

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 AND TO DISMISS CLAIMS OF TERRY RAHLFS**

I. STATEMENT OF THE CASE

After Home Depot fired its at-will Fairbanks store manager, Terry Rahlfs, he sued for breach of employment contract for Home Depot's alleged failure to follow employment manual disciplinary procedures, for bad faith because the firing was not fair, for age discrimination, and for negligent failure by Home Depot to train his supervisor. Home Depot moves to dismiss, or for summary judgment.¹

II. FACTS AND PROCEEDINGS

Home Depot operates several retail facilities in Alaska. It hired Mr. Rahlfs in August of 2003 to serve as manager for Home Depot's Kenai

¹ Def.'s Mot. Summ. J.

store. Mr. Rahlfs was then forty-four.² In November of 2005 Rahlfs transferred to Home Depot's Fairbanks store, again serving as manager until his termination in November of 2006.

Rahlfs' complaint contains a judicial admission that "Rahlfs was an employee at will."³ Home Depot's employee handbook states 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.⁴

Store managers are supervised by the Alaska District Manager. While Rahlfs was still in Kenai, Billy Parker succeeded Rich Walpole as District Manager. The District Manager is supported by a District Human Resources Manager in Alaska and reports to a Regional Vice President located in the Lower 48.⁵ The District Manager must seek approval from the Company's Employment Practices Director and Regional Human Resources Director before firing a store manager. Mr. Parker was not plaintiff's employer, and there was no contractual relationship between Parker as an individual and Mr. Rahlfs.⁶

² Rahlfs Dep. 23:6.

³ Compl. ¶ 35.

⁴ Def.'s Mot. Summ. J. Ex. C.

⁵ Parker Aff. 1-2 ¶ 2.

⁶ 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.

Mr. Rahlfs testified that he initially got along well with Mr. Parker and had no complaints about his management style. Parker averred that Mr. Rahlfs performed well and initially met prescribed goals (“metrics”); he received a “relatively positive” review from Parker.⁷ Rahlfs states that Parker spoke with him about advancement to a District Manager position. Parker gave Rahlfs a better review than did Walpole.⁸ In November of 2005, Rahlfs transferred to the Fairbanks store with an attendant pay raise; Parker had recommended him for the transfer. Rahlfs was then 46 years old.⁹

Home Depot maintains that Mr. Parker began receiving complaints about Mr. Rahlfs’ management and interpersonal skills from Fairbanks store associates after about six months.¹⁰ A May 2006 complaint by the store’s human resources manager stated that Mr. Rahlfs had kept her in his office for two hours for a contentious review of her work. A June 2006 complaint by a store associate alleged that Mr. Rahlfs had yelled at her in the presence of a customer. In each case, Mr. Parker counseled Mr. Rahlfs on his temper and communication skills.¹¹

Rahlfs counters that the human resources manager was not spending sufficient time hiring and training personnel for the garden

⁷ Rahlfs Dep. 57:20-24, 58:3-5, 43:5-8; Parker Aff. ¶ 14.

⁸ Pl.’s Opp. Def.’s Mot. Summ. J. 7.

⁹ Rahlfs Dep. 23:6.

¹⁰ Parker Aff. ¶ 16.

¹¹ Parker Aff. ¶ 16; Rahlfs Dep. 66-67.

center in anticipation of the summer season.¹² He characterizes his discussion with her as “reasonable, necessary, and appropriate.”¹³ He notes that Mr. Parker merely mentioned this incident to him in passing before he was fired.¹⁴

Home Depot avers that it received complaints about Mr. Rahlfs on a “1-800” awareness line, averaging one complaint per month. Home Depot received several “Awareness Line” complaints in July 2006 to the effect that Rahlfs was ignoring an inappropriate relationship between an assistant manager and a subordinate. Home Depot states that the District Human Resources Manager intervened.¹⁵ Mr. Rahlfs counters that he in fact spoke to one of the offending employees and alerted the District Human Resources Manager, Rowena Velonza, who advised him to investigate but not to act without proof.¹⁶ Parker spoke with and suspended one of the illicit-relation suspects, but then later lifted the sanction.¹⁷ Rahlfs believes that this undermined his authority as a store manager. When Ms. Velonza held town hall meetings regarding the personnel issue, employees complained about Mr. Rahlfs.¹⁸

Mr. Rahlfs contends that the “real reason” for his termination was that he gave Mr. Parker honest feedback about his performance as a

¹² Pl.’s Opp. Def.’s Mot. Summ. J. 8.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Def.’s Mot. Summ. J. 5.

¹⁶ Pl.’s Opp. Def.’s Mot. Summ. J. 9.

¹⁷ Rahlfs Aff. ¶¶ 15-16.

¹⁸ Parker Aff. ¶ 18.

District Manager, to the effect that Parker should spend more time in Fairbanks and that he made unfounded snap judgments. Rahlfs contends their relationship deteriorated from that point.¹⁹ Mr. Rahlfs attaches the affidavits of Kathleen Johnson and Richard Watkins²⁰ to the effect that Parker, not Rahlfs, was the source of poor morale. In her affidavit, Ms. Johnson stated that she “frequently” saw Mr. Parker scream at employees including Mr. Rahlfs.²¹

Home Depot requires annual performance evaluations of store employees before raises take effect. An audit revealed that at least 40 employees had not received reviews.²² Mr. Rahlfs contends this was a subordinate’s fault. Mr. Parker recommended that Mr. Rahlfs be fired because of the performance-review and employee-relations issues. Home Depot’s Regional Vice President, Regional Human Resources Director, and Employment Practices Director approved Mr. Rahlfs’ termination. Home Depot discharged Mr. Rahlfs effective November 5, 2006.²³

Mr. Rahlfs complains that he was fired without warning, without a performance improvement plan, and without opportunity to correct the performance-review deficiency.²⁴ Mr. Rahlfs testified in his deposition

¹⁹ Rahlfs Aff. ¶ 19.

²⁰ Home Depot contests the admissibility of the Johnson and Watkins affidavits due to untimely filing.

²¹ Johnson Aff. ¶¶ 4-5.

²² Id.

²³ Rahlfs Dep. 21:3-5.

²⁴ Pl.’s Opp. Def.’s Mot. Summ. J. 12.

that there was no breach of any Home Depot policy or guideline related to his termination.²⁵ Home Depot's written policies include the following:

While there are several forms of discipline, the Company has the sole discretion to determine the appropriate form of corrective action in any particular situation. This includes the right of the company to terminate an associate's employment without any prior counseling.²⁶

This Code of Conduct in no way alters the basic employment at will policy of the Company. An associate is free to terminate his/her relationship with the Company, and the Company is likewise free to terminate its relationship with an associate at any time with or without cause and without notice.²⁷

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."²⁸ 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.²⁹ If material beyond the pleadings is admitted into evidence, then the Court should treat such motion to dismiss as a motion for summary judgment.³⁰

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a

²⁵ Rahlfs Dep. 90:22-91:2.

²⁶ Aff. of Counsel in Support of Mot. S.J. Kendall Claims, Ex. B.

²⁷ Aff. of Counsel in Support of Mot. S.J. Rahlfs' Claims, Ex. C at 2.

²⁸ *Catholic Bishop of Northern Alaska v. Does 1-6*, 141 P.3d 719, 722 (Alaska 2006).

²⁹ *Id.*

³⁰ Alaska R. Civ. P. 12(b)(6).

matter of law.³¹ To defeat summary judgment the nonmoving party must affirmatively set forth specific material facts showing that there is a genuine issue for trial.³² 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.³³ 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."³⁴ The employer's decision is in bad faith when it discharges an employee for the purpose of depriving him of a contract benefit, such as a bonus or retirement entitlement.³⁵

An objective breach occurs when the employer fails to act in a manner that a reasonable person would consider fair.³⁶ Case law makes clear that actionable unfairness is limited to specific criteria, rather than to all conduct which a jury might regard as unfair in a general sense. Thus an employee must show that he was terminated based on employer misconduct of the type proscribed by the Alaska Supreme Court, including disparate employee treatment, violation of statutory or

³¹ *Lincoln v. Interior Reg'l Hous. Auth.*, 30 P.3d 582, 585-86 (Alaska 2001); ARCP 56(c).

³² ARCP 56(e).

³³ *Witt v. State, Dept. of Corrections*, 75 P.3d 1030, 1033 (Alaska 2003).

³⁴ *Pitka v. Interior Reg'l Hous. Auth.*, 54 P.3d 785, 789 (Alaska 2002).

³⁵ *Charles v. Interior Reg'l Hous. Auth.*, 55 P.3d 57, 62 (Alaska 2002).

³⁶ *Id.*

constitutional rights, or infringements upon public policy.³⁷ If an employer terminates an employee for deficient job performance, the firing stands even if the employer's decision is based on erroneous information.³⁸

The Alaska Supreme Court has held that covenant of fair dealing claims generally may not be brought against fellow employees.³⁹ There exists a limited exception if 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.⁴⁰

b. Wrongful Termination: Breach of Contract. An at-will employee may be terminated without cause.⁴¹ In *Jones v. Central Peninsula General Hospital*,⁴² the Alaska Supreme Court held that an employment manual may modify the terms of an at-will contract. The plaintiff must show that defendant's policies promised him specific treatment in specific circumstances that created a "reasonable expectation of job security."⁴³ The court also considers whether the manual "unambiguously and conspicuously" informed the employee that

³⁷ *Id.*

³⁸ *Era Aviation Inc. v. Seekins*, 973 P.2d 1137, 1139 (Alaska 1999).

³⁹ *Jones v. Central Peninsula Gen. Hosp.*, 779 P.2d 783, 791 (Alaska 1989).

⁴⁰ *Id.*

⁴¹ *Era Aviation*, 973 P.2d at 1139.

⁴² *Jones*, 779 P.2d at 787.

⁴³ *Id.* at 787-88.

it was not part of the contract and that he remained terminable-at-will notwithstanding administrative procedures set forth in the manual.⁴⁴

c. Age Discrimination. To establish a *prima facie* case for disparate treatment because of age, the burden is upon the plaintiff to show: (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.⁴⁵ The minimal inference necessary to ground a *prima facie* case is to be distinguished from the more substantial showing required to raise a pretext issue at the summary judgment stage. An employee's subjective personal assessment of competence is relevant, and taken together with other evidence may suffice to satisfy the *prima facie* standard.⁴⁶

If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the termination.⁴⁷ Then, the burden shifts back to the plaintiff to establish that the reasons offered are a pretext for discrimination.⁴⁸ An

⁴⁴ *Id.* at 788.

⁴⁵ *Raad v. Alaska State Comm'n for Human Rights*, 86 P.3d 899, 903 (Alaska 2004).

⁴⁶ *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 659-60 (9th Cir. 2002).

⁴⁷ *Raad*, 86 P.3d at 904.

⁴⁸ *Id.*

employee may demonstrate pretext either directly or indirectly by showing the employer's proffered explanation unworthy of credence.⁴⁹

Alternatively, a plaintiff may argue a mixed-motive theory to rebut the employer's reasons for the firing decision. The plaintiff must show that even if defendant's legitimate reasons were not completely pretextual, its actions were nonetheless substantially motivated by age discrimination.⁵⁰ In Alaska, the plaintiff must offer either direct evidence of prohibited motivation or circumstantial evidence strong enough to be functionally equivalent to direct proof.⁵¹ He 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."⁵²

Summary judgment is appropriate when the plaintiff presents nothing more than his own subjective belief that the employer's asserted ground is a pretext for discrimination.⁵³ 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."⁵⁴

⁴⁹ *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.

⁵⁰ *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 662 (Alaska 2006).

⁵¹ *Id.*

⁵² *Kinzel v. Discovery Drilling*, 93 P.3d 427, 434 (Alaska 2004).

⁵³ *Haroldsen v. Omni Enterprises, Inc.*, 901 P.2d 426, 431-32 (Alaska 1995).

⁵⁴ *Id.* at 426 n.11.

d. Wrongful Retaliation. The above-described burden-shifting framework for age discrimination applies to retaliation cases as well. To establish a prima facie case for wrongful retaliation, the plaintiff must show: (1) he was engaged in a protected activity, (2) an adverse employment decision was made, and (3) there was a causal relationship between the two.⁵⁵ A “protected activity” is one implicating an explicit public policy; examples include filing a workers compensation claim, acting as a whistleblower, or serving as a witness.⁵⁶

f. Infliction of Emotional Distress. The trial court must “make a threshold determination whether the severity of the emotional distress and the conduct of the offending party warrant a claim of intentional infliction of emotional distress (IIED).”⁵⁷ The Alaska Supreme Court defines severe emotional distress as “of such substantial quality or enduring quantity that no reasonable person in a civilized society should be expected to endure it.” The court lists examples including: “neuroses, psychoses, chronic depression, phobia, and shock. Temporary fright, disappointment or regret does not suffice under this standard.”⁵⁸ Liability for IIED should only be found when “the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all

⁵⁵ *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807, 815 n.24 (Alaska 2005).

⁵⁶ *Id.* at 812.

⁵⁷ *Lybrand v. Trask*, 31 P.3d 801, 803 (Alaska 2001) (internal quotations omitted).

⁵⁸ *Fyffe v. Wright*, 93 P.3d 444, 456 (Alaska 2004).

possible bounds of decency.”⁵⁹ To sustain a claim for IIED against an individual supervisor, plaintiff must also prove that the person’s conduct exceeded the scope of his employment and constituted an independent tort as against the individual plaintiff.

To recover for Negligent Infliction of Emotional Distress (NIED), plaintiff must establish that defendant owed him a duty of care, breached that duty, and the breach caused him harm. Generally, a claim of NIED requires physical injury. This rule is subject to two exceptions: (1) the bystander exception, and (2) the preexisting duty exception.⁶⁰ Where the defendant owes the plaintiff a preexisting duty, then the potential emotional distress to the plaintiff is considered sufficiently foreseeable to permit recovery. The defendant must stand in either a fiduciary or contractual relationship with the plaintiff in order to create such a preexisting duty.⁶¹ But ordinary contracts do not give rise to such a duty; the only contracts that will are those that are “highly personal and laden with emotion” such as “contracts to marry, to conduct a funeral, to sell a sealed casket, to conduct a cesarean birth, [or] to surgically rebuild a nose.”⁶²

g. Negligent Selection, Supervision, and Training. To establish negligence, the plaintiff must show that defendant had a duty, breached

⁵⁹ *Lybrand*, 31 P.3d at 803.

⁶⁰ *Kallstrom v. U.S.*, 43 P.3d 162, 166 (Alaska 2002).

⁶¹ *Id.*

⁶² *Nome Commercial Co. v. Nat’l Bank of Alaska*, 948 P.2d 443, 453 (Alaska 1997).

that duty, and the breach of duty caused injury to him.⁶³ An employer has a duty to exercise some degree of care in its selection and retention of employees, which may be breached if the employer knew or should have known that the employee would behave negligently.⁶⁴ To show corporate negligence, a plaintiff generally must include evidence that the employee either lacked standard credentials or previously had been the subject of a malpractice suit or disciplinary proceedings.⁶⁵

h. Punitive Damages. Compensatory and punitive damages are available under Alaska Statute 18.80 *et seq.*⁶⁶ Plaintiffs may only recover punitive damages if they “prove by clear and convincing evidence that the defendant’s conduct (1) was outrageous, including acts done with malice or bad motives; or (2) evidenced reckless indifference to the interest of another person.”⁶⁷

IV. DISCUSSION

a. Breach of Covenant of Good Faith and Fair Dealing. The court must afford Rahlfs all reasonable inferences from the evidence. Such favorable inferences include that Parker acted in ways that tended to undercut Rahlfs’ authority with his Fairbanks employees; that Parker soured on Rahlfs because Rahlfs gave him honest feedback; that Home

⁶³ *McGrew v. State, Dep’t of Health & Soc. Servs.*, 106 P.3d 319, 325 n.37 (Alaska 2005).

⁶⁴ *Ward v. Lutheran Hosps. & Homes Soc. of America, Inc.*, 963 P.2d 1031, 1034 n.2 (Alaska 1998).

⁶⁵ *Id.*

⁶⁶ *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 791 (Alaska 1996).

⁶⁷ AS 09.17.020(b).

Depot erred if it blamed Rahlfs for poor store morale; and that the forty unperformed evaluations must be laid in hindsight upon a subordinate.

Nonetheless, Rahlfs' bad faith claim suffers from a fatal analytic deficiency. He assumes he is entitled to litigate the factual correctness of Home Depot's grounds for termination. He contends that a showing of flawed decision-making suffices to take an employment case to the jury.

This is an overbroad interpretation of the Supreme Court's formulation that "[a]n objective breach occurs when the employer fails to act in a manner that a reasonable person would consider fair."⁶⁸ The formulation must be understood in the light of the applicable case law.⁶⁹ After all, a reasonable person might not consider it objectively fair to fire a longstanding employee based on wholly erroneous conclusions of fact. Yet our Supreme Court ratifies that outcome, because to do otherwise would be to eviscerate for all practical purposes the core nature of employment-at-will.⁷⁰ Since an employee can virtually always claim that an employer erred, linking the validity of a termination to its factual correctness would put every termination in the hands of jurors. Our case law has not developed in that fashion.

Rahlfs raises no material issues of disputed fact implicating a recognized variant of an objective good faith claim, such as disparate employee treatment, violation of statutory or constitutional rights, or

⁶⁸ *Charles v. Interior Reg'l Hous. Auth.*, 55 P.3d 57, 62 (Alaska 2002).

⁶⁹ *Id.*

⁷⁰ *See Era Aviation*, 973 P.2d at 1139.

infringements upon public policy.⁷¹ His recitation of facts and allegations tend to establish mere general unfairness. A mere showing of exercise of discretion based on incorrect data fails to raise justiciable issues of fact to defeat summary judgment on his good faith claim.

b. Breach of Covenant of Good Faith and Fair Dealing by Parker. Mr. Parker argues that Rahlfs' breach of covenant of good faith claims against him personally ought to be dismissed. Rahlfs complaint did not plead the elements of an independent tort or of actions outside of the scope of Parker's employment.⁷² He failed to address these issues in his opposition. Rahlfs has failed to state a claim upon which relief can be granted, and has in any event waived the claim by failing to defend it in his opposition memorandum.

c. Age discrimination. Home Depot argues that Mr. Rahlfs has failed to satisfy the *prima facie* element of competent performance.⁷³ But according him all favorable inferences from his evidence, including the favorable self-assessment implied by his proffered rebuttals of Home Depot's grounds for termination, competence is a disputed issue of material fact.

Home Depot also argues that Rahlfs fails to satisfy the *prima facie* element that a similarly situated younger employee was treated more

⁷¹ See *Charles*, 55 P.3d at 62.

⁷² See *Jones*, 779 P.2d at 791.

⁷³ Def.'s Mot. Summ. J. Re Rahlfs' Claims 9

favorably.⁷⁴ Rahlfs identifies no such employee.⁷⁵ He does not address the point in his memorandum, apparently on the assumption that the *prima facie* case is somehow self-evident.⁷⁶ It is not.

Employees are similarly situated when they have similar jobs and display conduct or a disciplinary record of comparable gravity.⁷⁷ It is Rahlfs' burden to identify such a specific person and present his or her circumstances with specificity.⁷⁸ Clearly, this represents an arduous investigative task for an attorney screening or filing an age discrimination case. But without such evidence, there is no case. Because Mr. Rahlfs presents no evidence, much less argument, regarding this element of his *prima facie* case, his age discrimination claim fails.

d. Breach of Contract. Mr. Rahlfs argues that Home Depot's written policies formed a contract which Home Depot breached when it fired him.⁷⁹ Specifically, Mr. Rahlfs claims that Home Depot did not follow its policy on "progressive monitoring" and performance improvement plans (PIP).⁸⁰ But in his statement of facts, he twice mentions the lack of a PIP only in passing, without citation to a provision in a manual on which he relies.⁸¹ He makes no further reference to the

⁷⁴ Id.

⁷⁵ Pl.'s Opp. Mot. Summ. J. 6-12 §B.

⁷⁶ See *Raad*, 86 P.3d at 903.

⁷⁷ *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641-42 (9th Cir. 2003)

⁷⁸ See *Raad*, 86 P.3d at 903.

⁷⁹ Compl. ¶ J.

⁸⁰ Id.

⁸¹ Pl.'s Opp. Mot. Summ. J. 6,12

matter, neither mentioning nor distinguishing the holding of *Jones v. Central Peninsula General Hospital*⁸² that a plaintiff must show a specific representation by an employer in the employment manual creating a “reasonable expectation of job security.”⁸³ By failing to meaningfully address Home Depot’s breach of contract challenge, Rahlfs waives his claim.

Moreover, Mr. Rahlfs affirmatively testified in his deposition that Home Depot breached no policy or guideline when it terminated him.⁸⁴ Home Depot’s written policies do not make it mandatory to administer a PIP prior to dismissal. Since the manual itself articulates that nothing it contains alters the at-will nature of any associate’s tenure, Mr. Rahlfs could not have formed a reasonable expectation of continued employ until he failed a PIP.⁸⁵ He fails to raise a material fact issue for the jury on his breach of contract claim.

e. Negligent Selection, Supervision and Training. Mr. Rahlfs alleges in his complaint that Home Depot was negligent when it “allowed Parker to hire and fire managers in Alaska without accountability.”⁸⁶ But Rahlfs does not develop that theory in his opposition. He offers no substantiation regarding any alleged delegation of authority by Home

⁸² *Jones*, 779 P.2d at 787.

⁸³ *Id.* at 787-88.

⁸⁴ Rahlfs Dep. 90:22-91:2.

⁸⁵ *See Jones*, 779 P.2d at 787-88.

⁸⁶ Compl. § I.

