

BROWN & JAMES, P.C.
Belleville, Illinois
www.brownjames.com

Denise Baker-Seal
dbaker-seal@bjpc.com

ALASKA

I. AT-WILL EMPLOYMENT

A. Statute

There is no statutory codification of the at-will employment doctrine in Alaska.

B. Case Law

Employees hired on an at-will basis may be fired for any reason that does not violate public policy/the implied covenant of good faith and fair dealing. See *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1131 (1989). Where the employment agreement is at-will, continuing to work after a modification of the agreement, after notice of such modification, is sufficient consideration to support the modification. *Id.*, at 1137 n.13. A state employee who serves at will has no expectation of continued employment and therefore no constitutional property right. *Blackburn v. State, Dep't of Transp. & Pub. Facilities*, 103 P.3d 900, 906 (2004).

MERRICK, HOFSTEDT & LINDSEY, P.S.
Seattle, Washington
www.mhlseattle.com

Tamara K. Nelson
tnelson@mhlseattle.com

MCNEES WALLACE & NURICK LLC
Harrisburg, Pennsylvania
www.mcneeslaw.com

Conner Porterfield
cporterfield@mcneeslaw.com

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783 (1989), Jones was employed from 1971 to 1978 as a nurse at the hospital. She claimed that the hospital breached her contract of employment by failing to afford her access to the grievance procedure contained in the hospital's personnel policy manual. The manual, issued in 1974, authorized termination for cause and provided for a grievance procedure for all employees. A second manual, issued in 1978, exempted the supervisory employees from the grievance procedures, but provided that all non-probationary employees were terminable only for good cause. After Jones' termination, she was denied resort to the grievance procedures since she was a supervisor. Jones' suit was dismissed on the hospital's motion for summary judgment. The trial court concluded that as a supervisor, Jones was not protected by the grievance procedure set forth in the 1978 manual.

The Alaska Supreme Court held that "employee policy manuals may modify at-will employment agreements, and that whether a given manual has modified an at-will employment agreement must be determined on the particular facts of each case." *Jones*, 779 P.2d at 787. The court found that the

1978 manual, which superseded the 1974 manual, was incorporated into Jones' at-will employment agreement.

Since the 1978 manual indicated that all non-probationary employees were terminable only for cause, the court held that the issue of whether "cause" existed for Jones' termination was a question of fact for the trier of fact. *Jones*, 779 P.2d at 789. The case was remanded to the trial court for further proceedings.

See also, Parker v. Mat-Su Council on Prevention of Alcohol & Drug Abuse, 813 P.2d 665 (1991) (it is generally a question of fact whether the personnel manual modifies an employment agreement); *Belluomini v. Fred Meyer, Inc.*, 993 P.2d 1009 (1999) (where employer had created specific procedures for terminating an employee for sexual harassment but no such procedure existed for terminating an employee on other grounds, covenant was not violated when employee was fired for insubordination, non-sexual harassment, and intimidation).

2. Provisions Regarding Fair Treatment

Alaska does not have law relevant to this topic.

3. Disclaimers

In *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783 (1989), the court rejected the hospital's contention that a disclaimer contained in the manual "is not a contract of employment nor is it incorporated in any contract of employment between the [hospital] and any employee" acted to prevent alteration of Jones' at-will employment status. The court rejected this argument because: (1) the disclaimer was followed by 85 pages of detailed text covering policies, rules and regulations which did not "unambiguously and conspicuously" inform the employee that the manual did not create a contract of employment; (2) the manual did not contain a provision that the hospital could terminate employees at its will, with or without cause; and (3) the detailed provisions of the manual created an impression in the minds of the employee that they would be given certain job protection, contrary to the language of the disclaimer. *Id.* at 787-788.

4. Implied Covenants of Good Faith and Fair Dealing

"[A]t-will employment contracts in Alaska contain an implied covenant of good faith and fair dealing." An employer can breach the implied covenant as follows:

The covenant can be breached objectively or subjectively. The objective prong of the covenant is breached when an employer fails to act in a manner that a reasonable person would consider fair, which includes treating similarly situated employees disparately, terminating employees on unconstitutional grounds, and terminating employees in violation of public policy. The subjective prong of the covenant is breached when an employer is motivated by the goal of depriving the employee of a benefit of the contract. The purpose of the covenant is to effectuate the reasonable expectations of the parties, not to alter or to add terms to the contract."

Miller v. Safeway, Inc., 170 P.3d 655, 658-59 (2007). Safeway terminated Miller's employment after he violated Safeway's grooming policy by refusing to cut his hair. The Alaska Supreme Court explained that, although Miller had a constitutional liberty and privacy interest in his personal choice to wear his hair long, that interest was outweighed by Safeway's legitimate interest in its grooming policy. *Id.* at 660. Safeway's enforcement of its grooming policy did not violate the implied covenant.

In *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751 (2008), the employer had concluded that Mitchell had sexually harassed a contractor's employee and had lied about it during the ensuing investigation. The Alaska Supreme Court reversed a summary judgment in the employer's favor on the employee's claim for breach of the covenant of good faith and fair dealing, explaining that the employee had created two triable issues of material fact that precluded summary judgment. First, the employee had presented evidence that, during the employer's investigation, he had not been given notice of the charges against him or a reasonable opportunity to explain his side of the story. *Id.* at 761. Second, the employee had also presented evidence that he was disparately treated, in that a white supervisor who had sexually harassed a contractor's employee had received only a letter of warning. *Id.* See also *Willard v. Khotol Services Corp.*, 171 P.3d 108 (2007) (holding that evidence of inadequacies in pre-termination investigation was sufficient to defeat employer's motion for summary judgment on the employee's claim for breach of the covenant of good faith and fair dealing).

In *Mitford v. de Lasala*, 666 P.2d 1002 (1983), Mitford was employed for approximately nine years as an accountant and comptroller in Hong Kong for various corporations owned or controlled by Robert de Lasala. In 1961, he moved to Anchorage where he was to "attach [himself] as the accountant of Australaska Corporation and Cosmopolitan Development Corporation and their affiliates" The time of his employment was stated to be for an indefinite period subject to determination by either side giving three months notice.

On July 2, 1962, Mitford inquired about the terms of his employment regarding leave pay. Robert de Lasala sent Mitford a letter explaining that Mitford would receive ten percent of the profits, and reiterating the indefinite period of employment. In 1977, Mitford reminded Ernest de Lasala, who stepped in after his father's death, of the ten percent profit-sharing arrangement. After much disagreement over this issue, Mitford was given notice of termination.

The Supreme Court of Alaska held that Mitford's employment contract, though at-will, nonetheless contained an implied covenant of good faith and fair dealing. The court stated that such a covenant "would prohibit firing Mitford for the purpose of preventing him from sharing in future profits of Australaska and Cosmopolitan." *Mitford*, 666 P.2d at 1007.

See also, *Era Aviation, Inc. v. Seekins*, 973 P.2d 1137 (1999) (the covenant is implied to effectuate the reasonable expectations of the parties rather than alter such expectations; as such, the employer may fire an at-will employee to avoid a personality conflict with another employee); *French v. Jadon, Inc.*, 911 P.2d 20 (1996) (the covenant does not lend itself to precise definition, but it requires at a minimum that an employer not act in bad faith to impair an employee's right to receive the benefits of an employment agreement); *Revelle v. Marston*, 898 P.2d 917 (1995) (the failure to follow established procedures for termination of an employee may indicate a breach of the implied covenant of good faith and fair dealing and an employer may breach the covenant through improper motive or intent but may also commit objective breach of the covenant by failing to act in a manner which a reasonable person would regard as fair); *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (1989) (employees hired on

an at-will basis can be fired for any reason that does not violate the implied covenant of good faith and fair dealing; however, employees hired for a specific term may not be discharged before the expiration of the term except for good cause).

B. Public Policy Exceptions

1. General

In *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (2004), Kinzel filed an occupational safety and hazard complaint against the company with which his employer had subcontracted. He was subsequently reassigned to a different work site, where he injured his back. He filed for workers' compensation and took medical leave, but was soon fired.

The court held that Kinzel was not limited to recovering only two weeks severance pay for his retaliatory discharge claim against his employer. Kinzel, 93 P.2d at 437. The court noted that Kinzel alleged violations of explicit public policies, including protection of whistleblowers who file safety complaints and workers who file workers' compensation claims. *Id.* at 438. The court held that the alleged retaliatory discharge in violation of explicit public policy gave rise to a tort claim as well as a contract claim. *Id.* The court stated that it was appropriate to allow a tort remedy to more effectively deter prohibited conduct. *Id.*

In *Lingley v. Alaska Airlines, Inc.*, 373 P.3d 506 (2016), Lingley claimed that Alaska Airlines retaliated against her for criticizing the company's failure to follow its own policies and for violations of federal law. The court held that even though Lingley was subject to a collective bargaining agreement, that for the purposes of RLA preemption, "a collective bargaining agreement cannot "alter[], circumscribe[], or define[]" state law protections even when the agreement appears to offer protections similar to those of state law." *Lingley*, 373 P.3d at 516.

2. Exercising a Legal Right

In *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807 (2005), Reust sued his former employer for retaliatory discharge in violation of the public policy protecting witnesses in legal proceedings against retaliation. The Alaska Supreme Court held that Alaska has an actionable public policy tort for retaliation against a witness in legal proceedings. *Id.* at 9. When an at-will employee is wrongfully discharged, damages are measured by the likely duration of employment had the wrongful discharge not occurred. *Id.* at 20. The court affirmed the superior court's award of punitive damages but reversed its award of economic damages and lost wages because they were excessive. *Id.*

See also Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 437-38 (2004) (holding that alleged violations of explicit public policies, including protection of workers who file workers' compensation claims, give rise to tort claim as well as contract claim).

3. Refusing to Violate the Law

Alaska does not have law relevant to this topic.

4. Exposing Illegal Activity (Whistleblowers)

In *Reed v. Municipality of Anchorage*, 782 P.2d 1155 (1989), Reed began working for the Municipality at the Anchorage Wastewater Treatment Plant on August 24, 1981. On March 1, 1982, he filed a job safety and health complaint with the Alaska Department of Labor (DOL) due to employee injuries. He also filed a telephone complaint with the office of the Mayor. Approximately one month later, Reed was terminated. Reed complained to the DOL that he was fired for "whistleblowing," and the DOL confirmed the allegation. In September of 1982, the DOL sued the Municipality for violation of AS 18.60.089, the "whistle blower protection" statute. Reed filed his own suit against the Municipality in 1984.

The Supreme Court of Alaska held that Reed stated a valid breach of contract allegation based on retaliatory discharge for blowing the whistle on the plant's unsafe working conditions. The court stated:

In the case at bar, Reed alleges that the Municipality terminated him in retaliation for "whistle blowing" and that in doing so, the Municipality breached the covenant of good faith and fair dealing that is implied in employment contracts. We hold that Reed's allegation expresses a breach of contract theory. 782 P.2d at 1158.

See also, Hammond v. State Dep't of Transp. & Pub. Facilities, 107 P.3d 871, 875 (2005) (to bring suit under the Alaska Whistleblower Act, a public employee must show that (1) he has engaged in a protected activity, and (2) the activity was a substantial or motivating factor in his termination); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir.1992) (a former employee's wrongful termination claims against officers and employees of a timber company for allegedly dismissing him solely because he had given testimony unfavorable to the company in proceedings before the House Subcommittee, were not preempted by the National Labor Relations Act); *Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (9th Cir. 1990) (a breach of the implied covenant of good faith occurs if an employer discharges an employee in retaliation for conduct protected by public policy). *But see Methvin v. Bartholomew*, 971 P.2d 151 (1998) (public sector employee was not engaged in whistleblowing activity where letters of complaint to governor and lieutenant governor contained only general criticisms and allegations of mismanagement and did not raise issue of public concern).

Note also that the Alaska Whistleblower Act, ALASKA STAT. § 39.90.100, *et seq.* (Supp. 1992) protects public employees from discharge or other discrimination for reporting or threatening to report a matter of public concern to a public body.

III. CONSTRUCTIVE DISCHARGE

In *Beard v. Baum*, 796 P.2d 1344, 1347 (Alaska 1990), Beard worked as a State Department of Transportation (DOT) employee, and in 1985 he became the Alaska Public Employees Association (APEA) building representative. Beard suspected that several of his co-workers and supervisors were violating DOT personnel rules such as falsifying time sheets and leave slips, and misusing state time and property. An investigation revealed that only two of Beard's twenty-one allegations were substantiated.

Beard alleged that following the investigation, several of the individuals Beard charged with wrongdoing began a series of "retaliatory pressure tactics" against him. He lost his position as APEA building representative and he began receiving poor work performance ratings. In addition, Beard's

supervisors reduced his workload, unfairly scrutinized his daily performance, transferred him frequently, and falsely accused him of stealing. Beard's supervisors created a work environment that was as uncomfortable as possible. Beard experienced both mental and physical manifestations of the stress he felt as a result of the harassment, and he ultimately resigned in 1986. He then filed suit against the Director of Design and Construction for DOT Northern Region as well as the State of Alaska.

In its decision, the Supreme Court of Alaska held that an employer will be liable to an employee who is forced to resign due to intolerable working conditions. The court noted the unanimous recognition of constructive discharge claims in the federal courts, and stated:

Today, we make explicit that where an employer makes working conditions so intolerable that the employee is forced into an involuntary resignation, the employer is as liable for any illegal conduct involved therein as if it had formally discharged the employee.

Beard, 796 P.2d at 1350. .

The court's grant of summary judgment to the State was revised because Beard's claim that working conditions were so intolerable as to force him to resign stated a triable case for breach of contract. The constructive discharge was as much a violation as a formal discharge without just cause. The case was reversed and remanded on this issue.

See also, State v. Beard, 960 P 2d 1 (1998) (to establish a constructive discharge, the employee has the burden of showing the reasonable person in the employee's position would have felt compelled to resign, although the employee need not prove that the employer acted with specific intent; criticisms of job performance or other management decisions do not alone create an intolerable working condition).

See also, Finch v. Greatland Foods, Inc. 21 P.3d 1282, 1285-86 (2001), the employee alleged that the employer criticized him for taking family leave; reassigned his distribution route to a junior employee; altered the pay system such that only his income dropped; and failed to support his customer service efforts. Any of the events alone might not have supported a constructive discharge, and the employer submitted strong evidence controverting the alleged events. But the court found that when reviewing the events "in totality and in the light most favorable to [the employee]," the events could lead a reasonable person in the employee's position to conclude that the employer pursued a sustained campaign of harassment, compelling the employee's resignation.

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

In *Cassel v. State, Dep't of Admin.*, 14 P.3d 278 (2000), Cassel, a probationary employee, was dismissed from his position as the Department of Public Safety's Identification Bureau Chief. He appealed his termination, claiming that objective grounds did not support his termination.

A court reviews a termination of cause to ensure that it "is not for any arbitrary, capricious, or illegal reason and is based on facts (1) supported by substantial evidence and (2) reasonably believed by

the employer to be true." *Cassel*, 14 P.3d at 284, *Braun v. Alaska Commercial Fishing & Agric. Bank*, 816 P.2d 140, 142 (1991) (quoting *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wash.2d 127 (1989)). "This approach thus 'checks the subjective good faith of the employer with an objective reasonable belief standard.'" *Cassel* 14 P.3d at 284, quoting *Baldwin*, 112 Wash. 2d 127 (1989). The court "will uphold a good faith termination upon substantial evidence of 'an objective failure to meet acceptable standards,' in other words, 'when objective standards of performance are not satisfied.'" *Cassel* 14 P.3d at 284, quoting *Univ. of Alaska v. Tovsen*, 835 P.2d 445, 447 (1992). The court affirmed the superior court's decision affirming the hearing officer's decision because the hearing officer "relied on evidence of Cassel's failure to meet objective managerial performance standards." *Cassel*, 14 P.3d at 285.

B. Status of Arbitration Clauses

In *Hammond v. State, Dep't of Transp. & Pub. Facilities*, 107 P.3d 871 (2005), Hammond was terminated from his job with the Department of Transportation and Public Facilities. He contested his termination by pursuing the grievance-arbitration mandated by his collective bargaining agreement. While his grievance was being arbitrated, he simultaneously pursued statutory whistleblower claims in state court against the Department of Transportation and Public Facilities and three fellow employees. His grievance was ultimately dismissed after arbitration. The court then gave res judicata effect to the arbitration decision to grant summary judgment for the defendants. Hammond appealed.

The court held that "an employee's exercise of the right to arbitrate under a collective bargaining agreement does not preclude subsequent litigation of related statutory claims in state court unless the employee clearly and unmistakably submits the statutory claims to arbitration." *Hammond*, 107 P.3d at 877. "An employee is not required to choose between the rights provided by a collective bargaining agreement and the rights provided by statutes such as the Alaska Whistleblower Act; absent a clear and unmistakable waiver, the employee is entitled to both." *Id.* at 876-77. The court held that Hammond did not submit his statutory claims to arbitration, and thus the arbitral decision was not entitled to preclusive effect in the judicial action. *Id.* at 878.

V. ORAL AGREEMENTS

A. Promissory Estoppel

In *Glover v. Sager*, 667 P.2d 1198 (1983), Glover and Fett were employed as truck drivers by Sager. In late 1979, Glover and Fett made plans to become independent truck owners under a proposed agreement by which they would continue driving for Sager. Both claimed that they were given assurances of long-term employment and enough work to enable them to make payments on the trucks they purchased. They further contended that Sager guaranteed that their compensation would cover existing expenses and any increases therein.

Glover and Fett bought trucks and signed agreements under which Sager leased the vehicles. Sager informed Glover and Fett that it was not earning an adequate profit, prompting the two drivers to agree to a modification of the seniority dispatch system. The result was a decrease in the amount of work extended to Glover and Fett. Sager ultimately terminated the lease agreement, and Glover and Fett filed suit for breach of contract.

The Supreme Court of Alaska held that "Glover and Fett had made a prima facie case of

promissory estoppel under the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).” *Glover*, 667 P.2d at 1202. Although the employment relationship was terminable at the will of either party, Glover and Fett were entitled to employment based on their reliance on Sager's promises regarding purchase of the trucks. The court further stated that "inherent in this holding is our conclusion that the actual terms of Glover and Fett's employment relationship with Sager are reasonably definite and certain and thus enforceable." *Id.* at 1202.

B. Fraud

In *Willard v. Khotol Services Corp.*, 171 P.3d 108 (2007), Willard, a probationary employee was terminated for alleged insubordination and violating workplace rules. His lawsuit included a claim for misrepresentation, alleging that his employer, Khotol, “misrepresented three conditions or terms of his employment through its employee manual: (1) the right to progressive discipline, (2) the right to not be terminated without just cause, and (3) that any dismissal would be subject to the company's grievance procedure.” *Id.* at 118. The Alaska Supreme Court explained that “the four elements required to establish negligent misrepresentation as: (1) the party accused of misrepresentation must have made the statement in the course of his business, profession or employment; (2) the representation must supply ‘false information’; (3) the plaintiff must show ‘justifiable reliance’ on the false information; and (4) the accused party must have failed ‘to exercise reasonable care or competence in obtaining or communicating the information.’” *Id.* at 118-119. Fraudulent misrepresentation requires an additional element: proof that the party making the misrepresentation knew that it was untrue. *Id.*, citing RESTATEMENT (SECOND) OF TORTS § 552. Willard pointed to certain provisions in Khotol’s employee manual. The Supreme Court affirmed dismissal of the misrepresentation claim, finding that Willard had “failed to offer evidence supporting a finding of justified reliance on any alleged misrepresentation.” *Id.* at 119.

C. Statute of Fraud

A contract that is subject to ALASKA STAT. § 09.25.010 that does not satisfy the requirements of that section, but that is otherwise valid, is enforceable if “it is a contract of employment for a period not exceeding one year from the commencement of work under its terms.” ALASKA STAT. § 09.25.020(5).

VI. DEFAMATION

A. General Rule

“The elements of defamation are: ‘(1) a false and defamatory statement; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) the existence of either ‘per se’ actionability or special harm.’” *Maddox v. Hardy*, 187 P.3d 486, 496 (2008).

In *Schneider v. Pay 'N Save Corp.*, 723 P.2d 619 (1986), a convenience store worker was terminated for failing to record register sales. She filed suit alleging wrongful termination and defamation, claiming that the loss-prevention manager who had her fired had defamed her by “maliciously accusing her of stealing money from the store.” *Id.* at 623. The employer claimed a defense of conditional privilege, with which the trial court agreed, and granted the employer’s summary judgment motion.

In Schneider’s appeal on the defamation issue, the Alaska Supreme Court agreed that the

accusations were privileged, *citing* the RESTATEMENT (SECOND) OF TORTS § 595, which provides:

1. An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
 - (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
 - (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.

The court found that the protection afforded by the employer/employee relationship is conditioned upon publication in a reasonable manner and for a proper purpose. The court also affirmed that a conditional privilege which is abused by the writer or speaker is lost and he must answer for the legal consequences of his publication. *Schneider*, 723 P.2d at 624. *See also* RESTATEMENT (SECOND) OF TORTS § 593.

The *Schneider* court stated:

The comments to the RESTATEMENT (SECOND) OF TORTS § 599 provide that a conditional privilege may be abused because of:

the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter . . . ; because the defamatory matter is published for some purpose other than that for which the particular privilege is given . . . ; because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege . . . ; or because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

723 P.2d at 624-5. *See also*, *French v. Jadon, Inc.*, 911 P.2d 20 (1996) (statement that employee traded sex for drugs or engaged in serious criminal activity is defamatory per se and recovery is permitted without proof of special damages); *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (2004) (challenged statement that was the subject of employee's defamation action against employer, in which supervisor stated he wondered if employee's actions on job site were deliberate, raised triable issue of material fact as to whether supervisor's statement was merely conjecture, or whether it was based on factual underpinnings that employee had sabotaged the work site, thereby precluding summary judgment against employee; statement could reasonably have been understood as an assessment by supervisor that was based upon factual underpinnings).

1. Libel

In *McCutcheon v. State*, 746 P.2d 461 (1987), the court held that knowledge of the defamatory statements on the part of the person libeled is not a necessary element for a cause of action for libel.

The mere speaking or writing of defamatory words, it is well settled is not actionable unless such words are heard or read and understood by persons other than the defamed; hence, the cause of action accrues only upon the satisfaction of this condition. The fact that the person defamed had no knowledge of the defamation, until shortly before the action is brought, is of no consequence.

2. Slander

In *City of Fairbanks v. Rice*, 20 P.3d 1097 (2000), the court held that a fire chief's defamatory statements that a firefighter had had an extramarital affair with a friend's wife were published in a telephone conversation with the firefighter's attorney, where there was no evidence the firefighter had authorized his attorney to act as his agent for the purpose of receiving communications on the subject of the chief's statements, and an allegedly defamatory communication to an attorney can be a "publication."

B. References

Alaska does not have law relevant to this topic.

C. Privileges

In *French v. Jadon, Inc.*, 911 P.2d 20 (1996), the court held that a statement is conditionally privileged if its maker reasonably believes that the statement affects a sufficiently important interest of the recipient and the recipient is person to whom its publication is otherwise within generally accepted standards of decent conduct.

D. Other Defenses

1. Truth

In *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (2004), the court noted that a person who makes an unprivileged defamatory statement that is false is liable unless he reasonably believes it to be true.

2. No Publication

"Publication" of defamatory matter generally imports its communication to someone other than the person defamed. *McCutcheon v. State*, 746 P.2d 461 (1987).

3. Self-Publication

Alaska does not have law relevant to this topic.

4. Invited Libel

Alaska does not have law relevant to this topic.

5. Opinion

The First Amendment bars actions for defamation where the allegedly defamatory statements are expressions of ideas and cannot reasonably be interpreted as stating actual facts about an individual). *See Sands v. Living Word Fellowship*, 34 P.3d 955 (2001). If it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable. The First Circuit has further explained that some statements are protected opinion speech not because they are vague or judgmental but because they are speculative: The test is whether the statement is properly understood as purely speculation or, alternatively, implies that the speaker or writer has concrete facts that confirm or underpin the truth of the speculation. The former is protected as opinion; the latter is taken as an indirect assertion of truth. *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (2004).

E. Job Referenced and Blacklisting Statutes

Alaska does not have law relevant to this topic.

F. Non-Disparagement Clauses

Alaska does not have law relevant to this topic.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

In *State v Beard*, 960 P 2d 1 (1998), Beard worked as a State Department of Transportation (DOT) employee, and in 1985 he became the Alaska Public Employees Association (APEA) building representative. Beard suspected that several of his co-workers and supervisors were violating DOT personnel rules such as falsifying time sheets and leave slips, and misusing state time and property. Beard claimed that after he made these allegations his supervisors began a purposeful campaign to force him off the job. The Alaska Supreme Court held that an employee who did nothing more than her job required, which was to supervise and evaluate the plaintiff's performance, could not be held liable for intentional infliction of emotional distress. *Cameron v. Beard*, 864 P.2d 538, 550 (Alaska 1993).

The elements necessary for establishing a prima facie case of intentional infliction of emotional distress are: (1) the conduct is extreme and outrageous, (2) the conduct is intentional or reckless, (3) the conduct causes emotional distress, and (4) the distress is severe. *Cameron*, 864 P.2d at 548, citing *Teamsters Local 959 v. Wells*, 749 P.2d 349, 357 (1988). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Cameron*, 864 P.2d at 548. However, the court also held that a reasonable juror could find that a supervisor's threats, coupled with his behind the scenes effort to collect evidence of disruptive conduct by the plaintiff, is sufficiently outrageous to permit recovery for an intentional infliction claim. *Id.* at 549.

Alaska has adopted the definition of "outrageous behavior" found in RESTATEMENT (SECOND) OF TORTS § 46, cmt d., which "explains that '[t]he liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good filing down.'" *Maddox v. Hardy*, 187 P.3d 486,

497, fn 42 (2008).

See also, *King v. Brooks*, 788 P.2d 707, 711 (1990) (holding that employee stated a prima facie intentional infliction claim against his supervisor where the supervisor had pursued a “two- year private vendetta” against the employee, causing him substantial emotional distress).

B. Negligent Infliction of Emotional Distress

In *Norcon, Inc. v. Kotowski*, 971 P.2d 158 (1999), Kotowski was employed to help with the Exxon Valdez oil spill clean-up. Kotowski alleged that during her second week of employment, the general foreman kissed her on the lips, patted her on the bottom, and asked “how’s it going, babe?” Two days later, she approached the general foreman about her work assignment. He invited her to his room, where they drank a glass of whiskey, he gave her the afternoon off, and asked her to return to his room that evening for a party. The foreman suggested they could discuss her employment at that time. Kotowski reported this incident to the executive in charge of cleanup and explained that the foreman had a reputation for granting employment preferences in exchange for sexual favors. The executive provided Kotowski with a tape recorder and promised her amnesty from being fired should there be any inappropriate conduct during the party.

During the party, Kotowski left the room to use the bathroom. When she returned, the general foreman was alone in the room wearing just his underwear and the lights were out. He then invited Kotowski to spend the night. Kotowski left and delivered the tapes the following day to the executive’s office. Another executive asked the union steward to write Kotowski up for insubordination, which he did. Shortly thereafter, Kotowski was interrogated for approximately six hours. Two days later, Kotowski requested permission to leave the site, which was granted. As a result, she was terminated for leaving work without permission and for breaking camp rules, most notably for drinking alcohol at the foreman’s party. *Norcon*, 971 P.2d at 161-63.

Addressing Kotowski’s negligent infliction of emotional distress claim, the court held that the evidence supported the jury finding of intentional infliction of emotional distress, which subsumed the negligent infliction of emotional distress claim and required no proof of physical injury. *Norcon*, 971 P.2d at 173.

In *Schack v. Schack*, 414 P.3d 639 (2018) The decedent's family members did not state a valid NIED claim under the bystander theory of liability because existing Alaska law did not permit recovery when the tortfeasor and the injured relative were the same person.

VIII. PRIVACY RIGHTS

A. Generally

In *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1132 (1989), the Alaska Supreme Court held that the state constitution guarantees employees’ right to privacy. The court noted that AS 18.80.220 makes it unlawful for employers to inquire into sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, age, race, religion, color, or national origin in connection with prospective employment, unless based upon a bona fide occupational qualification. *Luedtke*, 768 P.2d at 1132. Further, there is a common law right to privacy. *Id.* at 1133. The *Luedtke*

court declined to extend a constitutional right to privacy to prohibit action by private parties after determining that the parties had not established that article I, § 22 of the Alaska Constitution demonstrated an intent to proscribe private action. *Luedtke*, 768 P.2d at 1130.

See also, Miller v. Safeway, 102 P.3d 282, 288-89 (2004) (holding that state action is required for employee's constitutional privacy cause of action against private supermarket employer who fired employee after he refused to cut his hair, and therefore employee's action was subject to dismissal).

B. New Hire Processing

1. Eligibility Verification and Reporting Procedures

Alaska follows federal law: U.S. employers are required by law to verify the employment authorization of all workers they hire, regardless of the workers' immigration status. Employers who hire or continue to employ individuals knowing that they are not authorized to be employed in the United States, or who fail to comply with employment authorization verification requirements, may face civil and, in some cases, criminal penalties. Form I-9, Employment Eligibility Verification, must be completed for each newly hired employee, including U.S. citizens, permanent residents, and temporary foreign workers, to demonstrate the employer's compliance with the law and the employee's work authorization.

2. Background Checks

Alaska has not passed a law limiting employer use of criminal records in hiring or other employment decisions. However, Alaska has published a guide for employers, the *Alaska Employer Handbook*, which covers pre-employment questions about criminal arrests and convictions. The Handbook points out that employers should not use arrests, alone, as a basis for rejecting an applicant. It also states that employers should have a reasonable basis for even asking applicants about their arrest records. Whether or not an employer can legally turn down an applicant based on a conviction will depend on the facts, including the relationship of the offense to the job.

Regarding arrests, Alaska has a statute indicating an individual may not obtain non-conviction information or correctional treatment information. Despite this qualification, all criminal justice information, including information relating to a serious offense, may be provided if needed to determine whether to grant a person supervisory or disciplinary power over a child or dependent adult. ALASKA STAT. §§ 12.62.160 (b)(8), 12.62.160 (b)(9), 12.62.900.

Regarding convictions: There are no Alaska statutes restricting an employer's ability to obtain or use information regarding convictions. However, as discussed above, Alaska limits the release of non-convictions and correctional treatment criminal justice information. ALASKA STAT. § 12.62.160 (b)(9).

C. Other Specific Issues

1. Workplace Searches

In *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547 (2001), the court held that a (municipality's policy subjecting police and fire department employees to random

suspicionless substance abuse testing violated the search and seizure provision of the state constitution when examined under a special needs test, where there was no documented history of substance abuse problems among police or fire department employees.

2. Electronic Monitoring

ALASKA STAT. § 42.20.310 prohibits audio monitoring/recording generally, which is applicable to the workplace: (a) A person may not (1) use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation; (2) use or divulge any information which the person knows or reasonably should know was obtained through the illegal use of an eavesdropping device for personal benefit or another's benefit; (3) publish the existence, contents, substance, purport, effect, or meaning of any conversation the person has heard through the illegal use of an eavesdropping device; (4) divulge, or publish the existence, contents, substance, purport, effect, or meaning of any conversation the person has become acquainted with after the person knows or reasonably should know that the conversation and the information contained in the conversation was obtained through the illegal use of an eavesdropping device. (b) In this section "eavesdropping device" means any device capable of being used to hear or record oral conversation whether the conversation is conducted in person, by telephone, or by any other means; provided that this definition does not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

3. Social Media

Alaska has no statutes, nor instructive case law, regarding the use of social media in the workplace. Employers and employees alike are using social media for business and personal reasons. Consequently, it is critical that both employers and individuals take steps to protect their reputation and to the extent possible ensure that unflattering postings and images are kept off or "wiped off" the web. Companies need to understand that there are risks to viewing employees' or potential employees' online activities. Looking up an applicant's profile could be grounds for a lawsuit if the job seeker claims they were snubbed because of information garnered from the web regarding their race, religion or sexual orientation.

4. Taping of Employees

In *Cowles v. State*, 23 P.3d 1168 (2001), after receiving information that University of Alaska box office manager Lindalee Cowles was stealing cash from ticket sales, the University police, without obtaining a warrant, installed a hidden video camera which recorded her in the act of theft. Cowles contended that the videotape should be suppressed because it was the product of an unlawful search.

The court held that the fact that hidden surveillance videotaping of Cowles was conducted for the purpose of recording illicit conduct, namely Cowles' theft, did not violate her reasonable expectation of privacy. *Cowles*, 23 P.3d at 1172-3. Cowles' activities were observable by the public through an open ticket window and by co-workers circulating through the office. *Id.* at 1173.

5. Release of Personal Information on Employees

ALASKA STAT. § 39.25.080 applies to state employees and requires that personnel records be kept confidential, though public inspection and/or release of information is permitted in limited

circumstances: (1) the names and position titles of all state employees; (2) the position held by a state employee; (3) prior positions held by a state employee; (4) whether a state employee is in the classified, partially exempt, or exempt service; (5) the dates of appointment and separation of a state employee; (6) the compensation authorized for a state employee; and (7) whether a state employee has been dismissed or disciplined for a violation of ALASKA STAT. § 39.25.160(l) (interference or failure to cooperate with the Legislative Budget and Audit Committee). There currently is no statute affording the same confidentiality provisions in the private sector.

All employees are guaranteed access to their personnel files pursuant to ALASKA STAT. § 23.10.430, which requires an employer to permit an employee or former employee to inspect and make copies of the employee's personnel file and other personnel information maintained by the employer concerning the employee under reasonable rules during regular business hours. The employer may require an employee or former employee who requests copies of material under this subsection to pay the reasonable cost of duplication. "Employer" means a person who employs one or more other persons and includes the state, the University of Alaska, the Alaska Railroad, and political subdivisions of the state.

6. Medical Information

In *Risch v. State*, 879 P.2d 358 (1994), the court held that evidence showed that neither the hearing officer who conducted the hearing on the terminated railroad employee's application for unemployment benefits, nor the railroad's counsel, coerced the employee into waiving his confidentiality rights with respect to the results of a drug test that indicated marijuana use, leading to the employee's discharge, and his resulting ineligibility for unemployment compensation. Both the hearing officer and the railroad's counsel appeared to have taken pains to explain possible consequences of the employee's waiver decision to him and to offer him additional opportunity to seek legal advice before making such decision, and the employee was afforded a choice on how to proceed.

7. Restrictions on Requesting Salary History

There are no state restrictions in Alaska that prevent an employer from requesting an applicant's salary history.

IX. WORKPLACE SAFETY

A. Negligent Hiring

Alaska recognizes negligent hiring as independent bases for negligence liability. The theory entails an employer's direct liability for the failure to exercise reasonable care in hiring an employee. *Powell v. Tanner*, 59 P.3d 246, 252 (2002). An employer also has a duty to others to act reasonably in hiring a competent independent contractor. *Sievers v. McClure*, 746 P.2d 885, 991 (1987). A plaintiff must show that the defendant employer failed to exercise reasonable care in hiring, the employee and that the failure to do so was a substantial factor in causing harm to the plaintiff. *Kodiak Island Borough v. Roe*, 63 P.3d 1009, 1011 (2003). For actions arising after 1997, *Kodiak Island* recognized that fault for negligent hiring could be apportioned between the employer and employee to reduce the employer's share of the fault. *Id.* at 1012-1015. While the Alaska Supreme Court has not directly addressed whether ALASKA STAT. § 09.17.080's apportionment scheme supersedes the common law doctrine of respondeat

superior, the court has assumed in dicta that respondeat superior continues to apply even where both the employer and employee are named parties and have their fault apportioned. *See, Pagenkopf v. Chatham Elec., Inc.*, 165 P.3d 634 (2007). In *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211 (1991), a mother brought action on behalf of her child who was allegedly abused by a church employee. The court held that in selecting an employee, a master must exercise a degree of care commensurate with the nature and danger of the business in which he is engaged and the nature and grade of service for which the servant is intended. *Id.* at 1221, *quoting* 57 C.J.S. *Master & Servant* § 559, at 271 (1948). The church was required to use a relatively high level of care in selecting employees who would provide care for young children whose parents were attending church services. *Broderick*, 801 P.2d at 1221.

B. Negligent Supervision/Retention

Alaska recognizes the actionable failure to exercise due care in supervising persons under the employer's direction and control. *Powell v. Tanner*, 59 P.3d 246, 252 (2002). As noted above, under ALASKA STAT. § 09.17.080, an employer will only be liable for its own percentage of fault based on negligent hire, entrustment, or supervision. *Kodiak Island Borough v. Roe*, 63 P.3d 1009 (2003) (dicta). However, respondeat superior would offer a separate basis for liability against the employer; see Section X. A., *infra*.

C. Interplay with Workers' Comp Bar

The exclusive remedy doctrine is alive and well in Alaska. Under ALASKA STAT. § 23.30.055, an injured worker cannot sue his employer for anything other than workers' compensation benefits unless there is an intentional tort with intent to injure. *See, Wright v. Action Vending Co., Inc.*, 544 P.2d 82 (1975). Similarly, an injured worker cannot sue a co-worker unless that co-worker had committed an intentional tort with intent to injure. *See, Elliott v. Brown*, 569 P.2d 1323, 1327 (1977). A third party may also be able to avoid liability to a worker if acting in a "loaned servant" type situation where a worker is leased to the employer. *See, Ruble v. Arctic General, Inc.*, 598 P.2d 95 (1979). There is an intentional tort exception, and the court has held that an employer's violation of safety standards constitutes an intentional tort if the employer knowingly subjects an employee to a dangerous process with knowledge that harm to the employee will be a substantial certainty.

Under ALASKA STAT. § 09.17.080(a) a third-party tortfeasor is only required to pay for its percentage of fault. An employer's fault can be presented to a jury pursuant to Alaska Civil Rule 14(c). The employer's lien for workers' compensation paid and payable is reduced by the employer's percentage of fault pursuant to ALASKA STAT. § 23.30.015(g).

D. Firearms in the Workplace

Employers may prohibit firearms in secured restricted access areas, from vehicles leased or owned by the employer, and from employer-owned parking lots within 300 feet of a secured restricted access area that does not include common areas with entrance ways open to general public. Employers must post conspicuous signs at the entrances to such secured restricted access areas and any affected parking lots regarding prohibition of firearms in those places.

Employers may not prohibit an employee who has a federal or state legal right to possess a

firearm from possessing a firearm while in a motor vehicle, nor from storing a firearm that is locked in the employee's vehicle other than in secured restricted access parking lots as described above. ALASKA STAT. §18.65.800.

E. Use of Mobile Devices

There is no caselaw or statute in Alaska regarding the use of mobile devices in the workplace.

X. TORT LIABILITY

A. Respondeat Superior

Respondeat superior imposes vicarious liability for the employee's negligent and intentional torts if they were committed within the scope of employment. *Taranto v. North Slope Borough*, 909 P.2d 354, 358 (1996). Alaska follows the factors set out in the RESTATEMENT (SECOND) OF AGENCY, Sections 228 and 229, as relevant considerations in the fact-specific inquiry of determining whether an employee acts within the scope and course of his employment. *Id.* at pp. 358, 359.

B. Tortious Interference with Business/Contractual Relations

In *Knight v. Am. Guard & Alert, Inc.*, 714 P.2d 788 (1986), an employee brought suit against the security company who had fired him, as well as the pipeline operator that the company was guarding, for tortious interference with his employment contract. The court held that the elements of this tort are proof that (1) a contract existed, (2) the defendant knew of the contract and intended to induce a breach, (3) the contract was breached, (4) the defendant's wrongful conduct engendered the breach, (5) the breach caused the plaintiff's damages, and (6) the defendant's conduct was not privileged or justified. *Id.* at 793, citing *Bendix Corp. v. Adams*, 610 P.2d 24, 27 (1980). The court held that the pipeline operator's actions, in merely concurring in the decision to terminate the employee which had already been made by the security guard's employer, did not amount to playing "material and substantial part" in causing the employee's loss. *Knight*, 714 P.2d at 793-94.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

In *Data Mgmt., Inc. v. Greene*, 757 P.2d 62 (1988), Data Management employed James Greene and Richard Van Camp. The parties signed a contract containing a covenant not to compete. The covenant provided that the former employees would not compete with Data Management in Alaska for five years after termination. Subsequently, Data Management filed suit against the employees for breach of the covenant not to compete. Data Management sought a preliminary injunction prohibiting the former employees from rendering computing services to certain named individuals, and the preliminary injunction was granted. The superior court then granted summary judgment in favor of the former employees, finding that the non-compete covenant was not severable and wholly unenforceable.

The court held that if an overbroad covenant not to compete can be reasonably altered to render it enforceable, the court shall do so unless it determines covenant was not drafted in good faith, with the burden of proving good faith being on the employer. *Data Mgmt., Inc.*, 757 P.2d at 64. *See also*,

Metcalf Inv., Inc. v. Garrison, 919 P.2d 1356 (1996) (restrictive agreement upheld, even though it was a verbal agreement without additional consideration).

B. Blue Penciling

See, Data Mgmt., Inc. v. Greene, 757 P.2d 62 (1988) (“Blue pencil” approach to overbroad covenants not to compete, which allows court to delete words if the covenant could become enforceable by doing so, is too mechanical in that it values wording of contract over its substance).

C. Confidentiality Agreements

Alaska does not have law relevant to this topic.

D. Trade Secrets Statute

ALASKA STAT. § 45.50.592 grants authority to the attorney general to serve upon a person whom he or she believes to be in possession of document evidence that is relevant to an investigation authorized in ALASKA STAT. § 45.50.590 an investigative demand requiring the person to produce the documentary material and permit inspection and copying. However, ALASKA STAT. § 45.50.592(e) states “material that contains trade secrets may not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing the material.”

E. Fiduciary Duty and Other Considerations

None reported at this time.

XII. DRUG TESTING LAWS

A. Public Employers

In *Anchorage Police Dep’t Employees Assoc. v. Municipality of Anchorage*, 24 P.3d 547 (2001), police and fire department employees challenged a policy subjecting them to suspicionless substance abuse testing upon job application, promotion, demotion, transfer, after a traffic accident, and at random times. The policy only applied to employees in “public safety positions,” or one “having a substantially significant degree of responsibility for the safety of the public where the unsafe performance of an incumbent could result in death or injury to self or others.”

The court upheld the policy in relation to testing upon job application, promotion, demotion, transfer, and after a traffic accident but found that random testing violated the Alaska Constitution’s search and seizure clause. Under Article I, § 14, of the Alaska Constitution, “[t]he right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated.” The court has routinely held that this provision affords broader protection than its federal counterpart. The court has also recognized that this provision is inexorably entwined with the right to privacy in Article I, § 22, of the Alaska Constitution.

In relation to the random testing, the court concluded that it placed an increased demand on an employee’s reasonable expectation of privacy and was more intrusive than the other grounds for testing

in that it added an element of “fear and surprise” and created an “unsettling show of authority.” The random tests also affected the balance between the employee and the legitimate governmental interests by reducing the immediacy of the government’s need for the test results as there was “no immediate, job-contextual need to know the results of a randomly drawn urinalysis.” As such, where there was no documented history of substance abuse problems in the police or fire department and no evidence that the government’s needs could not be met through the remaining testing provisions, random drug testing would not be permitted as it violated the search and seizure clause of the Alaska Constitution. *See, Anchorage Police*, 24 P.3d at 559.

B. Private Employers

In *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (1989), two former employees, Paul and Clarence Luedtke, brought action challenging their discharge after they refused to submit to drug screening. Paul was suspended after urinalysis screening was positive for marijuana use. The urinalysis was conducting as part of an overall physical, before Nabors had announced its implementation of a drug testing program. Paul knew the urinalysis would be conducted, but not that a drug screening would be performed. When he was notified of the testing results, Paul was told he would not be allowed back to work until he passed two additional drug tests, scheduled approximately three and seven weeks from the date of the notification. Paul was discharged after refusing to take the additional tests. Clarence became subject to the drug testing policy after it was announced. His name was posted on a listing of employees who were scheduled for testing during their next “R&R” period. He worked a two week on, one week off schedule, and was thus supposed to submit to testing during his week off. He was discharged after refusing to submit to the testing, even though Nabors offered him additional time to “clean up.”

The Alaska Supreme court held the employer’s drug testing program did not violate the employees’ right to privacy, as guaranteed by the state constitution, since constitutional privacy rights do not extend to actions of private parties. *Luedtke*, 768 P.2d at 1130. However, the court stated the right to privacy in the Alaska Constitution “can be viewed . . . as evidence of a public policy supporting privacy,” and concluded that the violation of an employee’s privacy interests by a private employer may violate the implied covenant of good faith and fair dealing. *Luedtke*, 768 P.2d at 1130-33. The court stated that there exists a public policy protecting spheres of employee conduct into which employers may not intrude and “the boundaries of that sphere are determined by balancing a person’s right to privacy against other public policies, such as the health, safety rights, and privileges of others.” *Id.* at 1135-6 (citations and internal quotations omitted). After balancing the employees’ right to privacy against the employer’s interest in maintaining employee safety and performance, the court ruled a private employer may require an employee to submit to drug testing, with two limitations. *Luedtke*, 768 P.2d at 1136-38. First, drug testing must be conducted at a time reasonably contemporaneous with the employee’s work time. *Id.* at 1137. Second, the employee must receive notice of the adoption of a drug testing program, because it is an additional term of employment. *Id.* at 1137. The court ruled that the discharges for refusal to submit to drug testing did not violate the implied covenant of good faith and fair dealing. However, it remanded the grant of summary judgment as to whether Paul’s suspension violated the covenant. *Id.*

XIII. STATE ANTI-DISCRIMINATION STATUTES

A. Employers/Employees Covered

The Alaska Human Rights Act (AHRA), ALASKA STAT. § 18.80.010, *et seq.* prohibits discrimination against an employee on the basis of race, religion, color, sex, physical or mental disability, or national origin and prohibits retaliation based on an employee's report of or participation in investigation into such activity. Although sexual orientation is not included as a protected class in the AHRA, the US Supreme Court held that failing or refusing to hire, discharging, or otherwise discriminating against a person because they are homosexual or transgender is illegal discrimination based on sex under Title VII of the federal Civil Rights Act of 1964 (*Bostock v. Clayton Cty., Ga.*, 2020 WL 3146686, at *7 (U.S. June 15, 2020)). ALASKA STAT. § 18.80.300(5) defines an "employer" as "a person, including the state and a political subdivision of the state, who has one or more employees in the state but does not include a club that is exclusively social, or a fraternal, charitable, educational, or religious association or corporation, if the club, association, or corporation is not organized for private profit."

ALASKA STAT. § 18.80.300(4) defines an "employee" as "an individual employed by an employer but does not include an individual employed in the domestic service of any person."

B. Types of Conduct Prohibited

1. Gender Discrimination

In *ERA Aviation, Inc. v. Lindfors*, 17 P.3d 40 (2000), Lindfors, a former dispatcher and co-pilot, for ERA filed a complaint with the Alaska Human Rights Commission (AHRC), alleging that she had not received a promotion because she was a woman. Several months after resigning her position, Lindfors also filed suit, alleging gender discrimination and retaliation for filing the complaint with the AHRC. *Id.* at 42 (note *ERA Aviation* was superseded by statute related to exemptions for "Professional Employee[s]" under the Alaska Wage and Hour Act as stated in *Moody v. Royal Wolf Lodge*, 339 P.3d 636, 640 (Alaska 2014)).

The court held that in cases with no direct evidence of discriminatory intent, a three-part "pretext" analysis should be performed. Under this analysis, the plaintiff must demonstrate a prima facie case of discrimination in order to "eliminate [] the most common nondiscriminatory reasons for the plaintiff's rejection." *ERA Aviation*, 17 P.3d at 44, citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). If the plaintiff meets this requirement, the burden of production (but not the burden of persuasion) shifts to the defendant, who must articulate a legitimate, non-discriminatory reason for the employment action. *ERA Aviation*, 17 P.3d at 44, citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-507 (1993). The burden then shifts back to the plaintiff to prove that the defendant's stated reason was merely a pretext for discrimination. *ERA Aviation*, 17 P.3d at 44, citing *Burdine*, 450 U.S. at 256. The question of whether the "plaintiff has proven 'that the defendant intentionally discriminated against [her]'" based on her gender then is submitted to the trier of fact. *ERA Aviation*, 17 P.3d at 44, citing *Hicks*, 509 U.S. at 511.

However, if there is direct evidence of discrimination, plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Desert Palace, Inc.*

v. Costa, 539 U.S. 90, 101-102 (2003). *See also, Smith v. Anchorage School District*, 240 P.3d 834 (2010)

Having upheld the jury verdict on the plaintiff's discrimination claim, the court then addressed the award of \$725,000 in punitive damages. Based on its prior ruling in *Norcon, Inc. v. Kotowski*, 971 P.2d 158 (1999), the court concluded that this award was excessive and reduced it to \$500,000. *Era Aviation*, 17 P.3d at 48-49. In doing so, the court focused on the nature, magnitude, and flagrancy of the employer's conduct, the importance of the policy that was violated, the relationship between the compensatory and punitive damages, and the employer's wealth. *Id.* at 49.

In *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655 (2006), the Alaska Supreme Court explained that, in a mixed motive case, Alaska courts have "declined to strictly apply the federal 'direct evidence' requirement." *Mahan v. Arctic Catering, Inc.*,

[A] plaintiff in a mixed-motive case must at least offer either direct evidence of prohibited motivation or circumstantial evidence strong enough to be functionally equivalent to direct proof.

To meet this burden, the plaintiff in a mixed-motive case must present evidence of "conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting on the discriminatory attitude." If that evidence "is sufficient to permit the fact finder to infer that [the discrimination] was more likely than not a motivating factor in the employer's decision," then the plaintiff may recover "unless the employer [can] establish[] by a preponderance of the evidence that [it] would have taken the same action without consideration of the impermissible [discrimination.]" In a mixed- motive case, then, the claimant must go beyond establishing the existence of a potential retaliatory motive by adducing strong evidence – evidence akin to direct proof -- that tends to establish the improper motive's substantial contributing role.

Id. at 662-63.

See also, Miller v. Safeway, Inc., 102 P.3d 282, 293 (2004) (holding that under Title VII it is not unlawful for an employer to institute a sex-based grooming policy that treats men and women differently).

2. Racial Discrimination

In *Miller v. Safeway, Inc.*, 102 P.3d 282 (2004), Miller was an Athabascan Indian and a member of the Kenaitze tribe. Miller had worn his hair shoulder length or longer most of his life. Miller felt that his long hair was an expression of his natural personality, his spirituality and his ties with Alaska Native tradition. He was hired to work as a sales clerk for a Carrs supermarket in the Oaken Keg, the section of the store that markets liquor. The store manager who hired Miller informed him that he would be allowed to keep his hair long so long as he kept it tied back. However, the Carrs dress code policy stated that male employees' hair could be no longer than collar length. Subsequently, Safeway acquired Carrs, and the Oaken Keg store where Miller worked was scheduled to close. The employees were informed that they would have a job in either the Soldotna or Kenai Carrs stores. Miller expected that he would be

transferred to one of these other stores. According to Miller, he received regular job evaluations in which his performance was judged good to excellent in every respect. Miller was later informed that if he wanted to transfer to another store, he would have to cut his hair. Miller refused to cut his hair, and Safeway then terminated Miller.

Miller filed suit, alleging racial, religious, and gender discrimination in violation of AS 18.80.220. *Miller*, 102 P.3d at 286. The Alaska Supreme Court held that the AHRC, AS 18.80.220, is intended to be more broadly interpreted than federal law to further the goal of eradicating discrimination. *Miller*, 102 P.3d at 290. Under Title VII of the Civil Rights Act of 1964 and AS 18.80.220, an employee may bring both a disparate treatment and a disparate impact claim of employment discrimination. *Id.* Miller asserted both theories of discrimination. *Id.*

The court first considered the disparate treatment claim. The court applied the three-part pretext analysis adopted by the United States Supreme Court when the employee is unable to provide direct evidence that the employer acted with discriminatory intent. *Miller*, 102 P.3d at 290-91. Under the three-part analysis, the employee carries the initial burden of establishing a prima facie case of racial discrimination. *Id.* at 291, *citing Raad v. Alaska State Comm'n for Human Rights*, 86 P.3d 899, 904 (2004). The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason why the employee was discharged. *Miller*, 102 P.3d at 291. The final stage of the test shifts the burden back to the employee to show that the employer's stated for the discharge was in fact pretext. *Id.* See also *Perkins v. Doyon Universal Services, Inc.*, 151 P.3d 413, 416 (2006).

To show that Safeway terminated him with intent to discriminate, Miller first had to meet the threshold requirement of demonstrating a prima facie case by a preponderance of the evidence. *Miller*, 102 P.3d at 291, *citing St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). Miller had to show that: (1) he is a member of a protected class under the statute; (2) he was qualified for the position; (3) he suffered adverse employment action, despite these qualifications; and (4) the employer treated him less favorably than other qualified persons. *Miller*, 102 P.3d at 291. The court held that Miller did not present evidence that he was treated less favorably than non-Native male employees with long hair. *Id.*

Regarding the disparate impact claim, the court stated that in order to present a prima facie case of discrimination, an employee must show "that a facially neutral employment act, practice, or policy has a significant discriminatory impact on a protected group." *Miller*, 102 P.3d at 291, *citing Thomas v. Anchorage Tel. Util.*, 741 P.2d 618, 628 (1987). Due to the inadequacy of Miller's evidence, the court held that it need not decide whether a grooming policy pertaining to hair length would amount to impermissible discrimination if it were shown to have a disproportionate impact on Alaska Native males. *Miller*, 102 P.3d at 292. The court concluded that Miller did not present evidence sufficient to raise an inference of racial discrimination under AS 18.80.220(a)(1). *Miller*, 102 P.3d at 290. See also, *Raad v. Alaska State Comm'n for Human Rights*, 86 P.3d 899 (2004) (applying three-part pretext *McDonnell Douglas* analysis to claim of national origin discrimination); *Sengupta v. Univ. of Alaska*, 21 P.3d 1240 (2001) (applying mixed motive analysis to 42 U.S.C. § 1981 claim and Title VII claim of race and national origin discrimination and retaliation; holding that the plaintiff may sustain the threshold burden for a mixed motive claim by presenting circumstantial evidence if such evidence is directly linked to the alleged discriminatory attitude).

3. Religious Discrimination

In *Miller v. Safeway, Inc.*, 102 P.3d 282 (2004), Miller contended that his employer, Safeway, discriminated against him when it terminated him for expressing his religious beliefs through his hairstyle. The Alaska Supreme Court followed the approach employed by the Ninth Circuit Court of Appeals in Title VII cases, as articulated by *Opuku-Boateng v. State*, 95 F.3d 1461 (9th Cir.1996). *Miller*, 102 P.2d at 292. The Ninth Circuit's approach requires the plaintiff to demonstrate that: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; and (3) he or she suffered an adverse consequence for failing to comply with the conflicting employment requirement. *Id.* (citations omitted). Once these elements have been established, the burden shifts to the employer to show that it could not accommodate the plaintiff's religious beliefs without undue hardship. *Id.*, citing *Grant v. Joe Myers Toyota, Inc.*, 11 S.W.3d 419, 423 (2000). Because Miller did not inform Safeway of his religious beliefs or give notice of the fact that his hairstyle was tied to his spiritual beliefs, he did not satisfy the second requirement. *Miller*, 102 P.2d at 292-93. The court affirmed the superior court's grant of summary judgment on this issue.

See also, *Raad v. Alaska State Comm'n for Human Rights*, 86 P.3d 899, 908 (2004) (holding that a Muslim teacher failed to establish prima facie claim of religion discrimination in connection with school district's failure to hire her for any of 31 teaching positions, as there was no evidence any of the principals knew her religion and her religion was not readily apparent).

4. Sexual Harassment

(a) Quid pro quo harassment

i. Prima facie case

In *French v. Jadon, Inc.*, 911 P.2d 20 (1999), French, a cocktail waitress, was fired after calling in sick. French admitted that she had been late on several occasions but sued the employer, alleging that she had actually been terminated because she refused to date her supervisor's brother or to engage in "unethical and illegal activities." *Id.* at 23.

The court held that ALASKA STAT. § 18.80.220(a)(1) prohibits quid pro quo harassment, which is established when a plaintiff can demonstrate that "a defendant's statements or action . . . indicate that plaintiff's continued employment, or receipt of other employment benefits, was contingent on plaintiff granting sexual favors." *French*, 911 P.2d at 27 (citation omitted). Because the employer offered a legitimate basis for the termination, and French provided only personal guesses and opinions as to why she was fired, the court upheld summary judgment dismissing the claim. *Id.* at 27.

Alaska law does not distinguish between same-sex and opposite-sex sexual harassment.

ii. Vicarious liability

In *Norcon, Inc. v. Kotowski*, 971 P.2d 158 (1999), Kotowski was employed to help with the Exxon Valdez oil spill clean-up. Kotowski alleged that during her second week of employment, the general foreman kissed her on the lips, patted her on the bottom, and asked "how's it going, babe?" Two days later, she approached the general foreman about her work assignment. He invited her to his room,

where they drank a glass of whiskey, he gave her the afternoon off, and asked her to return to his room that evening for a party. The foreman suggested they could discuss her employment at that time. Kotowski reported this incident to the executive in charge of cleanup and explained that the foreman had a reputation for granting employment preferences in exchange for sexual favors. The executive provided Kotowski with a tape recorder and promised her amnesty from being fired should there be any inappropriate conduct during the party.

During the party, Kotowski left the room to use the bathroom. When she returned, the general foreman was alone in the room wearing just his underwear and the lights were out. He then invited Kotowski to spend the night. Kotowski left and delivered the tapes the following day to the executive's office. Another executive asked the union steward to write Kotowski up for insubordination, which he did. Shortly thereafter, Kotowski was interrogated for approximately six hours. Two days later, Kotowski requested permission to leave the site, which was granted. As a result, she was terminated for leaving work without permission and for breaking camp rules, most notably for drinking alcohol at the foreman's party. *Norcon*, 971 P.2d at 161-63.

Addressing Kotowski's claim of quid pro quo harassment, the court indicated that it would view a supervisor's or management-level employee's conduct as occurring within the scope of employment where there was a tangible alteration to the conditions or terms of plaintiff's employment. *Norcon*, 971 P.2d at 172 n.16, 172 (1999) (relying on *Faragher v. City of Boca Rotan*, 524 U.S. 775 (1998)). Because quid pro quo harassment generally occurs within the scope of a supervisor's employment, the court concluded that such conduct will be attributable to the employer and punitive damages may be awarded. *Norcon*, 971 P.2d at 174.

(b) Hostile Work Environment

i. Prima facie case

In *French v. Jadon, Inc.*, 911 P.2d 20 (1999), the Alaska Supreme Court also held that AS 18.80.220(a)(1) prohibits hostile work environment harassment. Relying on *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the court established that hostile work environment harassment exists where the plaintiff demonstrates that the behavior in question is sufficiently severe or pervasive enough to alter the conditions of the plaintiff's employment and creates a discriminatory hostile work environment. *French*, 911 P.2d at 28. The court specifically adopted the *Harris* standard, requiring the alleged conduct to be both objectively and subjectively abusive and hostile. *French*, 911 P.2d at 30.

ii. Vicarious liability

In *VECO, Inc. v. Rosebrock*, 970 P.2d 906 (1999) (overturned on other grounds), Rosebrock alleged that during the six weeks that Rosebrock worked on the North Slope for VECO a supervisor sexually propositioned her and made several explicit comments about her breasts, and a co-worker sexually assaulted her. Rosebrock complained to a different supervisor and showed her bruises from the co-worker's assault to a third party. Shortly thereafter, Rosebrock was terminated. *Id.* at 908-09. A jury found the employer vicariously liable for the supervisor's harassing conduct.

Relying on J. Marshall's concurrence in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), the

court held that an employer may be held vicariously liable for the hostile work environment created by a supervisor who has direct authority over the plaintiff. Vicarious liability will not be found where the supervisor in question does not actually supervise the plaintiff. Instead, that person will be treated as a “co-worker.” A supervisor is an individual who “serves in a supervisory position and has corporate authority to affect the terms and conditions of the employees he supervises” or who “has the authority to hire, fire, promote, discipline, or in any other manner affect the terms or conditions of an employee’s employment.” *Id.* at 916.

The court concluded that vicarious liability for a direct supervisor’s conduct could occur whether or not a management-level employee knew or should have known about the harassment and whether or not the supervisor was acting within the scope of his or her employment. The court based its conclusion on the belief that harassment by supervisors is made more serious and less likely to be reported because the supervisor’s actions are “understood to be clothed with the employer’s authority.” *VECO*, 970 P.2d at 914. The court further noted that the affirmative defense to vicarious liability as established by the U.S. Supreme Court in *Burlington Indus. v. Ellerth*, 524 U.S. 742, (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, (1998) were “supportive of the views” expressed by the Alaska Supreme Court. Despite this conclusion, the court reserved consideration of whether the defense should be adopted under the state law as it was not raised in the present appeal. *VECO*, 970 P.2d at 914 n.18.

The court also found that an employer generally will not be held vicariously liable for the creation of a hostile work environment by a co-worker. But liability may be established where a supervisor has actual knowledge of such harassment and fails to take proper remedial action. *VECO*, 970 P.2d at 915.

The court concluded that an award of punitive damages against an employer may be based on a theory of vicarious liability in the following circumstances:

- (a) the [employer] authorized the doing and the manner of the act, or
- (b) the [supervisor] was unfit and the [employer] was reckless in employing him, or
- (c) the [supervisor] was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the [employer] or a managerial agent of the principal ratified or approved the act.

VECO, 970 P.2d at 923 (adopting RESTATEMENT (SECOND) OF AGENCY § 217C). The court also indicated that it would extend liability for punitive damages to include the conduct of an employee who is not employed in a managerial capacity but who is acting within the scope of employment. However, the court refused to extend vicarious liability for punitive damages to allow recovery when a supervisory employee is acting outside the scope of employment. *VECO*, 970 P.2d at 924. It appears that under hostile work environment harassment, the employer must have knowledge of the conduct and have or approved of it in some manner. *Id.* at 923.

See also, *Ellison v. Plumbers & Steam Fitters Union Local 375*, 118 P.3d 1070, 1076-77 (2005) (holding that under ALASKA STAT. § 18.80.220 a union may only be liable on account of employer's discriminatory harassment when the harassed employee asks the union to take action within its representative capacity and the union decides not to pursue the complaint for discriminatory reasons and an aiding and abetting liability claim arises when the actor "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other") citing RESTATEMENT (SECOND) OF TORTS § 876 (1979).

5. Physical or Mental Disabilities

In *Moody-Herrera v. State Dep't of Natural Res.*, 967 P.2d 79 (1998), Moody had a substantial hearing disability and requested several accommodations throughout her employment. The employer provided special telephone accommodations, a fisheye mirror so she could see people entering her work space, an amplified fire alarm, staff who could assist her during an emergency evacuation, ear protection, special equipment training, and written expectations of job performance. The employer also consulted with Moody's counselor, union representatives, and family members, allowed almost unlimited leave in 1991, provided additional training, and offered her a job with simpler duties at the same pay and benefit level for 1992. *Id.* at 81. During the previous year, a supervisor had noted several problems with Moody's job performance, including tardiness, production backlog, excessive sick leave, failure to prioritize tasks, failure to work independently, and inability to use a computer program necessary for the job. During Moody's absences throughout 1990 and 1991, another employee was able to perform Moody's position in half the time. *Id.* at 80-81. After Moody was fired in April, 1992, she sued the employer, alleging disability discrimination.

The court concluded that ALASKA STAT. § 18.80.220 imposed a duty on employers to reasonably accommodate a disabled employee. *Moody-Herrera*, 967 P.2d at 86. In doing so, the court adopted the prima facie case for a disability claim under the federal Americans with Disabilities Act and the Rehabilitation Act. Thus, a plaintiff must demonstrate that he or she has a disability within the meaning of the statute, could perform the essential function of the position either with or without reasonable accommodation, and suffered an adverse employment decision as a result of the disability. *Moody-Herrera*, 967 P.2d at 88. The court noted that under the facts of this case, it was clear that the employer had made "extraordinary efforts to accommodate Moody" and affirmed the trial court's dismissal of the suit. *Id.*

In *Grant v. Anchorage Police Dep't*, 20 P.3d 553 (2001), Grant was terminated from the Anchorage Police Department ("APD") based on a physical deterioration from a gunshot wound to his hand. This deterioration prevented him from performing the necessary physical duties of a police officer. Grant admitted as much when he applied for permanent occupational disability from the Retirement Board. Grant sued APD, alleging disability discrimination.

The trial court dismissed this claim on the grounds of collateral estoppel, finding that Grant's statements before the Retirement Board precluded him from now claiming that he could perform the physical duties of a police officer. The Supreme Court overruled the trial court, concluding that there was not "an identity of issues between the two proceedings." The court based this conclusion on the fact that, before the Retirement Board, the plaintiff did not concede that he could not perform his job if a reasonable accommodation was made. Such a finding is necessary under ALASKA STAT. § 18.80.220.

Grant, 20 P.3d 553, citing *Moody-Herrera*, 967 P.2d at 79. The plaintiff did, however, establish that he could not make an arrest, which was one of his assigned duties. Because the Retirement Board had not considered the issue of reasonable accommodation, the plaintiff could still litigate this issue. *Grant*, 20 P.3d 553, (relying on *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999)). Thus, the disability discrimination claim was not barred by collateral estoppel.

See also, Anchorage Municipal Code 5.20.010 - 5.20.040 (prohibiting discrimination in the workplace based on physical or mental disability); *Goodman v. Fairbanks N. Star Borough Sch. Dist.*, 39 P.3d 1118 (2001) (holding that a “cause of action for failure to accommodate arises ‘when the employee receives unequivocal notice of the facts giving rise to his [or her] claim or a reasonable person would know of the facts giving rise to [the] claim.’”); *Welsh v. Municipality of Anchorage*, 676 P.2d 602 (1984) (alcoholism is not a physical disability as provided by the Anchorage Municipal Charter).

6. Retaliation

ALASKA STAT. § 18.80.220(a)(4) prohibits an employer from discriminating against an employee for opposing any employment practices that are prohibited by ALASKA STAT. §§ 18.80.220 - 18.80.280 or for filing a complaint, testifying, or assisting in a proceeding regarding such practices. See *VECO, Inc. v. Rosebrock*, 970 P.2d 906 (1999)(overturned on other grounds). In *VECO*, the court adopted the following standard under which to demonstrate discriminatory retaliation in the absence of direct evidence of discriminatory intent:

To establish a prima facie case of discriminatory retaliation, a plaintiff must show that (1) she engaged in an activity protected under [ALASKA STAT. § 18.80.220]; (2) her employer subjected her to adverse employment action; (3) there was a causal link between the protected activity and the employer’s action.

970 P.2d at 919, quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 730-31 (9th Cir. 1986). “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.” *VECO*, 970 P.2d at 919. Once a prima facie case is established, the burden then shifts to the employer who must demonstrate that the employment decision was motivated by a non-discriminatory reason; plaintiff is then required to show that such reason is merely a pretext. *Id.*

An employee may also pursue a mixed motive claim as well as a pretext claim, relying on the former where “there is direct evidence that the employer considered a forbidden characteristic in terminating [or disciplining] the plaintiff” and on the latter where there is only circumstantial evidence of a forbidden motive. *VECO*, 970 P.2d at 921. In order to succeed under the mixed motive theory, the plaintiff need not establish that the change in employment was caused solely or primarily by an improper motive; the plaintiff need only demonstrate by a preponderance of the evidence that the plaintiff’s opposition to the prohibited conduct was a causal factor in the employer’s action. *Id.* at 920 n.29, 921.

See also, *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (2004) (holding retaliatory discharge in violation of an explicit public policy gives rise to a tort as well as a contract claim and a mixed-motive instruction should be given where the “plaintiff presents evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged

discriminatory attitude, and that evidence is sufficient to permit the fact finder to infer that that attitude was more likely than not a motivating factor in the employer's decision").

Cf. Bruns v. Municipality of Anchorage, 32 P.3d 362 (2001) (holding that "fear of retaliatory discharge, like futility, bias, or other defects in the administrative process, can make pursuit of administrative remedies difficult or ineffective, and in some circumstances can excuse the employee's failure to exhaust available administrative remedies").

a. Statute of Limitations -- Continuing Violations

In *Sengupta v. Univ. of Alaska*, 21 P.3d 1240 (2001), the University of Alaska terminated the plaintiff, who was a tenured professor. The plaintiff sued, claiming he was terminated in retaliation for constitutionally protected conduct and speech and discriminated against on the basis of race and national origin. The court concluded that the former claim was barred by res judicata, and focused on the discrimination claim.

This claim was based primarily on what the plaintiff believed was a disparity in salary and on the University's refusal to grant the plaintiff's request that his pre-termination hearing be postponed seven to eight months in order to accommodate his health problems (*i.e.*, heightened stress levels). The University argued that this claim was barred by the relevant statute of limitations. In analyzing this claim, the supreme court formally adopted the 'continuing violations' theory, noting that "certain patterns of discriminatory acts against the same employee can preserve a claim as timely that might otherwise be barred by the statute of limitations." The court held that the plaintiff must demonstrate that a discriminatory act occurred within the limitations period and that the timely filed claim (based on the conduct within the limitations period) was closely related to the conduct falling outside of the limitations period. In order to determine whether the claims were closely related, the court focused on three factors: (1) subject matter, (2) temporal proximity, and (3) permanence. The court indicated that permanence was the most important factor as the "'permanent' violation triggers a reasonable person's awareness of the alleged discrimination and the need to assert her rights." Thus, if the plaintiff demonstrates, on a subjective basis, that he knew his rights had been violated at a certain point in time, the limitations period begins to run from that date. The court stressed that the "continuing violations doctrine does not exist to give a second chance to an employee who allowed a legitimate (discrimination) claim to lapse." *Sengupta*, 21 P.3d at 1249 (citation omitted).

C. Administrative Requirements

A person alleging discrimination may file a complaint with the Alaska Human Rights Commission under ALASKA STAT. § 18.80.100(a). Then, the Commission staff investigate the claim, and determine whether substantial evidence exists to support it. If the staff determines the claim is colorable, it attempts to remedy the problem via "conference, conciliation, and persuasion." ALASKA STAT. § 18.80.110. Failing that, the Commission's executive director may choose to refer the complaint for hearing, in which case she issues an accusations and presents it to the Commission. ALASKA STAT. § 18.80.120. "The Commission executive director and her staff control this process throughout: They may use discretion to eliminate claims at the mediation and prosecution stages." *Beegan v. Alaska Dep't of Trans. & Pub. Facilities*, 195 P.3d 134, 139 (2008).

ALASKA STAT. § 18.80.145(b) establishes a system of concurrent jurisdiction between the Alaska

Human Rights Commission and the superior court. Under ALASKA STAT. § 18.80.145(b), “questions left unresolved by the Commission remain open before the superior court: ‘the decision of the commission is binding on the parties to the court action as to all issues resolved in the hearing but not as to any issues not resolved in the hearing.’ ” *Beegan* 195 P.3d at 138, citing ALASKA STAT. § 18.80.145(b).

In *Barnica v. Kenai Peninsula Borough Sch. Dist.*, 46 P.3d 974 (2002), Barnica resigned as a custodian for a local high school based on his belief that his immediate supervisor was allowing female custodians to do less work than he was required to perform and that the supervisor retaliated against him by assigning him even more tasks after he complained. Barnica sued both the school district and his former supervisor, alleging sex discrimination under ALASKA STAT. § 18.80.220, retaliation, and constructive discharge. *Barnica*, 46 P.3d at 975.

The defendants moved for summary judgment, arguing that Barnica failed to exhaust his contractual remedies set forth in the collective bargaining unit, which expressly prohibited discriminatory treatment and contained a four-step grievance procedure ending in binding arbitration. The trial court granted summary judgment, concluding that Barnica was required to exhaust this contractual remedy. *Barnica*, 46 P.3d at 975-76.

In a plurality opinion, the court affirmed the trial court’s order, holding that “a claim subject to an agreement to arbitrate for which an independent statutory judicial remedy is also available must be arbitrated, unless the history and structure of the statute in question indicate that the legislature intended to preclude waiver of the judicial remedy in favor of the arbitral forum.” *Barnica*, 46 P.3d at 977 (relying on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)). After reviewing the Alaska Human Rights Act, ALASKA STAT. § 18.80, *et seq.*, the court concluded there was no such indication in the Act. *Barnica*, 46 P.3d at 977.¹

See also, Casey v. City of Fairbanks, 670 P.2d 1133, 1136 (1983) (holding that an employee must first exhaust his contractual or administrative remedies, or show that he was excused from doing so, before he may pursue a direct judicial action against his employer).

D. Remedies Available

In *Loomis Elec. Protection, Inc. v. Schaefer*, 549 P.2d 1341, 1343 (1976), the court held that the broad language of ALASKA STAT. § 22.10.020(c), now ALASKA STAT. § 22.10.020(i), indicates a legislative intent to authorize an award of compensatory and punitive damages for violations of this chapter, in addition to the illegal employment activities, and ordering back pay as a form of restitution.

In addition, ALASKA STAT. § 09.17.020(h), provides the following caps on punitive damages for actions accruing after August 7, 1997: \$200,000 if the employer has less than 100 employees in the state; \$300,000 if the employer has between 100 and 200 employees; \$400,000 if the employer has between 200 and 500 employees; and \$500,000 if the employer has 500 or more employees in the state.

¹ In April 2011, the United States Supreme Court held that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). This ruling likely extends beyond consumer arbitration agreements; and it is unknown what effect, if any, this decision will have on existing Alaska law.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

ALASKA STAT. § 09.20.037(a) prohibits penalizing an employee for responding to jury duty. If an employer violates the statute, an employee may:

- Bring a civil action to recover:
- lost wages resulting from the violation; or
- other damages resulting from the violation.
- Seek an order requiring the employee's reinstatement.

In *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807 (2005), Reust sued his former employer for retaliatory discharge in violation of the public policy protecting witnesses in legal proceedings against retaliation. The Alaska Supreme Court held that Alaska has an actionable public policy tort for retaliation against a witness in legal proceedings. *Id.* at 813. When an at-will employee is wrongfully discharged, damages are measured by the likely duration of employment had the wrongful discharge not occurred. *Id.* at 818. The court affirmed the superior court's award of punitive damages but reversed its award of economic damages and lost wages because they were excessive. *Id.*

B. Voting

ALASKA STAT. § 15.56.100 prohibits an employer's refusal to allow an employee time off to vote.

C. Family/Medical Leave

In *Municipality of Anchorage v. Gregg*, 101 P.3d 181 (2004), Gregg brought her claim under the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 and similar provisions of the Alaska Family Medical Leave Act, ALASKA STAT. § 39.20.500-.550. The court declined to address the Alaska Act because it does not provide a remedy. *Municipality of Anchorage*, 101 P.3d at 186-87, fn. 6, citing ALASKA STAT. § 39.20.540.

D. Pregnancy/Maternity/Paternity Leave

The federal Family and Medical Leave Act, 29 U.S.C. §§ 2601-265, requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons (the State of Alaska is a "covered" employer). Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

The Alaska Family Leave Act, ALASKA STAT. §§ 39.20.500 -.550 affords further protections, requiring covered employers to provide up to 18 weeks of unpaid, job-protected leave to eligible employees for certain family and medical reasons. Employees are eligible if they have been employed for a covered employer for at least 35 hours a week for at least six consecutive months or for at least 17.5 hours a week for at least 12 consecutive months immediately preceding the leave, and if there have

been at least 21 employees within 50 road miles during any period of 20 consecutive workweeks in the preceding two calendar years.

E. Day of Rest Statutes

Alaska has no statutes requiring a day of rest or observation each week.

Alaskan employers are required to provide break periods of at least 30 minutes for minors ages 14 through 17 who work 5 or more consecutive hours and are going to continue to work. ALASKA STAT. § 23.10.350. Employers are not required to give breaks for employees 18 and over. If an employer allows breaks, and they last less than 20 minutes, the employee must be paid for the break. If the employer allows meal periods, the employer is not required to pay for the meal period if it lasts more than 20 minutes and the employee performs no work during that time. See FLSA.

F. Military Leave

Alaska law provides as follows concerning paid military leave for employees of the state and its political subdivisions: "An employee of the state, or a political subdivision, with the approval of the city council or borough assembly, who is a member of a reserve or auxiliary component of the United States armed forces is entitled to a leave of absence without loss of pay, time, or efficiency rating on all days during which the employee is ordered to training duty, as distinguished from active duty, with troops or at field exercises, or for instruction, or when under direct military control in the performance of a search and rescue mission. The leave of absence may not exceed 16 1/2 working days in any 12-month period. If an employee is called to active duty by the governor, an employee otherwise qualified is entitled to five days leave of absence without loss of pay, time, or efficiency rating. ALASKA STAT. § 39.20.340(a)-(b).

Alaska law also protects employees who are called to duty in the state organized militia, which consists of the Alaska National Guard, the Alaska Naval Militia, and the Alaska State Defense Force. Under ALASKA STAT. §26.05.075, organized militia members who are called to active duty by order of the Governor have reinstatement rights. Members of the Alaska organized militia are entitled to unlimited unpaid leave from their jobs and reinstatement when their leave is over, with the pay, seniority, and benefits they would have enjoyed absent taking military leave. Employees must return to work on the workday following the last day necessary for travel.

An aggrieved employee may bring an action in superior court no sooner than 30 days after notifying the ADLWD. Employees must bring an action within two years after the claim arose. ALASKA STAT. Ann. § 26.05.075(e).

G. Sick Leave

Employers are not required to provide employees with sick leave, unless the employee is entitled to sick leave under FMLA.

H. Domestic Violence Leave

Alaska does not have any laws pertaining to domestic violence leave.

I. Other Leave Laws

Employers are not required to provide employees with leave for vacation or holidays.

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

ALASKA STAT. §§ 23.10.050–23.10.150 establishes minimum wage and overtime pay standards for employment subject to its provisions. The Alaska Minimum Wage Initiative, increased from \$7.75 per hour to \$8.75 per hour beginning on January 1, 2015, and the rate increased again to \$9.75 per hour beginning on January 1, 2016, with an additional increase to \$9.80 per hour on January 1, 2017. Thereafter, the rate will be adjusted either based on inflation, or remain \$1.00 higher than the federal minimum wage, whichever amount is greater. The minimum wage was raised to \$9.84 per hour on January 1, 2018. As of January 1, 2019 the minimum wage was raised again to \$9.89 per hour due to inflation. These standards are generally applicable to all employees. There are a number of professions exempt from these requirements, including but not limited to agriculture, domestic service, voluntary service, newspaper delivery, youth under age 18, bona fide executive, and school bus drivers (requiring at least two times the Alaska minimum wage).

As of January 1, 2021, Alaska's minimum wage is \$10.34. See Alaska Department of Labor and Workforce Development, Labor Standards and Safety Division: Wage and Hour Administration <https://labor.alaska.gov/lss/whhome.htm>.

B. Deductions from Pay

An employer may not make any deductions from an employee's wages for: cash shortages, damage or lost property, the cost of uniforms or necessary equipment, dishonored or bad checks, or any similar deductions.

ALASKA STAT. 23.10.085 does not, however, limit the right of an employer and employee to enter into a written agreement to provide for deductions of monetary obligations of an employee. Requiring or inducing an employee to return or give up any part of the compensation to which the employee is entitled, whether by force, intimidation, or threat of dismissal from employment, or by any other manner, is prohibited. A written agreement for deductions payable to the employer or person acting in the employer's behalf or interest is not valid if it would have the effect of reducing an employee's wage rate below the statutory minimum wage or overtime rates, or if it would require an employee to reimburse the employer for any of the following: (1) the customer's check is returned due to insufficient funds, or any other reason; (2) non-payment for goods or services as a result of theft or credit default; (3) cash or cash register shortages unless the employee admits, willingly and in writing, to having personally taken the specific amount of cash that is alleged to be missing; (4) lost, missing, or stolen property, unless the employee admits, willingly and in writing, to have personally taken the specific property alleged to be lost, missing, or stolen; or (5) damage or breakage costs unless clearly due to willful conduct of the employee and the employee has acknowledged responsibility in writing. Alaska Admin. Code tit. 8, § 15.160

An employer may, with the employee's written consent, make limited deductions from wages as

set forth by the administrative code. *Id.*

C. Overtime Rules

The standard work week for employees shall not exceed 40 hours per week or eight hours per day. Should an employer find it necessary to employ an employee in excess of these standards, overtime hours shall be compensated at the rate of one and one-half times the regular rate of pay; once again, a number of exceptions apply, refer to ALASKA STAT. §§ 23.10.055 and 23.10.060.

In *Fred Meyer of Alaska, Inc. v. Bailey*, 100 P.3d 881 (2004), Bailey was the manager of the home electronics department at a Fred Meyer store. Although he received a weekly salary with bonuses, he did not receive any overtime compensation. Bailey filed suit against his employer for overtime compensation.

The court held that a retail store employee, who worked about 60 percent of his time on non-management tasks and acted as a “role model” for other employees, was performing dual management and non-management roles, and thus was not exempt from overtime pay requirements under the Alaska Wage and Hour Act (AWHA). *Fred Meyer*, 100 P.3d at 884-85. The burden is on the employer to prove beyond a reasonable doubt that an employee is exempt from overtime pay requirements under the AWA. *Fred Meyer*, 101 P.3d at 884, *citing Dayhoff v. Temsco Helicopters, Inc.*, 848 P.2d 1367, 1371-72 (1993). Exemptions from overtime pay requirements under the AWA are to be narrowly construed against the employer. *Fred Meyer*, 100 P.3d at 884, *citing Dayhoff*, 848 P.2d at 1372.

The court held that Bailey’s employer failed to show by clear and convincing evidence that it acted in good faith in classifying Bailey as exempt from overtime pay requirements under the AWA. *Fred Meyer*, 100 P.3d at 887-89. Although the court acknowledged the employer’s review of pay structures, the employer’s expert in a related class action opined that certain employees should not be classified as exempt, and the court found testimony of the human resources vice president to be not credible. *Id.* at 887.

See also, Hutka v. Sisters of Providence in Washington, 102 P.3d 947 (2004) (hospital supervisor conceded that she provided direct care to patients approximately 12 hours per week, and thus she was an exempt employee who was not entitled to overtime compensation under the AWA, due to an AWA provision providing an exemption to a hospital employee whose employment “includes the provision of medical services.”)

D. Time for Payment upon Termination

Employees who are fired, discharged, terminated, or permanently laid off: When an employee is discharged from employment by the employer, no matter the reason, the employer must pay the employee all wages due within 3 working days. ALASKA STAT. § 23.05.140(b).

Employees who quit or resign: When an employee voluntarily quits or resigns employment, the employer must pay the employee by the next regular pay day that is at least three days after the employer received notice of the employee's resignation. ALASKA STAT. § 23.05.140(b).

Employees who are suspended or resigns due to a labor dispute (strike): When an employee

leaves employment as a result of a labor dispute, the employer must pay the employee by the next regular pay day. ALASKA STAT. § 23.05.170.

Employees who are temporarily laid off: When an employee is temporarily laid off, the employer must pay the employee by the next regular pay day. ALASKA STAT. § 23.05.170.

E. Breaks and Meal Periods

Employers in Alaska are required to provide minor employees who work five or more consecutive hours with a 30-minute break before continuing to work beyond the five hour mark. AS §23.10.350 (2019). Employers are not required to provide breaks to employees who have reached the age of majority. However, if a break is provided that is less than 20 minutes, the employee must be paid for the time they were on the break, pursuant to FLSA.

a. Employee Scheduling Laws

Minors may not work more than six days a week. AS §23.10.350 (2019).

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

ALASKA STAT. § 18.35.301 regulates smoking in enclosed areas. Generally the law prohibits smoking in enclosed public areas and workplaces.

Smoking is prohibited throughout the workplace except in designated smoking areas. An employer may designate the entire site as nonsmoking. Any location where smoking is prohibited must conspicuously display a sign that reads “Smoking Prohibited by Law – Fine \$50” and includes the international sign for no smoking. If smoking is allowed within a certain number of feet of the building, a sign must be consciously displayed that reads “Smoking within (number of feet) Feet of Entrance Prohibited by Law – Fine \$50.” Exceptions include the general prohibition of smoking listed under ALASKA STAT. § 18.35.301(d)-(h).

Smoking is allowed in a stand-alone shelter if it meets the requirements outlined in ALASKA STAT. § 18.35.301(h).

Alaska does not have a law protecting smokers from discrimination nor does it have a law protecting employees from discipline or discharge based on their off-duty conduct generally.

B. Health Benefit Mandates for Employers

Alaska does not have law relevant to this topic. Alaska employers should consult prevailing requirements under the federal Affordable Care Act.

C. Immigration Laws

An individual's intent to establish residency, remain indefinitely in Alaska, or to return to Alaska and remain indefinitely is demonstrated through the establishment and maintenance of customary ties indicative of Alaska residency and the absence of those ties in another state or country. 15 Alaska Administrative Code 23.143. Acts that are required by law or contract or are routinely performed by temporary residents of Alaska are not by themselves evidence of residency. An applicant is responsible for providing proof of residency ties. An individual may not become a resident while absent from Alaska.

Physical presence in Alaska is not, by itself, sufficient to establish residency. Before January 1 of the qualifying year, an individual must have taken at least one step beyond physical presence in Alaska to establish residency. Proof of establishing residency and the intent to remain indefinitely in Alaska may include the following:

- a contract to move household goods to Alaska dated prior to the qualifying year (Employer paid moving contracts are not an acceptable tie)
- proof of home ownership, a home purchase contract, rent receipts, or other proof that the individual maintains a principal home in Alaska. (Employer paid housing is not an acceptable tie)
- employment and unemployment records
- school records
- voter registration and voting records
- motor vehicle registration records
- licensing records such as those for hunting and fishing licenses
- court or other government agency records

Alaska Admin. Code tit. 15, § 23.173(g)

D. Right to Work Laws

Alaska is not a right to work state.

E. Lawful Off-Duty Conduct (including lawful marijuana use)

ALASKA STAT. § 17.37.040(d) provides for the medical use of marijuana and Alaska Stat. Ann. §§ 17.38.010 to 17.38.900 authorizes recreational usage of marijuana. However, employers are not required to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace or amend their policies restricting the use of marijuana by their employees. Alaska Stat. Ann. § 17.38.220.

F. Gender/Transgender Expression

Alaska adopted an Executive Order in 2002 prohibiting discrimination in public employment based on sexual orientation only; Alaska does not have law relevant to transgender identity/expression in the workplace. There are presently no comparable protections in the private employment sector. The Ninth Circuit Court of Appeals has found some protections in the 1964 Civil Rights Act for the category of gender identity.

G. Other Key State Statutes/Case Law

1. In 1998, Alaska voters adopted the “Marriage Amendment” to the Alaska Constitution. It provides that “to be valid or recognized in this State, a marriage may exist only between one man and one woman.” In *Alaska Civil Liberties Union v. State of Alaska & Municipality of Anchorage*, 122 P 3d 781 (2005), the Court upheld the Amendment following claims by the ACLU and nine lesbian and gay couples that the State of Alaska and the Municipality of Anchorage’s denial of fringe benefits to their “domestic partners” violated the Alaska Constitution’s right to equal protection. The court concluded the amendment was actually the basis for denying equal protection since it precluded same-sex couples from ever marrying, while unmarried opposite-sex couples could at any time elect to be married and thereby qualify for the benefits. *Alaska CLU*, 122 P. 3d at 786-87. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain the benefits, because they are not prevented by law from marrying. *Id.* at 788. In comparison, the amendment absolutely denies public employees in committed same-sex relationships any opportunity to ever obtain the benefits. *Id.* Since the parties did not address the issue of remedies, the court retained jurisdiction for supplemental briefing. *Id.* at 795. In the meantime, the disputed benefit programs remain in effect. *Id.* It is unclear at this time how the 2013 Supreme Court decision overturning the Defense of Marriage Act (“DOMA”) will impact current Alaska law.

In 2020, a plaintiff sued Alaskan Governor Dunleavy over an alleged denial of benefits from her Permanent Fund Dividend. *Smith v. Dunleavy*, 2020 U.S. Dist. LEXIS 26572 (D. Alaska 2020). On April 15, 2021, the case settled, and Alaska admitted to denying benefits to same-sex military spouses and dependents for five years in violation of a permanent injunction put in place by the 2014 U.S. District Court decision. The state also vowed to no longer use the outdated state law, stop denying military spouses and dependents oil checks going forward and update enforcement regulations.

2. The Occupational Safety and Health Act, Alaska Statutes Section 18.60.089 (1991) and the Wage and Hour Act, ALASKA STAT. § 23.10.135 (1990), contain provisions barring discharge or discrimination against an employee who has filed a complaint or testified as to violations of these two statutes.

3. An employer must pay its employees either semi-monthly or monthly, as elected by the employee. ALASKA STAT. § 23.05.140.

4. If there is a dispute between the employer and the employee regarding wages due, the employer must give the employee written notice to the employee of the wages, or part of the wages, that the employer concedes to be due, and must pay that amount, without condition, within the time required, depending on whether the employee was discharged or voluntarily quit. The employer may retain the disputed amount until the matter is resolved. ALASKA STAT. § 23.05.180.