

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION)
FOR HUMAN RIGHTS, PAULA M.)
HALEY, EXECUTIVE DIRECTOR,)
ex rel., CONNOR CARLE, SYDNEY)
PETERSON, BASHKIM HETEMI,)
ROBIN BURGESS and ANTHONY)
SHEPPARD)
)
Complainants,)
)
v.)
)
SULLIVAN'S OF ALASKA, INC.)
d/b/a SULLIVAN'S STEAKHOUSE,)
)
Respondent.)

Received

MAR 09 2018

State of Alaska
Office of Administrative Hearings

ASCHR No. J-12-005, J-12-192,
J-12-193

OAH No. 14-2059-HRC

PROPOSED ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the Administrative Law Judge's Recommended Remedial Order dated June 15, 2017 propose to issue the following order subject to consideration of objections as set forth in 6 AAC 30.480.

The Commission adopts the Recommended Remedial Order in part. The portion of the Recommended Remedial Order by paragraph of that order that is adopted in its entirety is the following:

1. Sullivan's violated AS 18.80.220(a)(1) by terminating the employment of Connor Carle, Sydney Peterson, Robin Burgess, Bashkim Hetemi, and Anthony Sheppard because they were under the age of 18;

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ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.

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2. Sullivan's is permanently ordered not to discriminate in hiring or employment on the basis of an applicant's or employee's status as a minor.

6. Sullivan's shall refrain from penalizing the minor employees in any way regarding future considerations for employment and, if rehired, for transfers, promotions, or upgrading because of the complaints the executive director filed with the Commission on their behalf;

7. Sullivan's shall refrain from advising or informing any other employer or potential employer of the minor employees of the facts or circumstances involved in this case, including the minor employees' involvement in a discrimination case against Sullivan's.

The portion of the Recommended Remedial Order by paragraph adopted except as to change of date is the following:

3. Paragraph 3 of the Remedial Order is adopted except the date for completion is 60 days from the date of this Remedial Order.

4. Paragraph 4 of the Remedial Order is adopted except the date for completion is 90 days from the date of this Remedial Order.

5. Paragraph 5 of the Remedial Order is adopted except the date for completion is 120 days from the date of this Remedial Order.

The portion of the Recommended Remedial Order that is amended is as follows:

1. The quarterly earnings approach should be used to calculate back pay. This is the method of calculating back pay that the Commission has historically followed. See

1 *eg. Echeverria v. Caribou*, (ASCHR Dec. 30, 2016); *Wheeler v. State, Dep't of Health and*
2 *Soc. Services* (ASCHR Mar. 7, 2016); *Gonzales v. Duke Investments, LLC* (ASCHR Jan.
3 30, 2014). This method of calculating back pay has also been commonly applied to back
4 pay awards for discrimination claims under Title VII and for unfair labor practice claims
5 under the National Labor Relations Board. *See Darnell v. City of Jasper*, 730 F.2d 653,
6 657 (11th Cir. 1984).

7
8 2. Based on the above quarterly earnings determination, the back pay awarded
9 to the following former employees based on the record evidence and as described in the
10 executive director's objections to the Recommended Remedial Order dated July 20, 2017,
11 is as follows:

12 Connor Carle: \$3,207.51;

13 Sydney Peterson: \$1,982.05;

14 Bashkim Hetemi: \$3,925.07;

15 Robin Burgess: \$2,050.07.

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17
18 Interest is awarded on the back pay at the rate of \$.23 per day from the June 16, 2017 date
19 of the Recommended Order to the date of payment as recommended in the Recommended
20 Remedial Order. No back pay is awarded to former employee Anthony Sheppard for the
21 reasons set forth in the Administrative Law Judge's Recommended Decision.

22
23 3. The Commissioners acknowledge that a Revised Recommended Order
24 dated November 28, 2017 was issued by the Administrative Law Judge. But the
25 Administrative Law Judge's Recommended Remedial Order was issued on June 15, 2017,
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28 **PROPOSED ORDER** – Page 3

*ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim
Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse,
ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.*

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the executive director submitted objections, and pursuant to the Commission's regulations the objections were deemed denied when there was no ruling on the objections within 20 days. 6 AAC 30.370(d). Thus, the jurisdiction before the Office of Administrative Hearing had expired before the November 28, 2017 Revised Recommended Order had issued. However, the Hearing Commissioners have reviewed the record evidence in this matter pursuant to 6 AAC 30.480.

Pursuant to 6 AAC 30.480, objections to this proposed order must be filed within 21 days of this order.


IT IS SO ORDERED.

DATED: March 8, 2018



Christa Bruce, Commissioner

DATED: March 8, 2018



Michele Christiansen, Commissioner

DATED: March 8, 2018



Brandon Nakasato, Commissioner

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CERTIFICATE OF SERVICE

I certify that on March 8, 2018, a true and correct copy of the foregoing **Proposed Order** was hand delivered and emailed to:

Stephen Koteff, Human Rights Advocate
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, AK 99501
Email: steve.koteff@alaska.gov

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

Respondent or Respondent's Representative
W. Sherman Ernouf
Law Offices of Ernouf & Coffey
P.O. Box 212314
Anchorage, AK 99508
Email: sernouf@eclawfirm.net

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

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



Shari Ketchum
Commission Secretary

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ruling on those objections was issued on November 28, 2017, finding that one of the objections had merit. This Revised Recommended Remedial Order addresses certain issues raised in the Objections.

II. Back Pay/Front Pay as a Remedy

A. Back Pay

The Accusations the Commission's Executive Director filed on behalf of the five complainants requested back pay, including any lost benefits or remuneration for Mr. Carle, Ms. Peterson, Ms. Burgess, Mr. Hetemi, and Mr. Sheppard (hereinafter, collectively referred to as the "Minor Employees").² Although the Minor Employees' employment with Sullivan's ended on December 29, 2011, they received a final paycheck from Sullivan's at the beginning of 2012.³ Unless subject to offset, back pay would begin to accrue from January 10, 2012 – the date Sullivan's was served with a complaint of discrimination arising from the Minor Employees' termination on December 29, 2011.⁴

1. Connor Carle, Sydney Peterson, and Robin Burgess

The evidence presented at the hearing, held on May 4-6, 2015, showed that Mr. Carle, Ms. Peterson, and Ms. Burgess each earned more income in 2012 through 2014 than they had earned while employed at Sullivan's in 2011.⁵ Thus, these three Minor Employees mitigated their damages completely and are not eligible for an award of back pay.⁶

2. Bashkim Hetemi

After he was terminated from Sullivan's, Mr. Hetemi applied to numerous retail jobs at the Dimond Mall, but was not called for any interviews.⁷ He very briefly held a job at Denny's, but only worked there a few days.⁸ Soon afterwards, Mr. Hetemi was hired by GNC. Despite his

² The Executive Director filed three Accusations on October 27, 2017: one on behalf of Connor Carle, another on behalf of Sydney Peterson, and a third on behalf of Robin Burgess, Bashkim Hetemi, and Anthony Sheppard.

³ See Exh. 79, p. 3 (Burgess); Exh. 88, p. 4 (Carle); Exh. 95, p. 1 (Hetemi); Exh. 105, p. 4 (Peterson) & Exh. 111, p. 3 (Sheppard).

⁴ AS 09.30.070(b); Exh. 16; see also *Tookalook Sales and Service v. McGahan*, 846 P.2d 127, 129 (Alaska 1993), *reh'g den*.

⁵ Exhs. 79-83 (Burgess); Exhs. 86-89 (Carle); & Exhs. 102, 104-107 (Peterson).

⁶ See AS 18.30.130(a)(1). For the reasons outlined in the Ruling on Objections, the annual loss method was used here to compute damages. There was no evidence in the record – *i.e.* no testimony and no exhibits – relating to the quarterly loss method espoused by the Executive Director in the Objections.

⁷ Testimony of Bashkim Hetemi. Mr. Hetemi attributed his lack of success in finding a job despite diligent efforts to his disclosure on job applications that he had been fired by Sullivan's.

⁸ Testimony of Bashkim Hetemi. Sullivan's failed to introduce any evidence at the hearing showing Mr. Hetemi's voluntary departure from Denny's tolled his eligibility for back pay until he secured the position at GNC. Cf. *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1101(3rd Cir. 1995).

mitigation efforts, Mr. Hetemi earned less in 2012 than he had earned in 2011 when he was employed by Sullivan's. Mr. Hetemi's gross earnings in 2011 from Sullivan's were \$3,795, comprised of \$2,759 in wages and \$1,036 in tips.⁹ By contrast, in 2012, Mr. Hetemi only earned \$1881.20 from his new employment.¹⁰ Thus, Mr. Hetemi's earnings in 2012 were \$1,913.80 *less than* the amount he had earned the prior year at Sullivan's.¹¹ Accordingly, he is eligible for back pay in the amount of \$1,913.80 plus interest as calculated in Part II-C. Mr. Hetemi is not eligible for back pay after 2012: in 2013, Mr. Hetemi's annual earnings exceeded his 2011 income from Sullivan's, and there was no evidence in the record relating to his gross earnings in 2014.¹²

3. Anthony Sheppard

Anthony Sheppard earned \$1,782.37 in wages from Sullivan's in 2011.¹³ Following his termination from Sullivan's, Mr. Sheppard held a job at Alaska Custom Gutters in 2012 after school ended in late May, and earned \$10 an hour in that job.¹⁴ Mr. Sheppard said he could not give an "accurate estimate" of the number of hours he worked each week, but guessed that he had worked "maybe 10 hours a week give or take."¹⁵ There is, however, no evidence in the record indicating exactly how many weeks he held that job in 2012 or his gross earnings from Alaska Custom Gutters.¹⁶ In addition to his summer job at Alaska Custom Gutters, Mr. Sheppard briefly worked at the Alaska Sportsplex "after the football season ended" in 2012, and earned \$99.70 from that employment.¹⁷

⁹ See Ex. 93. Sullivan's issued Mr. Hetemi's final paycheck in the amount of \$230.56 in 2012, but it was for work Mr. Hetemi had performed prior to his December 29, 2011 termination.

¹⁰ Exh. 95.

¹¹ It is the Respondent's burden to demonstrate that Mr. Hetemi failed to mitigate his damages by not remaining at Denny's. See *Lathem v. Dept. Of Children and Youth Services*, 172 F. 3d 786, 794 (11th Cir. 1999) (courts resolve uncertainties in back pay in favor of the discrimination victim; it is the defendant's burden to prove that the plaintiff did not use reasonable diligence to obtain comparable work); see also *EEOC v. Delight Wholesale Col.*, 973 F.2d 664, 670-671 (8th Cir. 1992). Since Respondent never made that argument, it need not be discussed here.

¹² Compare Exh. 93 with Exh. 94.

¹³ As a dishwasher, Mr. Sheppard did not receive tips. See Testimony of Anthony Sheppard. His 2011 earnings include the wages (\$1,584.37 set forth in his W-2 from Sullivan's for 2011) plus his final paycheck for 2011 in the amount of \$198, which he received in 2012. See Exh. 111. Although Mr. Sheppard testified that he believed he was paid \$10.00 an hour at Sullivan's, his pay history at Sullivan's shows that he was paid approximately \$9.00 an hour and his W-2 form suggests that he was paid \$9.19 an hour. Compare Testimony of Anthony Sheppard with Exh. 111.

¹⁴ Testimony of Anthony Sheppard. There were no tax returns, W-2 forms, or pay stubs in the record showing that Mr. Sheppard had worked for Alaska Custom Gutters, the duration of that employment, or the gross earnings he had received from that job. See Exhs. 111-115.

¹⁵ Testimony of Anthony Sheppard.

¹⁶ Mr. Sheppard testified that he worked for Alaska Custom Gutters after the end of May until "football season" began. No other dates for this employment were given, either through testimony or in exhibits introduced into evidence. See Exhs. 111-115.

¹⁷ See Exhs. 113 & 115; see also Testimony of Anthony Sheppard.

Before a tribunal can award damages, Mr. Sheppard must first establish that his economic loss was due to Sullivan's discrimination and the amount of that loss.¹⁸ Back pay is subject to an offset for wages Mr. Sheppard earned after his termination from Sullivan's.¹⁹ Here, Mr. Sheppard testified that he was unable to give an accurate estimate of his earnings at Alaska Custom Gutters in 2012, which would be part of that offset. There also were no documents in the record that could have been used to determine his wages at Alaska Custom Gutters. Consequently, Mr. Sheppard has not met his burden of establishing an economic loss or the amount of that loss. Accordingly, he cannot recover back pay for 2012. Moreover, since Mr. Sheppard's earnings in 2013 and 2014 exceeded the income he received from Sullivan's in 2011, he is not eligible to receive back pay for those two years.²⁰

B. Front Pay

Under AS 18.80.130, a complainant may receive front pay for a period of not more than one year under the circumstances enumerated in the statute.²¹ Like back pay, front pay must be reduced by the amount the employee could have earned by making reasonably diligent efforts to obtain similar employment. Here, no evidence of a potential front pay loss was shown at the hearing for any of the Minor Employees. This was understandable, since by 2013, the Minor Employees had obtained jobs which paid better than the entry-level jobs they previously had held at Sullivan's. Accordingly, no award of front pay is appropriate in this case.

C. Interest

Pursuant to 6 AAC 30.480(b), the Commission may order interest on monetary awards in accordance with AS 09.30.070(a), and such an award is appropriate in this case to compensate the Minor Employees for the long delay in receiving lost wages. Damages are calculated on an annual basis, starting on January 1, 2012.²² Interest is calculated from January 1, 2013.²³ The interest rate for state judgments rendered in 2017 is 4.25%. Interest assessed in accordance with AS 09.30.070 is simple, not compound, interest.²⁴

¹⁸ See *Taylor v. Philips Indus., Inc.*, 593 F.2d 783, 787 (7th Cir. 1979).

¹⁹ See *id.*

²⁰ Compare Exh. 111 with Exh. 112 & Exh. 113.

²¹ Front pay, if applicable, would be calculated from the date of this Revised Recommended Remedial Order. See *Zisumbo v. Ogden Regional Medical Center*, 801 F.3d 1185, 1205 (10th Cir. 2015) (Front pay is the money awarded for lost compensation during the period between judgement and reinstatement or in lieu of reinstatement to make the plaintiff whole).

²² For the reasons outlined in the Response to Objections to Recommended Remedial Order, the annual loss method has been used to compute these damages.

²³ See *Paula M. Haley ex rel., Cassandra Webb et al v. Die-Fast, Inc.*, OAH No. 06-0491-0495-HRC.

²⁴ See *Alyeska Pipeline Serv. Co. v. Anderson*, 669 P.2d 956, 956 (Alaska 1983).

Applying these concepts, interest on the \$1,913.80 in back pay damages owed to Mr. Hetemi in this case has accrued since January 1, 2013 at the rate of 23 cents per day, or \$81.34 per year. Thus, as of November 28, 2017, Mr. Hetemi should receive \$1,913.80 in principle and \$398.40 in interest, for a total as of this date of \$2,312.20.

III. Other Remedial Steps

The Commission is required by statute to order the respondent to refrain from engaging in any discriminatory conduct it has been found to be engaged in.²⁵ Here, the respondent has been found to have discriminated against employees based on their age and concomitant status as minors, which a majority of the Hearing Commissioners have determined to be impermissible. The respondent must be ordered not to engage in such discrimination in the future. The Commission also has discretion to order a wide range of other relief, including imposition of conditions on the respondent's future business conduct.

The only relief, other than damages and interest, that the Executive Director has advocated in the Accusations is that the Commission: (1) issue an order declaring that Sullivan's violated AS 18.80.220(a)(1) by terminating the Minor Employees; (2) order Sullivan's to adopt and disseminate a policy of nondiscrimination under the Alaska Human Rights Law (AHRL); (3) order Sullivan's to obtain in-person training, conducted by a neutral, third-party trainer, of at least six hours in length for its managers and supervisors and three hours in length for its employees, on the provisions of the AHRL that prohibit discrimination in employment, and that such order specify that the trainer and training curriculum be approved by the Executive Director prior to the training being conducted; (4) order Sullivan's to eliminate from the personnel records of the Minor Employees all documents and entries relating to the facts and circumstances that led to this case and any of the related events occurring thereafter; (5) order Sullivan's to refrain from penalizing any of the Minor Employees in any way in future considerations for employment and, if rehired, for transfers, promotions or upgrading because the Minor Employees complained about discrimination or because they filed a Complaint with the Commission; and (6) order Sullivan's to refrain from advising or informing any other employer or potential employer of any of the Minor Employees of the facts or circumstances involved in this case.

Sullivan's has not contested the appropriateness of this relief. All of it should be ordered, except that item (4) requires some further explanation. The Commission, in remanding the case for a Recommended Remedial Order, has requested that an "appropriate" remedy be fashioned.

²⁵ AS 18.80.130(a).

Because the Minor Employees are in the early stages of their respective careers, it is appropriate that their future employment options not be restricted due to Sullivan's discriminatory conduct.

The Employee Status Change Form for each of the Minor Employees indicates that their termination was "involuntary."²⁶ The Form further stated that the reason for termination was "non-compliance with company policy" and "violation of local, state or federal statutes."²⁷ Not surprisingly, three of the Minor Employees – Connor Carle, Sydney Peterson, and Bashkim Hetemi – testified that they initially had difficulty getting interviews after disclosing that they had been terminated from Sullivan's on job applications for prospective employers.²⁸ Mr. Sheppard avoided that problem by securing employment with a family friend after his employment at Sullivan's ended.²⁹ Ms. Burgess was able to get re-employed in the restaurant business shortly after her termination, but only because one of her former supervisors at Sullivan's recruited her for a position at the Glacier Brewhouse, where he was then employed.³⁰

Since a termination, especially for those reasons, can affect future employment options, an appropriate remedy in this case is for Sullivan's to change the termination codes for each of the Minor Employees to "T113, Discontinuation of Function/Position."³¹ This is the code which best fits the situation here (*i.e.*, an involuntary termination based on a decision not to employ minors under any circumstances) that is non-pejorative in nature.

ORDER

It is hereby **ORDERED** that:

1. Sullivan's violated AS 18.80.220(a)(1) by terminating the employment of Connor Carle, Sydney Peterson, Robin Burgess, Bashkim Hetemi, and Anthony Sheppard on December 29, 2011 because they were under the age of 18.
2. Sullivan's is permanently ordered not to discriminate in hiring or employment on the basis of an applicant's or employee's status as a minor.
3. By **February 1, 2018**, Sullivan's shall adopt and disseminate a policy of non-discrimination under the Alaska Human Rights Act.

²⁶ See Exhibit 1, pp. 69-73.

²⁷ *Id.*

²⁸ Testimony of Connor Carle; Testimony of Sydney Peterson; Testimony of Bashkim Hetemi. Ms. Peterson testified she was kept "out of the restaurant business for a while" because her termination made potential employers leery of hiring her.

²⁹ Testimony of Anthony Sheppard.

³⁰ Testimony of Robin Burgess. Ms. Burgess testified that, had she not been recruited by a former manager at Sullivan's who gave her a recommendation, her termination would "otherwise have been a problem."

³¹ See Exhibit 1, pp. 69-73.

4. By **February 1, 2018**, Sullivan's shall pay \$2,312.20 to Bashkim Hetemi, plus interest at \$0.22 per day commencing on November 28, 2017 to the date of payment.
5. By **February 15, 2018**, Sullivan's shall expunge from the personnel records of the Minor Employees any documents that are related to this case which arose after the Minor Employees were terminated from employment at Sullivan's, ensure that the Minor Employees' separation from employment at Sullivan's is no longer designated as an "involuntary termination: Code T104/T110" but rather is deemed an "involuntary termination: Code T113," and provide the Executive Director with documentation showing that it has corrected the personnel records reflecting the reason for the Minor Employees' separation from employment.
6. By **March 1, 2018**, Sullivan's shall provide six hours of in-person training conducted by a neutral, third-party trainer for its managers and supervisors and three hours of training for its employees on the provisions of the Alaska Human Rights Law that prohibit discrimination in employment. In addition, both the trainer selected to provide this training and the training curriculum shall be approved by the Executive Director of the Commission prior to the training being conducted.
7. Sullivan's shall refrain from penalizing the Minor Employees in any way regarding future considerations for employment and, if rehired, for transfers, promotions, or upgrading because of the Complaints the Executive Director filed with the Commission on their behalf.
8. Sullivan's shall refrain from advising or informing any other employer or potential employer of the Minor Employees of the facts or circumstances involved in this case, including the Minor Employees' involvement in a discrimination case against Sullivan's.

DATED: November 28, 2017.

By: Signed
Kathleen A. Frederick
Chief Administrative Law Judge

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