

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,

Plaintiff,

and

DENISE J. POOLE,

Plaintiff-  
Intervenor,

vs.

NEA-ALASKA, INC., THOMAS  
HARVEY, and NATIONAL EDUCATION  
ASSOCIATION,

Defendants.

Case No. 3:07-cv-0197-RRB

**ORDER REGARDING**  
**SUMMARY JUDGMENT MOTIONS**

**I. MOTIONS PRESENTED**

Two motions are pending before the Court. At Docket 54, Defendant NEA moves for summary judgment on the grounds that NEA is not an "employer" and, therefore, NEA is not an appropriate defendant in this matter. At Docket 71, Plaintiff-Intervenor Poole cross-moves for summary judgment seeking a ruling that Thomas Harvey was an employee of National Education Association from

January 1, 2002, through August 31, 2006, and further that the Court rule that NEA is vicariously liable, under the theory of *respondeat superior*, on the claim of intentional infliction of emotional distress against Thomas Harvey, and finally that the Court rule that NEA owed a duty to Poole to exercise reasonable care in the hiring and retention of Thomas Harvey as an employee.

## **II. BACKGROUND**

### **A. The Parties**

NEA-Alaska, Inc., is a union that represents teachers and other public school employees in Alaska. It is a local affiliate of the National Education Association ("NEA"), which is a national labor organization comprised of more than 3.2 million members. According to the NEA, the State affiliates are not subsidiaries of NEA; rather, each State affiliate is an independent and autonomous organization.

Defendant Tom Harvey served as NEA-Alaska's "interim" Assistant Executive Director for 17 months before his hire as "regular" AED beginning on August 30, 1999. Harvey assumed the position of Executive Director beginning January 1, 2002, and served until August 31, 2006.

Tom Harvey hired Denise Poole to fill a UniServ Director's position with NEA-Alaska to start on April 19, 2004, in Fairbanks. She served in Fairbanks at all times relevant to this

case. Although Poole worked out of the NEA-Alaska office in Fairbanks and Harvey had his office in Anchorage, Poole and Harvey interacted regularly, both in Anchorage and Fairbanks, as well as in phone conferences.

### **B. Procedural History**

This case concerns events beginning April 19, 2004, during Denise Poole's employment with NEA-Alaska. Poole filed a complaint with EEOC charging NEA-Alaska with employment discrimination because of her sex. EEOC, in turn, commenced this action on behalf of Poole against Defendant NEA-Alaska. By its Complaint, EEOC avers NEA-Alaska violated §§ 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-2(a) and 2000e-3(a)]. These sections of Title VII prohibit an "unlawful employment practice:" inter alia, "to . . . discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." and ". . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this title. . . ."

Poole intervened in the EEOC District Court action. Through her Complaint in Intervention, she personally advanced §703(a) and §704(a) claims made by EEOC described above. She added a State statutory claim and a claim for intentional infliction of

emotional distress. She also added Thomas Harvey and the National Education Association (NEA) as Defendants.

**C. Relationship Between NEA and NEA-Alaska**

NEA-Alaska is a State affiliate of NEA. NEA provides various forms of financial support to its State affiliates. One of those support programs, the Unified State Executive Director Program ("USEDP"), enables a State affiliate to have its Executive Director (in this case Thomas Harvey) designated as an NEA "employee" so that he or she will be eligible to participate in NEA's retirement plan. As to these USEDP Executive Directors, NEA issues the paychecks, but the State affiliate reimburses NEA for at least 70% of the compensation package. NEA has certain rights with respect to the employment status of USEDP Executive Directors, but NEA asserts that at the time of Harvey's employment, it had no right to control or direct a USEDP Executive Director in his or her supervision of the employees of a State affiliate, to discipline an Executive Director, or to decide that he or she should be terminated.<sup>1</sup>

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<sup>1</sup> NEA argues that in regard to his dealings with Poole and other employees of NEA-Alaska, Harvey answered solely to the officers of NEA-Alaska and was under their sole direction and control. NEA neither controlled Harvey in performing these functions nor had any right to do so.

The Guidelines governing the relationship between NEA and the USEDP Executive Directors stated that “[t]he USEDP Executive Director shall be an employee of the NEA, and NEA shall make all mandatory federal, state, and other deductions from his or her salary as applicable.”<sup>2</sup> But the Guidelines made clear that the State affiliate, not NEA, would determine what duties a USEDP Executive Director would perform - and that in performing those duties, the Executive Director would be “[s]ubject to the control and direction” of the State affiliate.<sup>3</sup> However, the Guidelines also provided that the USEDP Executive Director shall not be required to take any action that is contrary to the governing documents or policies of NEA.”<sup>4</sup> The Guidelines allowed the NEA to request that a USEDP Executive Director attend a reasonable number of training sessions, workshops, and/or other meetings designed to improve his or her effectiveness as the USEDP Executive Director.<sup>5</sup> The Guidelines did not contain any provision by which NEA could become involved in disciplining a USEDP Executive Director. And the Guidelines provided that any decision to terminate a USEDP Executive Director for cause would be made by the State affiliate,

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<sup>2</sup> Docket 56, Exhibit C, p. 5.

<sup>3</sup> Id. at 7.

<sup>4</sup> Id. at 7-8.

<sup>5</sup> Id. at 8.

which would "direct NEA to take said action." However, at the end of an Executive Director's term of employment, the Guidelines required the agreement of the NEA and the State affiliate, along with the USEDP Executive Director, to agree to continue employment for an additional term.<sup>6</sup> Similarly, the *original selection* of the USEDP Executive Director was subject to NEA's approval.<sup>7</sup>

In late 2006, NEA convened a Work Group to consider whether revisions should be made in the USEDP Guidelines. The Work Group's report noted that there was a "certain tension in the USEDP." On the one hand, the USEDP executive directors could participate in the NEA staff retirement system only if they were "employees" of NEA within the meaning of the Internal Revenue Code, but on the other hand, the basic concept of the USEDP is that the State association is the *de facto* employer. The Work Group concluded that this concept placed NEA in an unusual position, because the NEA lacked the broad authority over the USEDP executive directors that would meet the requisite legal criteria for an employment relationship: the authority to hire, fire, discipline, and otherwise control the terms and conditions of employment of the employees in question. The Work Group recommended that the Guidelines be revised "to establish an employment relationship

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<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.* at 4.

between NEA and the USEDP executive directors" on the understanding that "[t]he linchpin for such a relationship is . . . an adequate measure of control by NEA over the hiring, firing, disciplining, and other terms and conditions of employment of the USEDP executive directors." To that end, the Work Group recommended that the Guidelines should require that the selection and termination of a USEDP executive director by a State affiliate be approved by NEA.. These changes post-dated Harvey's departure from NEA-Alaska.

### **III. STANDARD OF REVIEW**

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.<sup>8</sup> The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.<sup>9</sup> Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.<sup>10</sup> All evidence presented by the non-movant must be

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<sup>8</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

<sup>9</sup> *Id.* at 323-325.

<sup>10</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.<sup>11</sup> However, the nonmoving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.<sup>12</sup>

#### **IV. DISCUSSION**

Poole's complaint against NEA asserts common law tort claims for "Intentional Infliction of Emotional Distress" (Third Cause of Action) and "Negligent Hiring and Retention" (Fourth Cause of Action). Both causes of action are predicated on the contention that "Harvey's actions towards Plaintiff-Intervenor Poole were performed as an employee of NEA." (Complaint ¶¶ 25, 38-40.)

Poole's position is that because NEA included Harvey on its payroll and its retirement system as an NEA employee, NEA may be held liable for negligent hiring and retention of Harvey.<sup>13</sup> In addition, she argues that because Harvey acted within the scope of employment in his harassment and retaliation of Poole, NEA may be held vicariously liable for the intentional infliction of emotional distress engaged in by Harvey toward Poole. Poole notes that

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<sup>11</sup> *Id.* at 255.

<sup>12</sup> *Id.* at 248-49.

<sup>13</sup> Docket 71 at 5.

Harvey has a "long history of harassing and abusing female employees," but nevertheless he was hired as NEA-Alaska's Executive Director.<sup>14</sup> She complains that NEA has attempted to make a third category of employment relationships outside of "employee" and "non-employee" by calling Harvey an "administrative employee." Such a designation, argues Poole, has no legal basis.

Poole finds it particularly significant that the Work Group that examined the USEDP Guidelines determined that "because the USEDP executive directors are identified as NEA employees - and the USEDP Guidelines on their face give NEA not insignificant control over some of the terms and conditions of their employment - individual plaintiffs and government agencies will seek to hold NEA liable for actions taken by the USEDP executive directors."<sup>15</sup>

In response, NEA argues that Alaska's law on vicarious liability for torts is clear: "Under the doctrine of *respondeat superior*, a master is liable for the [tort] of a *servant* that occurs within the scope of employment,"<sup>16</sup> and "[a] servant is a person employed to perform services in the affairs of another and *who with respect to the physical conduct in the performance of the*

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<sup>14</sup> Docket 71 at 10.

<sup>15</sup> See Docket 56, Exhibit D, P. 9.

<sup>16</sup> *Anderson v. PPCT Mgmt. Sys., Inc.*, 145 P.3d 503, 507 (Alaska 2006)

*services is subject to the other's control or right to control.*"<sup>17</sup> NEA argues that because it lacked the right to control Harvey "with respect to the physical conduct in the performance of [his] services," under *Anderson*, it cannot be held liable as Harvey's employer. NEA also argues that Poole's claims are barred by the statute of limitations.

#### **A. Intentional Infliction of Emotional Distress**

In her Third Cause of Action, Poole alleges that Harvey's conduct toward her constituted intentional infliction of emotional distress, and that NEA should be liable under *respondeat superior* for Harvey's allegedly tortious conduct during the period that he supervised her.<sup>18</sup> Under the doctrine of *respondeat superior*, an employer may be liable for the conduct of its employees if the conduct occurred within the scope of their employment.<sup>19</sup> The scope of employment is determined by factors set out in the Restatement (Second) of Agency § 220. The question of scope of employment is a jury question "unless the facts are undisputed or lend themselves

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<sup>17</sup> *Id.* (quoting Restatement (Second) of Agency § 220(1) (1995) (emphasis added)).

<sup>18</sup> See Complaint ¶¶ 23-25.

<sup>19</sup> *Ondrusek v. Murphy*, 120 P.3d 1053, 1057 (Alaska 2005); See also *Anderson v. PPCT Mgmt. Sys., Inc.*, 145 P.3d 503, 507 (Alaska 2006).

to only one conclusion.”<sup>20</sup> Poole argues that because it can only be concluded that Harvey was acting within the scope of his employment with NEA in engaging in the acts which constituted intentional infliction of emotional distress, the Court should rule, as a matter of law, that NEA shall be vicariously liable for such conduct at trial.<sup>21</sup>

The Court disagrees. Even assuming, for purposes of Poole’s IIED claim, that Harvey was an employee of NEA as a USEDP Executive Director, and even assuming that Harvey is guilty of actions constituting IIED against Poole, Harvey’s actions against Poole would have been as her supervisor working for NEA-Alaska, not in his capacity as an NEA USEDP Executive Director.

The Guidelines covering the relationship between NEA and the USEDP Executive Directors did not give NEA any authority to discipline or terminate a USEDP director. Harvey was answerable to, and was directed by, the officers of NEA-Alaska, not NEA, and the policies Harvey was required to implement with respect to NEA-Alaska’s employees, including Poole, were set by NEA-Alaska, not NEA. Hence, in supervising NEA-Alaska employees including Poole, as a matter of law Harvey cannot be considered to have been acting as NEA’s employee.

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<sup>20</sup> *Ondrusek*, 120 P.3d at 1057.

<sup>21</sup> Docket 71 at 21.

All of the interactions in which Poole complains that Harvey mistreated her concerned her work for NEA-Alaska, over which NEA had no authority whatsoever. Internal complaints concerning Harvey were addressed solely to NEA-Alaska, through procedures in which NEA played no part. Only NEA-Alaska, not NEA, could have disciplined or terminated Harvey for his alleged mistreatment of Poole. Poole's request to be given a different supervisor was one that only NEA-Alaska, not NEA, could have granted. Even though Harvey may have been an employee of NEA on paper, Harvey's alleged actions toward Poole simply were not "within the scope of [his] employment" with NEA.

Accordingly, NEA's Motion for Summary Judgment regarding Poole's IIED claim against NEA is **GRANTED**.

**B. Tort of Negligent Hiring and Retention**

In her Fourth Cause of Action, Poole alleges that NEA negligently "hired" and "retained" Harvey in his position as NEA-Alaska's Executive Director. Complaint ¶¶ 38-40. Poole argues that the Court should rule, as a matter of law, that NEA owed a duty to her to exercise reasonable care in the hiring and retention of Harvey as an employee of NEA.<sup>22</sup> She says NEA employed Harvey with full knowledge of his past history of abusive conduct towards

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<sup>22</sup> Docket 71 at 21.

female subordinates and colleagues. As of January 1, 2002, when Harvey was placed on the NEA payroll, multiple complaints had been made against Harvey around the country in a variety of NEA affiliate organizations. Poole complains that NEA's refusal to address the continued and repeated misconduct of Harvey, and its willingness instead to retain him as a senior manager, calls for judicial remedy and relief.

NEA argues that just as the fact that there was no master-servant relationship between Harvey and NEA with respect to Harvey's supervision of NEA-Alaska's employees precludes holding NEA vicariously liable for Harvey's alleged intentional infliction of emotional distress, it likewise precludes Poole's attempt to invoke "negligent hiring and retention" as a means of getting NEA on the hook.

The Court disagrees, in part. For the same reasons that the Court found that Poole's IIED claim could not go forward against NEA, the Court finds that a negligent "retention" claim could not go forward against NEA. NEA lacked the ability to discipline or dismiss a USEDP Executive Director once he was appointed. However, NEA did reserve the right to approve appointment of the USEDP director in the first place. If Poole can show that NEA approved Harvey with knowledge of his prior bad acts (a genuine issue of material fact at this juncture), Poole's claim

against NEA regarding negligent hiring could go forward. Therefore, the Court finds that Poole can pursue a claim of negligent hiring against NEA.

### **C. Statute of Limitations**

NEA argues that all of Poole's claims are subject to the two-year statute of limitations found in AS § 09.10.070. Because the Court has found that Poole's claim for IIED and negligent retention against NEA do not survive summary judgment, the statute of limitations is irrelevant with respect to those claims. However, the statute of limitations is relevant to Poole's claim of negligent hiring.

NEA argues that Poole cannot assert any claims that arose before January 14, 2006, the date two years before her complaint against NEA was filed. NEA argues that she was on "inquiry notice" by that point, and therefore any claim that accrued more than two years before she filed suit against NEA is time-barred.

Poole notes that her motion to intervene was filed on December 21, 2007. Under the two-year tort statute of limitations provided in AS 09.10.070, she suggests the applicable statute of limitations date on her claims is December 21, 2005. Furthermore, Poole argues that the statute of limitations date is based on when the last actionable conduct by Harvey took place, not when Poole became aware of the first actionable conduct, under "the continuing

violations doctrine" which allows plaintiffs to establish an ongoing tort through incidents that occurred before the statute of limitations period and that continued into the limitations period.<sup>23</sup>

The Court concludes that both parties are only partially correct. Because Poole is left with only her claim of negligent hiring, and not negligent retention, of Harvey, it is unlikely that the continuing violations doctrine would apply. Harvey was hired on a date certain, January 1, 2002. However, the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action.<sup>24</sup> Poole did not even start working for NEA-Alaska until April 19, 2004. The relevant question, therefore, is when Poole discovered, or had reason to discover, that NEA was aware of Harvey's prior [alleged] bad acts sufficient to warrant Poole's negligent hiring claim against NEA. This remains a genuine issue of material fact.

#### **V. CONCLUSION**

In light of the foregoing, NEA's Motion for Summary Judgment at **Docket 54** is **GRANTED IN PART and DENIED IN PART**.

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<sup>23</sup> See *Reich v. Cominco Alaska, Inc.*, 56 P.3d 18, 25-26 (Alaska 2002).

<sup>24</sup> *Russell v. Municipality of Anchorage*, 743 P.2d 372, 375 (Alaska 1987).

Summary judgment is granted in favor of NEA with respect to Poole's claims for IIED and Negligent Retention filed against NEA. Poole may go forward with her claim of Negligent Hiring. Poole's Cross-Motion for Summary Judgment at **Docket 71** is **DENIED**.

ENTERED this 17<sup>th</sup> day of April, 2009.

S/RALPH R. BEISTLINE  
UNITED STATES DISTRICT JUDGE