit or were fired. Instead of answering the interrogatory, AB&M stated that responsive documents did not exist. The interrogatory did not

⁷ This testimony occurred before Mr. Perez' affidavit was signed, and counsel for AB&M was present during the depositions.

ask for documents, it asked for a narrative answer, something that could have and should have been provided.

D. Requests for Production

The Executive Director notes that many of AB&M's responses refer to previously submitted exhibits. It is proper to state that requested documents have previously been produced. The Executive Director states "there is no way to determine whether any of those records are meant to be the complete current response." By stating in a response that the documents are contained in a specified exhibit, AB&M has in fact represented that the exhibit is a complete and current response.

By affidavit, counsel for the Executive Director states that one set of documents, exhibit H, has never been produced. Pursuant to the June 20, 2011 order, those documents should have been produced on June 28.

For other documents, AB&M stated that they would be available at its corporate offices. Pursuant to Civil Rule 34(b), the Executive Director's request for production specified that the documents should be produced at the Commission's office. AB&M did not move for an order requesting that a different location be specified. The place specified by the Executive Director is reasonable, and that is the location at which the documents must be produced.

E. Sanctions

AB&M has not filed an opposition or any other response to the Motion for Sanctions. If there are explanations for AB&M's discovery responses, or the lack of response, none have been provided.

Pursuant to Civil Rule 37 [arguably made applicable by 6 AAC 30.435(a)], the Executive Director is entitled to her costs and attorney fees for her successful motion to compel. In addition, she is entitled to reasonable sanctions, including but not limited to costs and fees, for AB&M's failure to comply with the prior discovery order.

In the alternative, the Executive Director is entitled to reasonable sanctions as well as reasonable costs and attorney fees pursuant to 2 AAC 64.360. AB&M did not comply with the previous order, and its tactics can only be considered to be in bad faith. As discussed above, the affidavit submitted by AB&M to support a motion for more time to respond to discovery requests is contrary to the sworn testimony of both AB&M's office manager and one of its owners. As shown in affidavits attached to the motion for sanctions, that affidavit was also

contradicted by statements made and actions taken during a meeting held to produce discovery documents.⁸ In addition, as discussed in the order denying the extension of time, the affidavit and accompanying motion, said nothing about why no one made any effort to gather the requested discovery documents prior to the time period during which the affiant was allegedly too busy to gather those documents. The request for an extension of time appears to have been an action taken in bad faith and for the sole purpose of causing additional delay.⁹

The failure to properly answer the interrogatory cannot be viewed as a simple mistake, as AB&M has retained experienced counsel. This answer can only be viewed as frivolous or as an attempt to cause unnecessary delay. The failure to produce Exhibit H is unexplained. It could conceivably be an oversight and is not a basis for imposing sanctions pursuant to 2 AAC 64.360(b). The failure to produce this document is a violation of the prior order compelling discovery, however. Absent any explanation for not producing the document, the failure to produce does justify sanctions pursuant to 2 AAC 64.360(a).

The Supreme Court favors resolution of disputes on their merits.¹⁰ Although AB&M's failure to properly respond to discovery requests and the failure to comply with this agency's discovery order has been unreasonable and prejudicial to her efforts to prepare for the August 8 hearing, the Executive Director has not requested that the sanctions entered now include a finding of liability, or other litigation ending sanctions. Instead, she has asked for an award of costs and attorney fees, and for an order limiting the evidence that may be introduced at the hearing. As stated above, AB&M has not opposed the imposition of these sanctions. The sanctions requested by the Executive Director are directed at curing the prejudice caused by AB&M's tactics and at encouraging future compliance with the rules applicable to this proceeding.

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⁸ During this meeting, AB&M interposed argument and objections against producing the documents. Affidavit of Lauri Owen; Second Affidavit of Stephen Koteff. AB&M's conduct during that meeting is an example of using tactics frivolously or solely to cause delay. 2 AAC 64.360(b).

⁹ The failure to provide any notice that it did not intend to oppose the current sanctions motion has independently caused additional delay, as it was necessary to wait until the time for filing an opposition expired before issuing this order.

¹⁰ *Copeland v. Ballard*, 210 P.3d 1197, 1205 (Alaska 2009).

IV. CONCLUSION

The Executive Director has made a valid argument for the sanctions requested, and in the absence of any opposition, sanctions will be imposed. Accordingly, IT IS HEREBY ORDERED:

1. The only witnesses AB&M may call at the hearing in this case are Michael Shomer and Ellaina Shomer. AB&M may cross-examine the Executive Director's witnesses;
2. AB&M may only introduce as exhibits documents or other evidence that were provided to the Executive Director on or before June 30, 2011;
3. Outstanding discovery requests are still valid, and the Executive Director may introduce evidence obtained from AB&M after June 30, 2011;
4. Any further discovery responses from AB&M, including production of documents, must be hand-delivered to the Executive Director's offices. These responses are **due on or before 2:00 p.m. on July 25, 2011**, or 30 days after service of the discovery request, whichever is later;
5. The Executive Director is entitled to reasonable costs and attorney fees, and may submit proof of those amounts pursuant to 2 AAC 64.360(b) within 10 days of this order. AB&M will have five days in which to file any response to that proof.

DATED this 20th day of July, 2011.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

Certificate of Service: The Undersigned certifies that on the 20th day of July, 2011, a true and correct copy of this document was mailed/e-mailed/faxed to the following: Kevin Anderson, counsel for AB&M Enterprises; Steve Koteff and Lauri Owen, Human Rights Advocates, ASCHR; Thomas P. Owens III, counsel for Melissa Parrish.

By: Signed
Kim DeMoss/Linda Schwass

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