

Nos. 08-35928; 08-35931

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**MYRNA I. JOHNSON,
Appellee/Cross-Appellant,**

v.

**FRED MEYER STORES, INC.,
Cross-Appellant/Appellee.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NO. 1:04-cv-00008-RRB
THE HONORABLE RALPH R. BEISTLINE
DISTRICT COURT JUDGE

BRIEF OF CROSS-APPELLANT FRED MEYER STORES, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Cross-Appellant Fred Meyer Stores, Inc., hereby states that it is an Ohio corporation which is a wholly-owned subsidiary of Fred Meyer, Inc., a Delaware corporation. Fred Meyer, Inc., is a wholly-owned subsidiary of The Kroger Co., an Ohio corporation which is publicly traded (NYSE: KR). No person or entity owns 10 percent or more of Kroger's stock.

Fred Meyer Stores, Inc., is the operating entity by which Appellee/Cross-Appellant Myrna I. Johnson was employed.

I. JURISDICTIONAL STATEMENT

Plaintiff Myrna I. Johnson filed a 22-page, 122-paragraph complaint in the District of Alaska, Juneau, on March 17, 2004. 2 ER 139-160. She alleged federal court jurisdiction based on diversity (28 U.S.C. § 1332) and federal claims (Age Discrimination in Employment Act – 29 U.S.C. § 623; Title VII (gender) – 42 U.S.C. § 2000e-5(f)(3); and the Family and Medical Leave Act – 29 U.S.C. § 2615); and supplemental jurisdiction per 28 U.S.C. § 1367 over plaintiff’s state law claims. 2 ER 140. Defendants Fred Meyer Stores, Inc. (“Fred Meyer”) and Jaime San Miguel (“San Miguel”) denied diversity of citizenship and also denied the appropriateness of supplemental jurisdiction over the state law claims. 2 ER 131-132.

On February 9, 2007, the district court granted Fred Meyer’s motion for summary judgment as to all claims except for the Alaska state law claim that Johnson was wrongfully terminated contrary to the implied covenant of good faith and fair dealing. 1 ER 110.

The case proceeded to trial, with multiple motions and rulings on whether Johnson could proceed with her implied covenant claim under either the subjective bad faith prong (termination to deprive her of an employment benefit), or the objective bad faith prong (e.g., termination in violation of public policy). The district court on October 5, 2007, dismissed the implied covenant claim of a breach of public policy (an objective bad faith claim with a tort theory and possible tort damages). 1 ER 68-

71. Plaintiff sought review of this dismissal by certifying the issue to the Alaska Supreme Court, 1 ER 65-67, which declined to answer the certified question. 1 ER 64. The remaining state law claim (still unclear as to legal theory) continued to trial on August 11, 2008, solely under the district court's discretionary supplemental jurisdiction. The district court advised the jury that while Johnson was employed at will and "could be terminated for any reason or for no reason," it would be unlawful to replace her with another employee with whom her supervisor hoped to develop a romantic interest. 1 ER 18-19.

After a jury verdict in favor of plaintiff (1 ER 15-16), denial of its post-trial motions on September 15, 2008 (1 ER 14), and entry of judgment on October 17, 2008 (1 ER 12), Fred Meyer filed its notice of appeal on November 5, 2008 (1 ER 1). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. ISSUES ON APPEAL

1. Did the district court err in submitting to the jury the claim that it was a violation of Alaska's implied covenant of good faith and fair dealing if plaintiff was terminated because her supervisor hoped to develop a personal relationship with another employee?

2. Did the district court err in submitting to the jury alternate theories by plaintiff that she either was terminated directly by Fred Meyer or was constructively

discharged by Fred Meyer when she had pursued only a claim of constructive discharge until Fred Meyer's motion to dismiss at the close of plaintiff's case?

3. Did the district court err in not setting aside the jury verdict because no reasonable jury could have found that plaintiff's "supervisor" terminated her when her supervisor had no termination authority, he never recommended that plaintiff be terminated, and he was not involved in the decision to terminate?

4. If the jury verdict is not set aside, did the district court err in awarding plaintiff prejudgment interest when she never proposed a verdict form segregating her alleged past and future damages as required by Alaska law?

III. STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff Myrna Johnson was the assistant apparel manager at the Fred Meyer store in Juneau, Alaska. She claimed that after her return from an extended personal leave in February and March 2002 she was terminated by defendants Fred Meyer and the apparel department manager (San Miguel) because of her gender; her age; her family leave; her parenthood; and contrary to the Alaska implied covenant of good faith and fair dealing. Only the implied covenant of good faith and fair dealing under Alaska law survived defendants' original motion for summary judgment in July 2006.

Fred Meyer contended that Johnson voluntarily terminated her employment by walking out of a counseling session with her store director (Fred Sayre) and apparel

manager (San Miguel) in March 2002. Johnson claimed she was constructively discharged. But the decision that Johnson voluntarily terminated her employment by walking out, contrary to written company policy, was made by the Fred Meyer human resources representative Mary Lucas, in Lynnwood, Washington, during a subsequent telephone conference with the store director (the apparel manager, San Miguel, did not participate in the call). Neither the Juneau store director (Sayre), nor Johnson's manager (San Miguel) recommended her termination to the human resources representative, Lucas.

B. Course of Proceedings.

1. Complaint. Johnson filed a 22-page, 122-paragraph complaint against Fred Meyer and San Miguel on March 17, 2004. 2 ER 139-160. She alleged six separate counts, combining federal and state claims of age and gender discrimination, family leave, and wrongful discharge as noted above.

2. Pretrial and Trial. Johnson's first two attorneys withdrew in January 2005 for good cause, which delayed discovery and trial.¹ They were replaced several months later by plaintiff's subsequent trial counsel.

On July 31, 2006, Fred Meyer moved for summary judgment on all six claims. Doc. 45. On February 9, 2007, the district court dismissed all claims except for the claim of wrongful termination contrary to Alaska's implied covenant of good faith and

¹ This was prior to electronic filing. Separate motions to withdraw for cause were filed on January 3, 2005, by attorneys Kathleen A. Frederick and Kimberly A. Marsh.

fair dealing. 1 ER 92-110. Per the pretrial order, trial was set for October 9, 2007. 1 ER 86. Before trial Fred Meyer again moved to dismiss the sole remaining claim of wrongful termination. Doc. 86. The court denied the motion. 1 ER 84-85. At the pretrial conference on September 26, 2007, the court stated that plaintiff's termination would be "unfair" (and therefore "unlawful") if it was to replace her with a more attractive woman. Fred Meyer then filed a brief on September 27, 2007, contending it was not unlawful, nor a breach of public policy, to replace one employee with a "sweetie," Doc. 116, citing *Preston v. Wisconsin Public Health*, 397 F.3d 539, 541 (7th Cir. 2005).

On October 1, 2007, the district court issued an order on Fred Meyer's motion to exclude certain potential evidence at trial. 1 ER 72-83. In footnote 16, the district court stated that the "jury would be permitted to decide whether Defendants' actions comport with 'what is just and right' . . .", without further definition. 1 ER 81. Fred Meyer immediately moved on October 2, 2007, for reconsideration. Doc. 122. The district court then issued another order on October 5, 2007, modifying its prior ruling by striking footnote 16 and dismissing the claim of objective bad faith in violation of public policy as a theory of recovery, along with the potential for tort damages. 1 ER 68-71. At the final pretrial conference that same day, October 5, 2007, the district court agreed to certify to the Alaska Supreme Court the issue of whether the stricken

tort claim stated a cause of action under Alaska law. 1 ER 65-67. On February 22, 2008, the Alaska Supreme Court declined to address the issue. 1 ER 64-66.

After certification was denied, Fred Meyer filed a motion on March 12, 2008, to dismiss San Miguel as an individual defendant and to seek clarification on the specific implied covenant claim, and alleged evidence, which Johnson intended to pursue at trial. Doc. 137. The district court dismissed San Miguel as a defendant on April 30, 2008, but stated that it would instruct the jury “on both the subjective and objective prongs of ‘the test’ for breach of the covenant of good faith and fair dealing.” 1 ER 62-63.

The district court held a pretrial conference with the parties on August 7, 2008, and thereafter issued another order on the law of the case. 1 ER 57. The August 7, 2008, order began by referring to the “understandable confusion regarding the law of the case.” 1 ER 57. The district court stated that “upon further consideration, however, the Court is inclined not to instruct the jury regarding the objective element” of the covenant of good faith and fair dealing “for it is unclear.” 1 ER 58. But the court held that “the issue for the jury is not whether Plaintiff was deprived of a benefit of a contract, but rather whether Defendant acted ‘with subjectively improper motive’ in discharging Plaintiff” and in “bad faith.” 1 ER 59. (Neither “improper motive” nor “bad faith” was defined.)

After receiving the August 7, 2008, order Fred Meyer filed motions *in limine* on August 8, 2008, regarding certain potential evidence plaintiff Johnson suggested she would offer, to include evidence that Johnson was terminated so her supervisor could replace her with another woman. Doc. 165. Fred Meyer argued that the district court's Order of October 5, 2007, stating that "There does not appear to be an explicit public policy in Alaska prohibiting an employer from discharging an at-will employee in order to replace her with someone else – even if motivated by a hoped-for romantic interest," 1 ER 70, was correct as a matter of law. See Doc. 165, p. 3. Accordingly, Fred Meyer argued, if it was not contrary to public policy, there could not be a "subjectively improper motive" in discharging Johnson even if her manager did so because he preferred to replace her with a hoped for "sweetie." *Id.*

The district court issued an additional order on August 8, 2008, denying Fred Meyer's motion to exclude alleged evidence that Johnson was terminated so that her supervisor could replace her with a pretty young single woman. 1 ER 54. The court concluded that it would be "a violation of the implied covenant of good faith and fair dealing because firing under these circumstances *would be based on improper motives and bad faith as a matter of law.*" 1 ER 53 (emphasis added).

The case proceeded to trial in Juneau on August 11, 2008. The district court continued to express its confusion over what the Alaska law was or whether plaintiff had a claim under her allegations, but suggested that the appellate courts would

resolve the issue.² At the close of plaintiff's case, Fred Meyer moved to dismiss, 1 ER 27-30, which motion was denied. 1 ER 39.

When the parties argued jury instructions Fred Meyer contended there was no claim which should be submitted to the jury. 1 ER 43. But if an instruction was submitted on the subjective prong of the covenant, Fred Meyer argued that per Alaska case law it should state that the "improper motive" or "bad faith" was only where the termination was "to unfairly deprive the employee of a benefit contemplated by the employment relationship." 1 ER 41, 44. The district court's response was that this was "way more complicated than I want." 1 ER 44. Instruction No. 17 submitted by the district court, 1 ER 19 (and in the addendum hereto), states:

An employer violates the covenant of good faith and fair dealing when it acts with improper motive or in bad faith.

It is a breach of the covenant of good faith and fair dealing if a supervisor terminates an employee for the purpose of hiring another employee for whom he had a hoped-for romantic interest.

At the close of the case, Fred Meyer made various motions to dismiss per Fed. R. Civ. P. 50. First, Fred Meyer moved to dismiss plaintiff's claim as described in Instruction No. 17. 1 ER 45-46. The district court denied the motion. 1 ER 47.

² "It's a murky case." 1 ER 42. "Maybe the Ninth Circuit will refer the matter to the Alaska Supreme Court. Then maybe they will give us a decision on it the next time around." 1 ER 47. "The Ninth Circuit will reconsider." 2 ER 2.

Fred Meyer next moved to dismiss any claim, even one under Instruction No. 17, except for termination by constructive discharge. 1 ER 47-48. The district court denied the motion. 1 ER 49.

Finally, Fred Meyer moved to dismiss the constructive discharge claim. 1 ER 50. The district court denied the motion. Id. Fred Meyer then took exception to Instruction No. 17 and argued that it failed to state a claim under Alaska law. 1 ER 51. Fred Meyer also took exception to the trial court's failure to give its proposed Jury Instruction No. 10, ¶ 2, on disparate treatment. 1 ER 51. The exceptions were not accepted.

C. Disposition in District Court.

On August 15, 2008, the jury returned a verdict in favor of plaintiff Johnson. 1 ER 52. It found that she was terminated from her employment with Fred Meyer in violation of the covenant of good faith and fair dealing and awarded her damages of \$208,000. 1 ER 15-16.

On August 28, 2008, Fred Meyer filed its post-trial motions for judgment as a matter of law for failure to state a claim in Instruction No. 17 and because no reasonable jury could have found per the instructions that Johnson's *supervisor* (San Miguel) terminated her to hire someone else. This was because the undisputed evidence was that San Miguel did not have the authority to terminate Johnson and because San Miguel did not recommend nor was involved in the decision by the

human resources representative to terminate Johnson for breaching company policy by walking off the job. Doc. 177. In response, Johnson cited no authority or evidence in support of Instruction No. 17 or the jury verdict. Doc. 181. The district court, also without citing any authority or evidence, denied Fred Meyer's motion. 1 ER 14.

Johnson thereafter sought an award of \$54,609 in prejudgment interest on the unsegregated jury verdict of \$208,00. Doc. 182. Fred Meyer opposed any prejudgment interest because Alaska law requires a verdict form separating past and future losses, and Johnson never submitted one. Doc. 188. Without explanation as to the bases therefor, on October 2, 2008, the district court awarded Johnson \$48,352 in prejudgment interest. 1 ER 13. Final judgment was entered October 8, 2008. 1 ER 12. Thereafter, Fred Meyer filed its timely notice of appeal on November 4, 2008. 1 ER 1.

IV. STATEMENT OF FACTS

Myrna Johnson was born and grew up in the Philippines. 2 ER 3. She married, had three girls, divorced, and came to the United States where she met her husband, Russell Johnson, in South Carolina. 2 ER 4. She moved to Alaska in 1992 and applied at Fred Meyer where she initially was hired part-time. 2 ER 6. After less than a year she took a job with the state of Alaska. 2 ER 8. Over two years later she was rehired by Fred Meyer as a relief assistant in the apparel department. 2 ER 9.

Jamie San Miguel moved from Puerto Rico to Alaska in 1991 and was hired by Fred Meyer. 2 ER 37. He worked in Fairbanks and Soldotna before he transferred to Juneau in 1996 as an assistant manager in the apparel department where he first met Johnson. 2 ER 37-40.³ San Miguel and Johnson got along great, and she invited San Miguel to her house several times. 2 ER 41.

San Miguel divorced in 2001. Thereafter he dated other women working at Fred Meyer but not in the apparel department because it was against company policy to date someone in the same department. 2 ER 95-96.

In March 2001, San Miguel was promoted to apparel manager. 2 ER 42. He then posted an opening for lead assistant and he selected Johnson. 2 ER 43. San Miguel liked Johnson, he had a good working relationship with her, and he thought her people skills were very good. 2 ER 44. He evaluated her weaknesses as lack of delegation, failure to follow-up, and failure to prioritize, but thought she would improve. 2 ER 44-45. San Miguel remained friendly with Johnson and approved her request for a two-week leave in January 2002. 2 ER 46.

After Johnson returned in February 2002 from her two-week leave she said that she had some personal problems with her daughter. 2 ER 47-48. San Miguel told her to take some time off. Id. Thereafter, Johnson requested and received approval from

³ The apparel department was one of a half dozen departments in the Juneau store (e.g., apparel, food, home, photo/electronics, pharmacy, and building store maintenance). 2 ER 102A. The managers of each department reported to the store director, Fred Sayre, and in turn they directed 240-300 employees. Id.

Fred Meyer for family leave and took her daughter to the Philippines. 2 ER 12. She said she would be gone from February 13, 2002, to March 13, 2002. Id.

After Johnson left on family leave in February, San Miguel had staffing issues in the apparel department because his assistant manager was gone for a month and his relief assistant was out with an injury. 2 ER 50. San Miguel was supervising 30 to 35 employees and it was a struggle to run the department without an assistant manager. 2 ER 51, 52. San Miguel called the apparel regional manager, Dennis Affleck, in Lynnwood, Washington, and told him he needed someone experienced to help him for a few weeks. 2 ER 52-53.⁴ Affleck checked with apparel managers at the ten different Fred Meyer stores in Alaska and then called San Miguel to say he had found an experienced assistant apparel manager in Wasilla, Johnna Havard, who was willing to come to Juneau on a temporary basis for three weeks. 2 ER 54-55.

San Miguel had never met Havard before she came to Juneau in March 2002, but she did a good job the three weeks she was there. 2 ER 56.⁵

Before she left Juneau on March 18, 2002, Havard initiated discussions with San Miguel that she would be willing to come to Juneau if an opening ever occurred.

⁴ San Miguel denied asking Affleck to send someone young and beautiful, in addition to experienced, but another witness said she overheard San Miguel on the telephone say to someone (she did not know who) that while he wanted someone experienced and beautiful, he did not want an old hag.

⁵ In March 2002, San Miguel was dating Kaylonna Haase, later his wife, who worked in the Fred Meyer liquor department. 2 ER 96. Per Fred Meyer policy, San Miguel could not date Havard or anyone else in his department. 2 ER 95.

2 ER 33. She later applied after the opening was posted following Johnson's walk off the job. 2 ER 34.

San Miguel discovered on Sunday, March 10, 2002, that Johnson had returned to Juneau, was in the Fred Meyer store, and yet had not called him. 2 ER 58. He went to the store, saw Johnson doing a setup for an outside vendor (a part-time job she did in addition to working at Fred Meyer) and discussed with her a date for her return to Fred Meyer. 2 ER 58-59. She agreed to come to work on Tuesday, March 12, 2002. 2 ER 60. As the schedule already had been posted for the week, San Miguel assigned Johnson to the closing shift because he thought she could improve recovery (i.e., straighten shelves, products, etc.) as there was a lot of pressure from the new higher level management team to improve store presentation. 2 ER 60-62.

The following week, after Johnson had been working the closing shift with recovery problems continuing, San Miguel came to work on Monday, March 18, 2002, and toured⁶ the apparel department. The store director, Fred Sayre, called San Miguel and told him that he already had toured the apparel department and its recovery condition was substandard. 2 ER 63-64.

Sayre, after reviewing with San Miguel the recovery problems in apparel since Johnson had returned, asked San Miguel if he had talked to her. 2 ER 64. San Miguel

⁶ A tour is when a manager walks a department, noting areas which need to be picked up, cleaned, or reset before customers arrive.

said he had, but maybe they jointly should counsel her on the need to improve. 2 ER 64.

San Miguel printed his emails from the prior week critical of Johnson's closing shift efforts. This was because he knew from previous experience that Johnson did not take criticism well; she always became emotional. 2 ER 66. He asked Johnson to meet him in the store director's office upstairs because it had a door to close for privacy. 2 ER 67, 68.

When Johnson arrived at the small store director's office, Sayre was sitting at his desk and San Miguel was standing to the side. Johnson sat in one of the two chairs across from Sayre. 2 ER 69. San Miguel asked Johnson why certain items had not been completed, but she disagreed that there were any problems. 2 ER 70. San Miguel then showed her the employee warning notice he had drafted, Ex. L (2 ER 19) (see addendum hereto), which stated that she needed to improve her performance within 30 days. 2 ER 72. He advised Johnson that she was not being suspended without pay, 2 ER 73, and the form was not going in her file. 2 ER 74. But if Johnson failed to show any improvement in the next 30 days she would be removed as the assistant apparel manager (which San Miguel never expected to happen). Id. All he wanted was *any* improvement by Johnson over the next 30 days. 2 ER 75.

Johnson became upset after seeing the warning notice and threatened to just quit or walk out. At this time the store director, Fred Sayre, took over the discussion. 2 ER 111.

As Sayre testified, the counseling of Johnson was the type of employee counseling done on a daily basis where there are 240-300 employees. 2 ER 110. The intent of the employee warning notice, Ex. L, was simply to tell Johnson what was lacking, to find out what was going on, and to understand how San Miguel and he could help her improve. 2 ER 114. Johnson was not being fired; she was not being suspended; and she was not being demoted. 2 ER 115. Johnson responded to Sayre that she “ought to just quit,” but Sayre told her he did not want that. 2 ER 111. Johnson then got up and walked out anyway, despite Sayre’s comments to her that if she walked out of the meeting it would be considered a voluntary resignation per the Fred Meyer Employee Responsibilities form.⁷ 2 ER 112, 118, 119.

Both Sayre and San Miguel were shocked by Johnson’s unexpected walkout of the counseling meeting. 2 ER 80, 116. It was particularly devastating to San Miguel because he was shorthanded on managers and it was hard to lose a good employee. 2 ER 90.

⁷ The Fred Meyer Employee Responsibilities form, Ex. B, is attached to the addendum hereto.

Johnson returned to the store director's office about 45 minutes after initially walking out and she asked for a copy of the employee warning notice, Ex. L. 2 ER 88. San Miguel asked her to sit down and discuss matters, but she just took the copy of Ex. L that Sayre gave her and left again. Id. This was the last time San Miguel talked to Johnson before the litigation. 2 ER 89. As an apparel manager, San Miguel did not have the authority to terminate Johnson or anybody else at Fred Meyer. 2 ER 71, 107. Only the store director, Sayre, had that authority. Id. But Sayre did not fire Johnson, nor did San Miguel. 2 ER 119.

Sayre called the human resources regional representative in Lynnwood, Washington, Mary Lucas, for advice. 2 ER 118, 119. Lucas concluded that Johnson had walked off the job, a voluntary resignation under the Fred Meyer Employee Responsibilities form. 2 ER 83 (Ex. B), 119. Lucas then initiated the paperwork for Johnson's voluntary resignation, but noted that it was okay to rehire Johnson. 2 ER 119. Neither Sayre, the store director, nor San Miguel, the apparel manager, fired Johnson or recommended her termination. Id.

If Johnson had reapplied the next week at Fred Meyer she would have been rehired. 2 ER 120. But she never returned. She engaged the first of her four different attorneys and this litigation followed.

V. SUMMARY OF THE ARGUMENT

1. The district court struggled with the issue of whether an at-will employee could pursue a claim under Alaska's covenant of good faith and fair dealing based on the allegation that she was terminated so her supervisor could replace her with someone in whom he might have a romantic interest. After properly declaring there was no breach of Alaska public policy by such allegations, the district court also should have held that there could not have been bad faith (undefined) in breach of the covenant by such allegations. Instead, this claim was improperly submitted to the jury. The jury verdict should be set aside.

2. The jury instructions required a finding that the plaintiff's supervisor terminated her in order to replace her with someone with whom he hoped to have a romantic interest. But the undisputed evidence was that plaintiff's supervisor merely recommended counseling; he did not have termination authority; and he did not recommend termination. The decision to terminate plaintiff was made by the company's human resources representative, contacted by the store director by telephone, on the sole basis that the employee walked off the job during a counseling meeting, contrary to written company policy signed and acknowledged by the employee. On this alternative basis, the jury verdict should be set aside because there was no evidence by which a reasonable jury could have found that plaintiff's supervisor terminated her.

3. The plaintiff pursued a claim of constructive discharge during discovery, pretrial motions, trial brief , and proposed jury instructions. At the close of plaintiff's case her sole claim of constructive discharge should have been dismissed and judgment entered for the defendant employer. But the plaintiff was permitted to change her theory after resting her case to add direct termination as well as constructive discharge, even though discovery had not been pursued on this theory. The jury found no constructive discharge. Accordingly, the jury verdict of termination should be set aside.

4. If the jury verdict is not set aside, the award of prejudgment interest should be set aside because plaintiff did not submit a segregated damage verdict form per the Alaska statute which requires segregation of the past and future damages as prejudgment interest only applies to past damages.

VI. ARGUMENT

- A. The district court erred in submitting to the jury plaintiff's claim of a violation of Alaska's implied covenant of good faith and fair dealing if she was terminated because her supervisor hoped to develop a personal relationship with another employee.**

Jury instructions challenged as a misstatement of law are reviewed *de novo*. *Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1052 n.11 (9th Cir. 2004). Fred Meyer contends that the limited claim pursued at trial and submitted to the jury per Instruction No. 17 (to which Fred Meyer excepted) fails to state a claim

under Alaska law. Therefore, the jury verdict should be set aside and judgment should be entered in favor of Fred Meyer.

Instruction No. 16 (addendum hereto) stated that plaintiff was an “at-will” employee, who could be terminated for any reason or for no reason, but not for an improper reason, i.e., “for a reason that violates the implied covenant of good faith and fair dealing.”

Instruction No. 17 (in addendum) stated:

An employer violates the covenant of good faith and fair dealing when it acts with improper motive or in bad faith.

It is a breach of the covenant of good faith and fair dealing if a supervisor terminates an employee for the purpose of hiring another employee for whom he had a hoped-for romantic interest.

Fred Meyer contends that this instruction fails to state a claim under Alaska state law.

Alaska is an at-will state but it does recognize a *limited* cause of action for breach of the covenant of good faith and fair dealing. *Ludtke v. Nabors Alaska Drilling, Inc.*, 168 P.2d 1123, 1130-31 (Alaska 1989).

The limited claim for breach of the covenant of good faith and fair dealing may arise in two situations per the Alaska Supreme Court:

(1) Termination in order to unfairly deprive the employee of a benefit contemplated by the employment agreement (e.g., a promised share of business profits) (*subjective* bad faith); or

(2) Termination by disparate treatment (unconstitutional grounds, or in violation of public policy, or different treatment from similarly situated employees) (*objective* bad faith).

Chijide v. Maniilaq Assoc. of Kotzebue, 972 P.2d 167, 172 (Alaska 1999).

The district court recognized that Johnson was not terminated based on (a) unconstitutional grounds, or (b) contrary to public policy, or (c) because of disparate treatment, i.e., objective bad faith. Accordingly, it concluded on August 7, 2008, that the jury would not be instructed on the objective element of the covenant. 1 ER 60-61. But the court did hold that the claim could proceed under the subjective prong analysis. *Id.* Fred Meyer contends this was error.

The only Alaska cases on the subjective prong require termination in order to unfairly deprive the employee (i.e., Johnson) of an economic benefit contemplated by the employment agreement (e.g., a promised share of business profits) (subjective bad faith). *Chijide, supra*. But there was no lost economic benefit for Johnson other than her at-will employment, and this does not state a viable claim as such. Johnson was employed at will so being terminated was not bad faith. Johnson's argument was that she "expected" to have a long career at Fred Meyer and she asked for future lost

earnings (and received such future damages). But “expectation” of long-time employment does not state a claim as it is not a constitutional issue, a public policy issue, or disparate treatment. *Belluomini v. Fred Meyer*, 993 P.2d 1009, 1012-14 (Alaska 1999).

In its Order on October 5, 2007 (1 ER 70), the district court recognized that there was no “explicit public policy in Alaska prohibiting an employer from discharging an at-will employee in order to replace her with someone else – even if motivated by a hoped-for romantic interest.” This is consistent with the EEOC guidelines and multiple cases which have addressed the issue.⁸

If it was not a violation of Alaska public policy for a supervisor to prefer a potential romantic interest over another employee, it follows there *could not be* a subjectively improper motive in terminating an employee, i.e., Johnson, because her supervisor preferred another employee with whom he hoped to have a romantic

⁸ See EEOC Notice No. 915.048, EEOC policy guidance on employer liability under Title VII for sexual favoritism, quoted in *Womack v. Runyon*, 147 F.3d 1298, 1300 (11th Cir. 1998). The EEOC policy states that preferential treatment toward a “paramour” (or “hoped-for paramour”), or a spouse, or a friend, similar to nepotism, is not unlawful. See *Preston v. Wisconsin Health Fund*, 397 F.3d 539, 541 (7th Cir. 2005); and *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996), *cert. denied*, 137 L. Ed. 2d 221 (1997). The law “does not, however, prevent employers from favoring employees because of personal relationships . . . because she is a protégé, an old friend, a close relative, or a love interest.” *Schobert v. Illinois Dept. of Transp.*, 304 F.3d 725, 733 (7th Cir. 2002). *Accord, De Cintio v. Westchester Cty. Med. Ctr.*, 807 F.2d 304, 306 (2d Cir. 1986); *Womack v. Runyon*, 147 F.3d 1298 (11th Cir. 1998).

relationship. But the district court later held (without reference to any Alaska case authority):

If Plaintiff succeeds in establishing that she was fired so that her supervisor could hire a woman with whom he had a hoped-for romantic interest, then Plaintiff may recover as a violation of the implied covenant of good faith and fair dealing because firing under these circumstances would be based on improper motives and bad faith as a matter of law.

Order, August 8, 2008. 1 ER 53.

The district court said this was the “law of the case” and that the “sweetie rule” was “not before this Court.” *Id.* But in reality the “sweetie rule” was before the district court when it declared *as a matter of law* that it was a breach of the covenant if a supervisor terminated an at-will employee (Johnson) in order to retain another woman (Havard) with whom he (allegedly) hoped to have a romantic relationship. Under this ruling Johnson did not have to prove even a violation of public policy because the district court improperly concluded *as a matter of law* that such action would be a violation of the covenant of good faith and fair dealing.

Fred Meyer contends the district court’s legal conclusion was incorrect. Alaska law does not prevent an employer from favoring certain employees because of a personal relationship, e.g., preferring family members (nepotism) over a current employee. Under the rationale of the district court’s holding, however, it is “bad faith” as a matter of Alaska law for a supervisor or owner to prefer his wife, or his daughter, or his son over a current employee. Or “bad faith” to prefer his fiancé, or

his girlfriend, or his “hoped for” girlfriend over a current at-will employee. The district court’s decision, set forth in Instruction No. 17, that it was “bad faith” if Johnson’s supervisor replaced her with another employee with whom he “hoped for a personal relationship” is not the law in Alaska.

The jury in this case was permitted to sit as a super-personnel department reviewing the wisdom or fairness of a business decision made by Fred Meyer. This is contrary to Alaska law. *Van Huff v. Sohio Alaska Petroleum Co.*, 835 P.2d 1181, 1183 (Alaska 1992). See also *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995).

Over the years the Alaska Supreme Court has polished its analysis of the claim of an alleged breach of the implied covenant of good faith and fair dealing with regard to the termination of an at-will employee.

In addressing the subjective aspect of the implied covenant of good faith and fair dealing, the *only* Alaska Supreme Court decision upholding a claim under the subjective prong is *Mitford v. de Lasala*, 666 P.2d 1000, 1006 (Alaska 1983). The plaintiff in *Mitford* was terminated to prevent payment to him of 10% of the future profits of the business, per his employment agreement. The Alaska Supreme Court held that where the employer’s motive in firing an employee was to deprive the employee of the economic benefits of the contract, this was a bad faith violation of the covenant of good faith and fair dealing. This has remained the Alaska Supreme

Court's limited definition of the subjective prong. See *Luedtke v. Nabors Alaska Drilling*, 834 P.2d 1220, 1224 (Alaska 1992); *Era Aviation, Inc. v. Seekins*, 973 P.2d 1137, 1139 (Alaska 1999).

There are no Alaska Supreme Court decisions which support the contention that as a matter of law it was "bad faith" to replace Myrna Johnson with another employee in whom the supervisor (arguably) had a personal interest. Under the scope of Instruction No. 17 given the jury, however, if the plaintiff was replaced by another employee who was a family member, or a better softball player, or a prospective daughter-in-law, this would state a claim for "bad faith." This is not the law in Alaska.

None of the key Alaska cases addressing the subjective prong of the covenant of good faith and fair dealing after *Mitford* support the claim submitted to the jury in Instruction No. 17. See:

Ramsey v. City of Sand Point, 936 P.2d 126, 133 (Alaska 1997) (An employer engages in subjective bad faith when it discharges an employee for the purpose of depriving him of one of the benefits of the employment contract. But where the plaintiff could not point to an alleged deprivation of benefits under the employment contract, "the subjective element of the covenant was not implicated.")

Era Aviation, Inc. v. Seekins, 973 P.2d 1137, 1141 (Alaska 1999):

In the at-will employment context, it is insufficient to show that an employee was discharged for reasons unrelated to job performance; instead, the employee must show a purpose that is, in itself, improper or impermissible.

. . . the company's alleged desire to avoid a personality conflict between two of its employees would [not], if proved, amount to an impermissible motive for firing [plaintiff].

Era Aviation is the closest decision to the issue in our case. The plaintiff Seekins alleged that she was terminated because of a "personality clash" with her supervisor. The Alaska Supreme Court disagreed "with the broad view of the implied covenant that Seekins proposed." The court declared that "in the at-will employment context, it is *insufficient to show that an employee was discharged for reasons unrelated to job performance.*" The court concluded that "personality conflict" was not an impermissible motive, and favorably cited in footnote 29 the decision in *E.I. DuPont de Nemours v. Pressman*, 679 A.2d 436, 444 (Del. 1996), which held that termination because of dislike, hatred, or ill will did not state a bad faith claim for an at-will employee. If it is not bad faith to terminate because of "hatred" under the subjective prong, how could it be bad faith to terminate because of a potential romantic interest?

Under the facts of this case, it was error to submit Johnson's claim to the jury as set forth in Instruction No. 17. This Court should hold that as a matter of Alaska law it was not bad faith, under the subjective test, for a supervisor to allegedly replace one employee with another person with whom he hoped to have a personal relationship.

This Court should set aside the jury's verdict, and direct the district court to enter judgment in favor of Fred Meyer as a matter of law.

B. This Court should set aside the jury verdict because it was improper to submit the alternative theory that Johnson was terminated by Fred Meyer rather than constructively discharged.

Formulations of jury instructions are reviewed for abuse of discretion. See *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001). This case went through discovery, pretrial, motions, and the plaintiff's case-in-chief on the single contention by Johnson that she was "constructively discharged" from her employment with Fred Meyer. Accordingly, at the close of Johnson's case-in-chief, and Fred Meyer's motion to dismiss, it was improper to permit her to change theories and to argue to the jury that she also was wrongfully terminated by her supervisor.

Jury Instruction Nos. 16, 17, 18 and 19 and the verdict form (all are in the addendum hereto) gave Johnson the option to argue that she was either directly "terminated" by Fred Meyer or "constructively discharged." The case never should have been submitted to the jury with the option for it to decide if Johnson was "terminated" outright by Fred Meyer.

In her complaint, 2 ER 150-156 (¶¶ 81, 100, 102, 106 and 112), Johnson alleged wrongful discharge and constructive discharge in breach of the implied covenant of good faith and fair dealing. As the parties proceeded through four years of discovery, the only contention by Johnson in her response to motions, her trial brief, and her

proposed jury instructions, was that she had been “constructively discharged.” In its Answer, 2 ER 135 (¶ 37), Fred Meyer denied that plaintiff “was constructively discharged.”

The pretrial order issued by the Court on April 5, 2007, directed the parties to submit their proposed jury instructions by September 17, 2007 (one year before trial). 1 ER 89. Johnson filed her proposed jury instructions on September 17, 2007. Doc. 102. Johnson did *not* propose any jury instruction on “termination” by Fred Meyer, but only submitted Instruction No. 2 defining “constructive discharge” as “working conditions so intolerable that an employee is forced to an involuntary resignation.”

In Johnson’s trial brief filed September 17, 2007, Doc. 103, the *only* theory of termination was “constructive discharge,” discussed at page 12: “The record of this case supports a claim of constructive discharge.”

In Fred Meyer’s trial brief also submitted on September 17, 2007, Doc. 99, we discussed Johnson’s sole contention that “Fred Meyer constructively discharged her.” Id. at 2 In Fred Meyer’s proposed jury instructions also submitted on September 17, 2007, the only proposed instruction on discharge was No. 10 on constructive discharge. 2 ER 98. No instruction from either party addressed direct “termination” because that was never an issue.

After Johnson's complaint, discovery, and her contentions for four years, the only claim she presented at the pretrial conference on August 6, 2008, was that she was "constructively discharged." The district court's original proposed instructions on discharge only had the "Constructive Discharge Definition." Johnson's counsel never suggested there was a separate contention that she had been directly terminated by Fred Meyer. At the beginning of trial on Monday, August 11, 2008, the advance instruction to the jury pool and subsequent opening statement by counsel only referred to "constructive discharge." After the district court and counsel conferred on Tuesday, August 12, 2008, proposed Instruction No. 18 referred to "constructive discharge"; no instruction was proposed on "termination." The parties and court also discussed at length proposed changes to the jury instructions and the verdict form based solely on the theory of "constructive discharge."

After Fred Meyer's cross-examination of Johnson, where she admitted that she had walked out of the counseling session on March 18, 2002, without being restricted from doing so, and that she had returned about an hour later to get additional information (including a copy of the counseling memo), and that she prepared the next morning to return to work at Fred Meyer, it was clear that the elements of constructive discharge could not be met by Johnson. Accordingly, Fred Meyer moved to dismiss Johnson's claims at the close of plaintiff's case. 1 ER 29. Recognizing that Fred Meyer's motion was well taken, Johnson argued for the first time that she also wanted

to proceed on the alternate theory of direct termination. Fred Meyer responded that this was a new theory, it was prejudicial to Fred Meyer because it had not conducted discovery on this theory, nor prepared proposed jury instructions, nor prepared witnesses, nor sought to introduce exhibits, nor otherwise anticipated that in the middle of trial Fred Meyer would have to defend a new theory. 1 ER 35. Fred Meyer's motion to dismiss at the close of Johnson's case-in-chief was denied improperly. The case went to jury on the alternate theories of either direct termination or constructive discharge.

Fred Meyer contends that this case never should have gone to the jury on the theory of whether Johnson was directly terminated by it. The only theory should have been constructive discharge. The jury did not find constructive discharge per the Verdict Form. See addendum. Therefore, because the theory of "termination" was improperly submitted, and because there was no constructive discharge, the jury verdict should be set aside and the district court should be directed to enter judgment for Fred Meyer.

C. The district court erred in not setting aside the jury verdict because no reasonable jury could have found that Johnson's "supervisor" terminated her as he had no authority to terminate and he never recommended termination.

A jury verdict is reviewed under the substantial evidence standard. *Engquist v. Oregon Dept. Agri.*, 478 F.3d 985, 992 (9th Cir. 2007).

Jury Instruction No. 17 states:

An employer violates the covenant of good faith and fair dealing when it acts with improper motive or in bad faith.

It is a breach of the covenant of good faith and fair dealing if a *supervisor* terminates an employee for the purpose of hiring another employee for whom he had a hoped-for romantic interest.

(Emphasis added.)

Under this instruction, Johnson's "supervisor" had to terminate her. No reasonable jury could have found that Johnson's "supervisor" terminated her based on the evidence at trial.

1. It is undisputed that San Miguel was Johnson's supervisor. 2 ER 43.
2. It is undisputed that San Miguel did not have authority to terminate Johnson. 2 ER 57, 84.
3. It is undisputed that Johnson walked out of a counseling session after being told that such action could be considered her voluntary resignation. 2 ER 112, 118-119.
4. It is undisputed that San Miguel did not recommend to either Sayre or Mary Lucas in Human Resources that Johnson be terminated; that San Miguel did not speak to Sayre about terminating Johnson; and that neither Sayre nor Mary Lucas had any knowledge of any alleged hoped-for romantic interest by San Miguel in Johnna Havard. 2 ER 73, 74, 86, 87, 89, 105; Doc. 177.
4. It is undisputed that Mary Lucas was advised only that Johnson had walked out of the meeting after Sayre told her that if she did, she would be breaching

the Fred Meyer Employee Responsibilities form and this would be a voluntary termination. 2 ER 119.

The Fred Meyer employee who made the decision to “terminate” Johnson was Mary Lucas. 2 ER 118-119. While Johnson had voluntarily terminated, she remained eligible for re-hire. Id. It is undisputed that the only information Lucas had was that Johnson had walked off the job. Id. Accordingly, there is no way a reasonable jury could have found (as required by Instruction No. 17) that Johnson’s “supervisor” (San Miguel) had terminated her in order to replace her with another employee.

A case from the First Circuit illustrates the analysis for this issue. In *Kouvchinov v. Parametric Technology Corp.*, 537 F.3d 62 (1st Cir. 2008), the question was the proper analysis of a claim of employment discrimination. The district court granted summary judgment for the defendant and the Court of Appeals affirmed.

The Court of Appeals noted that in analyzing “pretext” (which is similar to analyzing “bad faith”):

[T]he focus is on the mindset of the *actual decision-maker*. This holds true even when the decision-maker is relying on information that may later prove to be inaccurate. In other words, it is not enough for a plaintiff to show that the decision-maker acted on an incorrect perception. Instead, the plaintiff must show that the decision-maker did not believe in the accuracy of the reason given for the adverse employment action. This is as it should be: the anti-discrimination laws do not insure against inaccuracy or flawed business judgment on the employer’s part; rather, they are designed to protect against, and to prevent, actions spurred by some discriminatory animus.

537 F.3d at 67 (emphasis added).

In our case the evidence is undisputed that the only person with an alleged discriminatory animus was Jaime San Miguel. It is also undisputed that the only information provided to Mary Lucas about plaintiff was that Johnson had walked out of the counseling session on March 18, 2002. Even if Lucas “acted on an incorrect perception,” there was no “bad faith” in Lucas’ action. Accordingly, there could not have been any “bad faith” on the part of “Fred Meyer” because the decision-maker for Johnson’s termination was not San Miguel, and his alleged intentions were never communicated to Mary Lucas. This Court should direct that the jury verdict be set aside because no reasonable jury could find that Mary Lucas terminated Johnson so San Miguel could potentially replace her with someone else.

D. If this verdict is not set aside, then the district court erred in awarding Johnson prejudgment interest on a non-segregated claim combining both front and back pay damages.

1. Damages sought for both back pay and front pay. The amount of an award of prejudgment interest, if legally appropriate, is reviewed for abuse of discretion. *Webb v. Ada County*, 285 F.3d 829, 841 (9th Cir. 2002). Johnson requested prejudgment interest of \$54,609 based on the August 15, 2008, jury verdict of \$208,000. Doc. 182. But Johnson sought back pay damages for the six years from March 2002 (termination) to August 2008 (trial) and nine years of front pay damages from August 2008 until 2016 when she expected to retire. 2 ER 122-125. Fred Meyer

argued there was no lost back pay because, for example, her tax return for 2001 was \$92,919 and for 2006 was \$92,219 (only \$700 difference) and she was making \$10,000 a year more in 2008 than she made at Fred Meyer in 2002. 2 ER 127. By failing to segregate the damages between alleged lost back pay and alleged lost front pay damages, Johnson did not establish a right to prejudgment interest.

2. Alaska law requires verdict form separating past and future losses.

Whether prejudgment interest is permitted as a matter of law is reviewed *de novo*. *Polar Bear Productions., Inc. v. Timex Corp.*, 384 F.3d 700, 716 (9th Cir. 2004). The key Alaska statute is AS § 09.17.040 which describes the procedure when a plaintiff is seeking an award for both past or future damages.

AS § 09.17.040 requires:

(a) In every case where damages . . . are awarded by the . . . jury, the verdict shall be itemized . . . as follows:

(1) past economic loss;

* * *

(3) future economic loss;

* * *

Johnson failed to request a verdict form separating her claims between lost past earnings and lost future earnings. As a result, she should not have been awarded prejudgment interest (which is only for past economic loss) as it is pure speculation as to whether the award was for past or future economic loss.

In *McConkey v. Hart*, 930 P.2d 402, 403 (Alaska 1996), the jury verdict form properly separated “past economic loss” from “future economic loss.” Citing AS § 09.30.070(b), the Alaska Supreme Court held that “prejudgment interest . . . should not be awarded for any future damages, discounted or nondiscounted,” because this would equate to a double recovery. 930 P.2d at 406. As Johnson failed to propose and submit a verdict form distinguishing between her claim for “past lost wages” and “future lost wages,” she should not have been awarded any prejudgment interest. The district court, however, without explanation, awarded Johnson prejudgment interest of \$48,352. 1 ER 12. This award should be set aside if this issue is reached.

VII. CONCLUSION

On alternate grounds, Fred Meyer asks this Court to set aside the jury verdict in favor of plaintiff Johnson.

First, Instruction No. 17 submitted to the jury fails to state a claim under Alaska law because it is not bad faith to replace an at-will employee with another employee with whom the supervisor hoped to have a romantic relationship.

Second, even if Instruction No. 17 stated a claim, the evidence did not support the jury’s verdict that Johnson’s “supervisor” terminated her.

Third, the claim that Fred Meyer “terminated” Johnson never should have been submitted to the jury because Johnson’s only theory before and during the trial was “constructive discharge.”

Finally, if the jury verdict is not set aside, the award of prejudgment interest should be disallowed because Johnson did not submit a segregated verdict form distinguishing between alleged past and future damages.

DATED this 6th day of April, 2009.

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**BRIEF FORMAT CERTIFICATION PURSUANT
TO CIRCUIT RULE 32(a)(7) FOR CASE NOS. 08-35928/08-35931**

Pursuant to Ninth Circuit Rule 32(a)(7)(C)(i). I hereby certify that the BRIEF
OF CROSS-APPELLANT FRED MEYER STORES, INC. is
proportionately spaced, has a typeface of 14 points or more and contains
fewer than 14,000 words (opening, answering, and the second and third
briefs filed in cross-appeals must not exceed 14,000 words)

DATED this 6th day of April, 2009.

MILLER NASH LLP

s/ James R. Dickens

James R. Dickens

WSB No. 4610

Attorneys for Cross-Appellant/Appellee
Fred Meyer Stores, Inc.

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Numbers: 08-35928/08-35931

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 6, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ James R. Dickens

James R. Dickens