

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

PHILIP BART KENDALL and )  
TERRY RAHLFS, )  
) )  
Plaintiffs, )  
) )  
vs. )  
) )  
THE HOME DEPOT, INC., a )  
foreign corporation authorized to do business )  
in Alaska, and BILLY PARKER, )  
) )  
Defendants. )  
\_\_\_\_\_ )

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**LANE POWELL LLC**

Case No. 3AN- 06-13817 Civil

**ORDER ON HOME DEPOT'S MOTIONS FOR SUMMARY**

**JUDGMENT AGAINST KENDALL**

**I. STATEMENT OF THE CASE**

Plaintiff Phillip Bart Kendall sues his former employer Home Depot, Inc. for breach of the covenant of good faith, breach of employment contract, age discrimination, disability discrimination, retaliatory discharge for taking medical leave, negligent hiring and supervision of Kendall's direct superior, and infliction of emotional distress. Home Depot moves for summary judgment or ARCP 12(b)(6) dismissal of all claims.

## II. FACTS AND PROCEEDINGS

Home Depot operates several retail facilities in Alaska. Mr. Kendall was fifty-four when hired by Home Depot in July of 2002.<sup>1</sup> He became a co-manager in 2003 and full manager of Home Depot's Tudor Road store in June 2005, until his termination in June of 2006.<sup>2</sup> As he judicially admitted in his Complaint, he was an employee-at-will.<sup>3</sup> His employee handbook stated that all employment with Home Depot is at will:

As an associate of The Home Depot, your employment is for no specific period of time, and you have the right to terminate your employment at any time, at your convenience with or without cause or reason. Home Depot has the same right.<sup>4</sup>

Store managers are supervised by the Alaska District Manager. Kendall was initially supervised by Rich Walpole and subsequently by Billy Parker. The District Manager receives assistance from a District Human Resources Manager located in Alaska and reports to a Regional Vice President located in the Lower 48.<sup>5</sup> The District Manager must seek approval from the Company's Employment Practices Director and Regional Human Resources Director before firing a store manager. There was no contractual relationship between Kendall and Parker individually.<sup>6</sup>

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<sup>1</sup> Kendall Aff. ¶ 2.

<sup>2</sup> Parker Aff. 5.

<sup>3</sup> Complaint §I(A.)(5).

<sup>4</sup> Def.'s Mot. Summ. J. Ex. C.

<sup>5</sup> Parker Aff. 1-2 ¶ 2.

<sup>6</sup> Def.'s Mot. Summ. J. of Pl.'s Claims against Billy Parker, Partnow Aff. Ex. A at 3 (no contract as to Kendall); Ex. B at 3-4.

Approximately six months after Kendall became co-manager, District Manager Walpole put him on a “performance improvement plan” (PIP). At Home Depot, a PIP may be used when there are:

[g]eneral job performance issues that do not involve a specific violation of company policy (such as poor customer service, missing key deadlines, poor quality of work produced) and is used at the time of the annual review and/or during the performance cycle.<sup>7</sup>

The Home Depot PIP policy guidelines clearly state that “At the end of the performance improvement period (or anytime during the plan, if performance slips further or has not shown any improvement), leaders should make a final assessment as to the associate’s outcome.” One potential outcome is termination. District managers must obtain approval from the regional Human Resources Department to fire an employee.<sup>8</sup>

The 2004 PIP cited Mr. Kendall for failure to keep the store in compliance with company-set financial and operational goals (“metrics”), to hold staff accountable, to spend time “walking the sales floor,” and to “remain positive when things don’t go his way.” It read in part as follows:

The store missed several key Metrics and failed to perform at a consistent level that is expected from our Store Managers...[W]hen it comes to making the Metrics you must maintain a consistent level of accountability with your staff and associates...If [Kendall] is [t]o be successful going forward he must be engaged into the daily business and teach people what the expectations are and be able to hold them accountable when things are not done. This has been a pit fall for [Kendall] on holding people accountable...<sup>9</sup>

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<sup>7</sup> Pl.’s Opp. Mot. Summ. J. Ex. 5.

<sup>8</sup> Pl.’s Opp. Def.’s Mot. Summ. J. Ex. 5 at 94.

<sup>9</sup> Def.’s Mot. Summ. J. Ex. A at 26.

Kendall remained a co-manager of the Tudor Road store for over a year following the PIP.<sup>10</sup> In May 2005 he was promoted to store manager. Within the month, Billy Parker replaced Mr. Walpole as the District Manager. Mr. Parker observed Mr. Kendall's performance as store manager and was dissatisfied.<sup>11</sup> As he explained in his affidavit in support of summary judgment:

In the summer of 2005, I began to work with and coach Mr. Kendall because his store was not performing well and not meeting its "Metrics", which are goals (financial and operational, etc.) set by the Company based on the particular characteristics of the store and its local market. Mr. Kendall's store had significant problems with out-of-stocks (keeping the store adequately stocked) and with freight movement. Often times, the store looked messy because merchandise was not properly stored or shelved. This also created potential safety hazards. Many of these problems appeared rooted in Mr. Kendall's poor management skills. He continually failed to complete tasks, effectively communicate with his store associates, or hold his associates accountable when they failed to complete tasks. I coached Mr. Kendall that he needed to provide his staff with clearer direction and goals, and specific follow-up.

I repeatedly discussed my concerns with Mr. Kendall and began tracking these discussions on a Performance Discussion Tracking Form...Despite my efforts to coach Mr. Kendall, his performance (and his store's) performance continued to be unacceptable.<sup>12</sup>

Performance tracking forms reflect that on August 10, 2005, Mr. Parker discussed with Mr. Kendall his lack of "engagement" regarding the severity of the out-of-stock situation, and as to other deficiencies such as freight flow, ad procurement, and aisle management. On September 12,

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<sup>10</sup> Kendall Dep. 49:13-16; Def.'s Mot. Summ. J. Ex. A at 26-27.

<sup>11</sup> Kendall Dep. 49:20-50:6, 50:24-51:1.

<sup>12</sup> Parker Aff. 2-3 ¶¶ 5-6.

Parker observed nineteen pallets of freight on the floor during peak operation. The two men walked area D25 and counted 452 out-of-stock items. Mr. Parker noted that a failure to timely unload freight vans had resulted in \$19,000 in demurrage charges year-to-date. On November 5, Parker noted that while the out-of-stock metric was 300 or less, the Tudor store's four-week average was 802.

On November 10, Mr. Parker observed that the Tudor store was the only Alaska store to receive deficient scores; the store was judged deficient in operations, sales floor maintenance, and overhead tagging. On November 28, Mr. Parker logged that the store had opened one-half hour late on the day after Thanksgiving, and that the store was unprepared in terms of stocking and signage due to lack of crew coordination.<sup>13</sup> Mr. Kendall concedes "absolutely" that he in fact was suffering from a lack of engagement.<sup>14</sup> He agrees that his out-of-stock performance was deficient.<sup>15</sup>

Around this time Mr. Kendall went to a specialist in attention deficit and hyperactivity disorder (ADHD), Dr. William Larson. Kendall informed Dr. Larson variously that he was moody and depressed, subject to procrastination, unable to focus, distractible, disorganized, poor at absorbing information upon first reading, and deficient in communication skills with employees. Kendall told his doctor that the only accommodation he needed was time for medication to take hold so

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<sup>13</sup> Parker Aff. Ex. A.

<sup>14</sup> Kendall Dep. 96:16-19.

<sup>15</sup> Id. 129:12-16.

that he could regain focus, rather than more concrete remedies such as a private office or a personal secretary.<sup>16</sup>

By December of 2005, Home Depot initiated steps to terminate Mr. Kendall's employment.<sup>17</sup> On December 14, 2005, Mr. Kendall e-mailed Mr. Parker, Regional Human Resources Director Mike McEnroe, and Regional Human Resources Manager Rowena Velonza, a letter from Dr. Larson indicating that Mr. Kendall had been diagnosed with ADHD, anxiety and depression. In his e-mail, Mr. Kendall opined that the "issues [he] ... had lately" might be related to his ADHD.<sup>18</sup>

Dr. Larson's letter of December 10, 2005 read in part as follows:

You asked me to write you a letter about Attention Deficit/Hyperactivity Disorder as it relates to your recent diagnosis of this disorder by me and the effect A.D./H.D. may have on issues in the workplace.

A.D./H.D. is a neurobiologic disorder that is genetically acquired. A.D./H.D. may result in increased distractibility, problems sustaining focus, completing tasks, disorganization, and procrastination. These problems escalate exponentially when someone with A.D./H.D. is overwhelmed such as you are with having lost a large number of your well-trained, experienced senior and junior staff to Home Depot's aggressive expansion in Anchorage. Also, you are under enormous pressure to make your store even more competitive and more highly profitable to partially offset the cost initially involved with such a rapid expansion...You are being distracted by all of the things that you "should" be doing as a store manager whereas you need to very significantly narrow your priorities and time commitments to essentials...

It is likely that medications that I have prescribed for you will be helpful. Often, companies offer competent,

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<sup>16</sup> Id. 85:1-90:24.

<sup>17</sup> Parker Aff. 6 ¶ 7.

<sup>18</sup> Def.'s Mot. Summ. J. Ex. A at 44.

experienced employees such as yourself, certain specific accommodations. This issue can be addressed later if necessary...<sup>19</sup>

In response, Mr. Parker wrote Mr. Kendall offering support and seeking additional information:

I understand that you have received a recent diagnosis of A.D./H.D. As you know, over the past 6 months your performance as a Store Manager has been unacceptable and I have discussed my concerns about your performance with you. In fact, prior to the receipt of your email, your employment was in jeopardy. It is imperative that your performance improve.

We would like to support you while you receive treatment for your condition. However, we are unsure of what assistance you are asking us to provide. We request that your physician provide us with specific detail on what, if any, accommodation you need. As you know, you are eligible to take a medical leave of absence, if necessary, or step down to a non-supervisory position if medically necessary. Of course, we will consider other reasonable recommendations from your physician.

Please provide us with the requested information within the next two weeks. We are willing to delay any decision on your employment status for a reasonable period of time.<sup>20</sup>

On January 26, 2006, Mr. Kendall filed a Physician's Certificate of necessity for medical leave provided by Dr. Larson. Dr. Larson explained that while it was conceivable that some accommodation might maximize Kendall's utility in light of his ADHD, accommodation was not the critical issue. Rather, Dr. Larson focused upon the accompanying but treatable syndromes of anxiety, depression, and sleep deprivation. Dr. Larson

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<sup>19</sup> Def.'s Mot. Summ. J. Ex. A at 42.

<sup>20</sup> Id. at 43.

opined that when this co-morbid condition cleared, Kendall could perform as a healthy, high-functioning employee.<sup>21</sup>

Home Depot suspended proceedings to terminate Mr. Kendall's employment.<sup>22</sup> Mr. Kendall requested and was granted three months of paid medical leave from January 27 through April 27, 2006.<sup>23</sup> At the end of this respite, Mr. Kendall and his physician notified Home Depot that Kendall was ready to return to work without restrictions. Kendall explicitly stated that no accommodation of his condition was necessary.<sup>24</sup> He reiterated in his subsequent deposition that upon his return he did not require any accommodation, because there was no medical reason he could not perform his job.<sup>25</sup>

Home Depot then placed Mr. Kendall on a PIP of up to 90 days, focused upon metrics compliance. The PIP specifically addressed basic in-stock, maintenance, signage, and management tasks. It also cited basic management skills such as developing weekly meeting agendas, establishing a routine location for posting communications with staff, and creating daily, weekly, and monthly plans.<sup>26</sup> Mr. Parker affied that he drafted this PIP with input from Mr. McEnroe.<sup>27</sup> Mr. Parker and Ms.

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<sup>21</sup> Parker Aff. Ex. 4.

<sup>22</sup> Parker Aff. ¶ 8.

<sup>23</sup> Compl. ¶ 6.

<sup>24</sup> Kendall Dep. 131:13-132:2, 91:8-15; Def.'s Mot. Summ. J. Ex. A at 46-47.

<sup>25</sup> Kendall Dep. 130:20-132:2.

<sup>26</sup> Def.'s Mot. Summ. J. Ex. A at 29.

<sup>27</sup> Parker Aff. ¶ 11.

Velonza met with Mr. Kendall to review the PIP. Mr. Parker averred that he provided Mr. Kendall with feedback and coaching.<sup>28</sup>

On May 5, 2006, less than one month after Kendall's return to service, Parker logged Kendall's progress, as follows:

Bart and I have discussed his lack of engagement and the store's performance with out of stock reduction efforts...Bart has not shown that he can communicate and plan to improve outs, with follow up measures that accurately address the concerns in out of stocks, freight flow, or basic grand opening ready conditions such as setting ads, daily packdown list, or aisle maintenance....I have had conversations with Bart in the past regarding his ability to properly and effectively manage his team and provide them with clear expectations. Bart continues to struggle with getting results as the out of stocks continue to grow week after week in the store...<sup>29</sup>

On May 15, Parker's performance tracking log entry reflects Kendall's failure to follow instructions to meet with a subordinate to improve freight flow. Parker noted he had met with five store employees, only to find that three of them were unaware Kendall had returned, though he had been on the job for three weeks at that point.<sup>30</sup>

Parker's final performance tracking entry somewhat exhaustively recapped a by-then familiar critique of Kendall's managerial skill set:

While walking the Tudor Store on Tuesday 5/23/06 I discussed with Bart that his store had not made improvements with in-stock nor are we ready for the biggest sales weekend of the year, Memorial Day. [The Store] has not completed the Memorial Day playbook that was sent out four weeks ago [to be completed] 100% by 5/18/06. Staffing is a priority for the weekend and all stores were directed to schedule a 10% lift in key departments. [The Tudor Store]

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<sup>28</sup> Parker Aff. ¶¶11-12.

<sup>29</sup> Parker Aff. Ex. A at 2.

<sup>30</sup> Id. at 3.

has four departments that are significantly understaffed (D90 under scheduled by 24%)...garden has 17 pallets of freight sitting in the aisle that need to be stocked...[The Tudor store] has not made improvement in the store's in-stock position in the last four weeks as well as in the execution of packing product down from the overhead, [which] has decreased significantly. The store's out-of-stock average is 648 over the past four weeks and is the highest out-of-stock count in the district. In addition [the store's bin restock from overhead storage] performance (71% on a minimum of 90%) is costing the store sales and creating customer dissatisfaction due to not having the product available. Bart has not shown that he can communicate to his team properly in order to obtain the desired results. This is a direct reflection of his lack of leadership and ability to improve key financial metrics, such as out-of-stocks below 1% (the store has over 2% outs)...on-time execution 90% ([the store] is at 71%, average days open [bin] 1.1 days ([the store] is at 2.2 days), and location on label above 80% ([Tudor] is at 56%. I informed Bart that his progress toward accomplishing the areas outlined in his performance improvement plan were below expectations and that the condition of the store is unacceptable. Since receiving his performance review Bart has made little progress in the areas outlined...<sup>31</sup>

In late May 2006, Mr. Parker recommended to Mr. McEnroe that Mr. Kendall's employment be terminated. Mr. McEnroe and Regional Vice President Kim Sentovich reviewed the recommendation and concurred. Home Depot's Employment Practices Director reviewed Mr. Kendall's performance information and the metrics for the Alaska stores and approved the termination. In June 2006, approximately one month after his return to work, Home Depot terminated Mr. Kendall's employment.<sup>32</sup>

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<sup>31</sup> Id.

<sup>32</sup> Parker Aff. 5 ¶12

Mr. Kendall drafted a parting letter to his staff explaining his perspective on his termination:

I truly believe that I have not been in favor ever since our new [district manager] arrived and for that I apologize. It has probably brought unnecessary scrutiny on the store and the team. Accountability is the only thing in his vocabulary and there was no way that I was going to hold you all accountable for every thing that he wanted, so I just absorbed the issues and tried to bring you the softer version...<sup>33</sup>

Home Depot recited or referenced virtually all of the above facts in its Motion for Summary Judgment. Mr. Kendall filed a rebutting affidavit, averring the following:

1. Since the profit from the Tudor store exceeded its target in 2005, it should be inferred that Kendall's performance was not materially deficient.
2. It should also be inferred that any overstock problem had no causal link to profitability, sales, customer satisfaction, store appearance, or morale.
3. Any employee morale problem was likely caused by Parker's policy of pooling profits of the three Anchorage stores for bonus purposes rather than rewarding Tudor for Tudor profits.
4. Mr. Parker at all relevant times failed to provide remedial training to Kendall.
5. Kendall's first PIP should be viewed historically; he successfully completed it, got a good review, and received a \$7,000 raise, followed by a \$4,000 raise in 2004.
6. The out-of-stock situation was attributable to an unjustified termination of the Automatic Replenishment System by Mr. Walpole, followed by an unavoidably inefficient six-month restart period once Mr. Parker resumed the program.

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<sup>33</sup> Def.'s Mot. Summ. J. Ex. A at 48.

7. The out-of-stock situation is also explained by the loss of approximately 150 seasoned Tudor associates as the other two Anchorage stores opened, up to and through Kendall's medical leave.

8. The Tudor store didn't have enough freight receiving doors and temporary storage.

9. The 34-day duration of Kendall's second PIP was too short to allow for meaningful change.

10. Mr. Parker's last performance evaluation acknowledged strengths, including integrity, personal responsibility, and inclusiveness.<sup>34</sup>

Store employees, Richard Watkins and Kathleen Johnson, state that Mr. Parker had a reputation for verbal abuse, shouting, and using profanity.<sup>35</sup> Ms. Johnson avers that Mr. Parker told her and others that Mr. Kendall was too old to do his job.<sup>36</sup> Richard Watkins avers that Parker displayed disdain for Kendall.<sup>37</sup>

### III. PRINCIPLES OF LAW

To survive a motion to dismiss, a complaint need only allege "a set of facts consistent with and appropriate to some cause of action."<sup>38</sup> A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief.<sup>39</sup> If material beyond the pleadings is

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<sup>34</sup> Kendall Aff. 1-8.

<sup>35</sup> Watkins Aff. ¶¶ 3-4; Johnson Aff ¶¶ 4-5.

<sup>36</sup> Johnson Aff. ¶ 6.

<sup>37</sup> Watkins Aff. ¶ 4. Watkins also refers to comments that Parker sought to overload Kendall to cause him to resign, but the court cannot consider inadmissible hearsay.

<sup>38</sup> *Catholic Bishop of Northern Alaska v. Does 1-6*, 141 P.3d 719, 722 (Alaska 2006).

<sup>39</sup> *Id.*

admitted into evidence, then the Court should treat such motion to dismiss as a motion for summary judgment.<sup>40</sup>

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>41</sup> To defeat summary judgment the nonmoving party must affirmatively set forth specific material facts showing that there is a genuine issue for trial.<sup>42</sup> The Court draws all reasonable inferences in favor of the non-moving party and against the movant.

**a. Wrongful Termination: Breach of Covenant of Good Faith and Fair Dealing.** In Alaska, the covenant of good faith and fair dealing provides limited protection to an at-will employee.<sup>43</sup> The covenant can be breached objectively or subjectively. To prove subjective breach, the employee must present proof that the employer's decision to terminate him or her "was actually made in bad faith."<sup>44</sup> An employer acts in bad faith when it discharges an employee to deprive him of a contract benefit, such as a bonus or retirement entitlement.<sup>45</sup> The mere general intent to terminate an employee's contract benefits by firing him does not constitute subjective breach.

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<sup>40</sup> Alaska R. Civ. P. 12(b)(6).

<sup>41</sup> *Lincoln v. Interior Reg'l Hous. Auth.*, 30 P.3d 582, 585-86 (Alaska 2001); ARCP 56(c).

<sup>42</sup> ARCP 56(e).

<sup>43</sup> *Witt v. State, Dept. of Corr.*, 75 P.3d 1030, 1033 (Alaska 2003).

<sup>44</sup> *Pitka v. Interior Reg'l Hous. Auth.*, 54 P.3d 785, 789 (Alaska 2002).

<sup>45</sup> *Charles v. Interior Reg'l Hous. Auth.*, 55 P.3d 57, 62 (Alaska 2002).

An objective breach occurs when the employer fails to act in a manner that a reasonable person would consider fair.<sup>46</sup> This does not suggest that termination of at-will employment necessitates an analysis of fairness on a standardless, *ad hoc* basis. Rather, the plaintiff must show that he was terminated based on a variant of employer misconduct specifically delineated as actionable by the Alaska Supreme Court, including disparate employee treatment, violation of statutory or constitutional rights, or infringements upon public policy.<sup>47</sup> If the employer terminates an employee for deficient job performance, the firing stands even if the employer's decision was in fact erroneous.<sup>48</sup>

The Alaska Supreme Court has held that covenant-of-fair-dealing claims may not be brought against fellow employees or supervisors.<sup>49</sup> There is a limited exception where the plaintiff demonstrates that a supervisor acted outside the course and scope of employment in pursuance of personal financial advantage, or committed some independent tort.<sup>50</sup>

**b. Wrongful Termination: Breach of Contract.** An at-will employee may be terminated without cause.<sup>51</sup> In *Jones v. Central Peninsula General Hospital*,<sup>52</sup> the Alaska Supreme Court held that an employment manual may modify an at-will contract. The employee must

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Era Aviation Inc. v. Seekins*, 973 P.2d 1137, 1139 (Alaska 1999).

<sup>49</sup> *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 791 (Alaska 1989).

<sup>50</sup> *Id.*

<sup>51</sup> *Era Aviation*, 973 P.2d at 1139.

<sup>52</sup> *Jones*, 779 P.2d at 787.

show that the manual promised specific treatment in specific circumstances, thereby creating a “reasonable expectation of job security.”<sup>53</sup> But if the manual “unambiguously and conspicuously” informs the employee that he remains terminable-at-will notwithstanding administrative procedures set forth in the manual, unfettered employer discretion persists.<sup>54</sup>

**c. Age Discrimination.** To establish a *prima facie* case for disparate treatment because of age, the burden is upon the plaintiff to show that: (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subjected to an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably.<sup>55</sup> An employee’s subjective personal assessment of competence is relevant, and taken together with other evidence may suffice to satisfy the undemanding *prima facie* standard.<sup>56</sup>

If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the termination.<sup>57</sup> Then, the burden shifts back to the plaintiff to establish that any such reason is a pretext for discrimination.<sup>58</sup> An

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<sup>53</sup> *Id.* at 787-88.

<sup>54</sup> *Id.* at 788 (citing examples of rights provisions as those relate to terminations for cause, grievance procedures, and arbitration procedures).

<sup>55</sup> *Raad v. Alaska State Comm’n for Human Rights*, 86 P.3d 899, 903 (Alaska 2004).

<sup>56</sup> *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 659-60 (9th Cir. 2002).

<sup>57</sup> *Raad*, 86 P.3d at 904.

<sup>58</sup> *Id.*

employee may demonstrate pretext either directly, or indirectly by showing the employer's proffered explanation unworthy of credence.<sup>59</sup>

Alternatively, an employee may challenge his termination via a mixed-motive theory. The employee must show that even if the employer's firing rationale were legitimated in part, its actions were nonetheless substantially motivated by forbidden criteria.<sup>60</sup> The employee must offer either direct evidence of prohibited motivation, or circumstantial evidence strong enough to be functionally equivalent to direct proof.<sup>61</sup> He must show "conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting on the discriminatory attitude."<sup>62</sup>

Summary judgment is appropriate if an employee provides nothing more than his own subjective belief that the employer's asserted ground is a pretext for discrimination.<sup>63</sup> But where issues of intent are present, summary judgment should only be granted in clear cases, because the "fact finder ought to be given the opportunity to observe the demeanor of the witnesses."<sup>64</sup>

**d. Disability Discrimination.** This burden-shifting framework also governs disability discrimination cases, but the elements of the

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<sup>59</sup> *Id.* at 905 (internal citations omitted). A variety of factors may be used to show pretext. There are generally three types of evidence presented: (1) direct evidence of discrimination, (2) comparative evidence, and (3) statistics. *Raad*, 86 P.3d at 905.

<sup>60</sup> *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 662 (Alaska 2006).

<sup>61</sup> *Id.*

<sup>62</sup> *Kinzel v. Discovery Drilling*, 93 P.3d 427, 434 (Alaska 2004).

<sup>63</sup> *Haroldsen v. Omni Enterprises, Inc.*, 901 P.2d 426, 431-32 (Alaska 1995).

<sup>64</sup> *Id.* at 426 n.11.