

SOME RECENT EMPLOYMENT LAW DEVELOPMENTS RELATED TO ALASKA

Presented to the Employment Law Section
of the Alaska Bar Association
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9th Circuit Court of Appeals

Recent case law

1. Title VII preemption of AS 18 fee entitlement: In *Hubbard v. SoBreck*, 531 F.3d 983 (9th Cir. 2008), the 9th Circuit held:

As federal law does not allow the grant of fees to defendants for non-frivolous ADA actions, we must conclude that preemption principles preclude the imposition of fees on a plaintiff for bringing nonfrivolous claims under state law that parallel claims also filed pursuant to the federal law.

This holding conflicts with the Alaska Supreme Court's holding in *Moody-Herrera v. State*, 967 P.2d 79 (Alaska 1998).

2. USERRA suits against state entities/officials: In *Townsend v. University of Alaska*, 2008 WL 4093609 (9th Cir. Sept. 5, 2008), the 9th Circuit held that private USERRA claims against state entities belong exclusively (if at all) in state court, and that USERRA doesn't provide a claim against individual defendants.

Pending issues

Constitutionality of GERA: The 9th Circuit has granted rehearing *en banc* in *State of Alaska v. EEOC*, 508 F.3d 476 (9th Cir. 2008), where the issue is adequacy of the Congressional record of state hostility toward veterans. If the record fails to show state hostility toward high political appointees, is the Governmental Employees Rights Act of 1991, purporting to include those individuals within Title VII protection, constitutional? The 3-judge panel held that Act unconstitutional. The briefing appears at <http://www.akemplaw.com/wiki/2008/09/03/9th-circuit-addresses-the-constitutionality-of-gera/>

District of Alaska

Recent case law

1. The good faith covenant/public policy tort: Judge Beistline has issued a series of orders that, in the last version, permitted an employee to get to the jury on a claim that she was impermissibly dismissed in order to clear way for the supervisor's sweetheart. See various posts on *Johnson v. Fred Meyer Stores*, all linked at <http://www.akemplaw.com/wiki/2008/08/18/dalaska-fred-meyer-loses/>
2. ANCSA shareholder preference: Judge Beistline has held that an ANCSA shareholder hiring preference is not a proxy for race. The case is *Conitz v. Teck Cominco*, which may be found at <http://www.akemplaw.com/wiki/2008/07/22/dalaska-court-upholds-nana-shareholder-preference-at-red-dog/>

The matter is on appeal to the 9th Circuit.

3. Pro se litigants. The local District Court has developed tools to assist *pro se* complainants, and defendants of *pro se* plaintiffs. Federal law requires the court to engage in early scrutiny of *pro se* plaintiffs who request fee waivers. See 28 USC § 915(e)(2), but the local court's scrutiny goes beyond that subset of *pro se* litigants. See <http://www.akemplaw.com/wiki/2008/06/19/dalaska-pro-se-litigants/>

Pending issues

AWHA burden of proof: Did the 2005 amendments to the Alaska Wage and Hour Act (adopting federal definitions for white collar exemptions) change the state law burden of proof – perhaps BARD, *via Fred Meyer v. Bailey*, 100 P.3d 881 (Alaska 2004), to the federal standard (perhaps preponderance)? The issue is before Judge Burgess in *Borge v. Getronics*. The briefing may be found at <http://www.akemplaw.com/wiki/2008/09/04/awha-burden-of-proof-for-exemptions-preponderance-or-beyond-a-reasonable-doubt/>

Alaska Supreme Court

Recent case law

1. Effect of administrative closure of ACHR claims: In *Parson v. State, Dep't of Revenue, AHFC*, 189 P.3d 1032 (Alaska 2008), the Supreme Court held that ASCHR's administrative closure of a Title 18 charge for lack of substantial evidence is not an "acquittal" under AS 18.80.280. That statute provides:

The acquittal of a person by the commission or a court of competent jurisdiction of any alleged violation of this chapter is a bar to any other action, civil or criminal based on the same act or omission.

Several weeks later, Judge Burgess held in *Billingham v. State, DOTPF*, that the Superior Court's affirmance of the Human Rights Commission's dismissal precludes an employee from challenging the validity of a Last Chance Agreement in both her Title VII and Title 18 claims. See <http://www.akemplaw.com/wiki/2008/08/15/dalaska-collateral-estoppel-in-title-vii-and-title-18/>

2. Interest on arbitration award: In *ASEA v. State*, 190 P.3d 720 (Alaska 2008), the Court held that arbitration confirmation actions (at least this one) are contractual in nature, and thus the state's waiver of sovereign immunity for contract claims (in AS 09.50.250) authorizes the award of prejudgment interest against the State from the date of the Award forward. More here: <http://www.akemplaw.com/wiki/2008/08/22/alaska-supreme-court-state-owes-interest-on-arbitration-award/>

3. Comparators: In *Mitchell v. Teck Cominco*, Op. No. 6310 (Alaska Sept. 26, 2008), the Court (*per* Justice Winfree) held that a disciplined employee may look to the employer's subsequent discipline of other employees for comparison under the objective wing of the covenant of good faith and fair dealing. In so ruling, the Court relied on Title VII case law.

The Court also reversed the trial court's summary judgment ruling that the employer had conducted an adequate internal investigation. The employer "conceded that the implied covenant requires some minimal level of fairness to the employee during an employer's investigation," and the supervisor testified "that it would be 'reasonable' to ask an employee being investigated to tell his side of the story and acknowledged that he had not given [the employee] this opportunity." On that evidence, the court found a triable issue of fact on this part of the employee's covenant claim.

Pending issues

1. Mandatory arbitration in non-CBA employment: The Supreme Court has granted a petition for review in *Gibson v. Nye Ford*, in which Superior Court Judge John Suddock ordered arbitration. For more info, go to <http://www.akemplaw.com/wiki/2008/05/19/alaska-supreme-court-will-review-mandatory-arbitration-of-awha-claim/>

NELA's amicus brief is at <http://www.akemplaw.com/wiki/2008/07/22/alaska-supreme-court-nela-submits-amicus-brief-on-shared-costs-in-mandatory-arbitration/>

2. Constitutionality of 2005 retroactivity statute re air crews: In the overtime class action entitled *Harms v. Hageland*, Superior Court Judge Peter Michalski held that the employees had a property interest in receipt of overtime compensation at the end of each pay period, and that the retroactive abolition of that interest violated the Takings Clause. He also held that the 2005 amendment impaired the employees' contract rights.

The \$1.6m settlement is subject to affirmance by the Supreme Court. For more, go to <http://www.akemplaw.com/wiki/2008/08/18/harms-v-hageland-on-appeal/>

