

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

No. 08-35928, 08-35931

MYRNA I. JOHNSON,

Appellee/Cross-Appellant,

v.

FRED MEYER STORES, INC.,

Cross-Appellant/Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. 1:04-cv-00008-RRB

Honorable Ralph R. Beistline,
District Court Judge

**BRIEF OF APPELLEE/CROSS-APPELLANT
MYRNA I. JOHNSON**

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JURISDICTIONAL STATEMENT

This case was heard in the District Court on diversity jurisdiction under (28 U.S.C. §1332) and pendent state law claims (28 U.S.C. §1367). Judgment was entered on October 17, 2008 [1 ER 14]. Appeal was filed on November 5, 2008 by Fred Meyer Stores, Inc. and Cross-Appeal was filed on November 5, 2008 by Myrna Johnson. This court has jurisdiction over this appeal under 28 U.S.C. §1291.

ISSUES ON APPEAL

1. Is it a violation of the covenant of good faith and fair dealing under Alaska law to fire an employee without normal progressive discipline so that her supervisor can pursue a sexual or romantic relationship with a younger and better-looking replacement employee?
2. Was it error for the trial court to submit the case to the jury on the plaintiff's allegation that plaintiff was terminated directly by Fred Meyer Stores, after defendant had clear notice that plaintiff was pursuing that allegation?
3. Was it error for the trial court to accept the jury's determination that one of the plaintiff's supervisors terminated her?
4. Did the trial court err by not segregating past and future damages under a statute that applies only to tort cases?
5. Did the trial court err by not submitting to the jury the question of whether the defendant was liable for a public policy tort?

STATEMENT OF THE CASE

A. Facts of the Case

This is a case of a long-term employee of the Fred Meyer department store chain who was terminated at the instigation of a supervisor who wanted to have a sexual or romantic relationship with a younger and more attractive replacement employee.

The jury found for the plaintiff, Myrna Johnson, after hearing this testimony:

Myrna Johnson, who was fifty years old when she was terminated,¹ worked at the Juneau Fred Meyer store starting in 1992,² working her way up to assistant manager of apparel.³ She was consistently recognized as an outstanding and hard worker,⁴ "excellent," according to her store manager,⁵ "a really hard worker" and "no complaints" according to the apparel manager, Jaime San Miguel.⁶ She received consistently outstanding evaluations.⁷ She was considered a good friend by San Miguel,⁸ who told her she would become the apparel manager when he was promoted.⁹

¹ Tr. 1-238

² Tr. 1-171

³ Tr. 3-69

⁴ Tr 1-178, 1-188, 1-181, 2-149, 2-154, 3-15, 2-248, 2-249, 3-69, 3-70

⁵ Tr. 2-163

⁶ Tr 3-195

⁷ Tr 1-188

⁸ Tr. 2-154

⁹ Tr. 1-244

Then, in March, 2002, it suddenly changed. Ms. Johnson returned from a two-week emergency family leave¹⁰ to find San Miguel had moved her to the night shift,¹¹ where she was required to put in ten to twelve hours each night.¹² During the next week, San Miguel repeatedly criticized her and demanded harder work,¹³ even though he did not identify anything she was doing wrong. He asked other workers to tell him privately things she was doing wrong.¹⁴

On March 18, 2002, after she was required by Mr. San Miguel to work eight straight days of eleven and twelve hour work without even a lunch break,¹⁵ she was called into a small windowless room by the store manager and by San Miguel.¹⁶ The door was closed and no other women were present, contrary to store policy.¹⁷ San Miguel and the manager then launched into criticisms and demanded that she improve her performance -- again without identifying anything she was doing wrong.¹⁸ She was confronted with a written warning form that said she had thirty days to improve or she would be fired,¹⁹ contrary to the store's policy of progressive discipline, i.e., first informal counseling, then a verbal warning, and

¹⁰ Tr. 1-192

¹¹ Tr. 1-195, 196

¹² Tr. 1-197, 205, 212

¹³ Tr. 1-203, 204, 205, 206, 213, 3-12

¹⁴ Tr. 1-215, 2-216

¹⁵ Tr. 1-205, 212, 215-16

¹⁶ Tr. 1-215, 1-216

¹⁷ Tr. 1-187, 215, 216, 2-84, 2-138

¹⁸ Tr. 1-215, 216, 217, 220, 222

¹⁹ Tr. 1-217-219

only then a written warning with a time line.²⁰ Ms. Johnson became so distraught and so convinced that she was being set up for firing, ending her career, that she had to leave the room to keep from passing out.²¹ She spent an hour in an employees' area crying, then had to go home as she was too upset to work.²²

The next day she called in to schedule extra work to make up for the time lost when she left early after the incident in the closed office.²³ But the store manager's office told her that she no longer worked there, that her job had ended when she left the day before.²⁴ She appealed to the regional manager and the area human resources supervisor, who both said they would look into it, but she never heard from either of them, or anyone else at Fred Meyer, again.²⁵ The jury heard that other store supervisors, including San Miguel, had left the store at times of emotional distress with no repercussions.²⁶

As Ms. Johnson told the jury, she later found out she had been set up.²⁷ The jury heard that her supervisor, Jaime San Miguel, had, before the firing, tried to get several of the employees he supervised to find him dates with women.²⁸ He had

²⁰ Tr. 1-185, 217, 220, 221, 2-86, 87

²¹ Tr. 1-217, 220, 221, 222, 223

²² Tr. 1-224

²³ Tr. 1-230

²⁴ Tr. 1-230, 231

²⁵ Tr. 1-231, 234

²⁶ Tr. 2-221, 2-225

²⁷ Tr. 2-216, 2-109, 110

²⁸ Tr. 2-233, 207

been heard many times making inappropriate comments about good-looking women in the store, both workers and customers, including the comment about good-looking women that if they applied for a job, he would hire them.²⁹ The women he did hire were young and beautiful.³⁰ And when Ms. Johnson went on emergency leave, he asked for a temporary replacement who was "good looking...Don't send me a hag."³¹ The replacement, Joanna Havard, was tall and beautiful, which is the description San Miguel had said a number of times was the type of woman he preferred.³² (All of the older women working in the apparel department were hired by persons other than San Miguel.³³) He put Ms. Havard on the same shift as himself, took her out to dinner, and invited her to his home for "Latin dancing."³⁴ He also told her she should consider becoming assistant manager, i.e., Ms. Johnson's position, at a time they both knew Ms. Johnson would soon return to her job from her emergency leave.³⁵ Ms. Havard testified that his inappropriate attentions to her ended abruptly when she told him she was dating someone else, at which point he put her on a different shift, minimized interactions

²⁹ Tr. 2-151, 2-152, 2-180, 2-204, 2-217, 2-236, 2-237, 2-238

³⁰ Tr. 2-204, 206

³¹ Tr. 2-203

³² Tr. 2-206, 2-208, 2-236

³³ Tr. 2-236

³⁴ Tr. 3-12, 3-13, 3-21, 3-23

³⁵ Tr. 3-14

with her, and for the first time became critical of her work.³⁶ She later left for another department because she could see San Miguel doing the same thing to her that he had done to Ms. Johnson.³⁷ San Miguel claimed that he did not have romantic or sexual relations with women working at Fred Meyer, but a rebuttal witness testified that he had had sex with her while she was a store employee,³⁸ and he admitted dating and eventually marrying another Fred Meyer employee.³⁹

B. The Litigation Below

After she became convinced that San Miguel had set her up for firing so that he could replace her with a younger and better looking woman with whom he could pursue a personal romantic or sexual relationship, Ms. Johnson brought suit for her substantial economic damages and for emotional and punitive damages, under both contract and tort theories.

The District Court allowed the case to go to the jury only on the contract theory of breach of the covenant of good faith and fair dealing. It refused to allow the jury to decide her tort claim based on violation of public policy. The jury returned a special verdict, finding that she was fired in violation of the contractual duty of good faith and fair dealing, and awarded her \$208,000 in damages.

Both sides appealed, Fred Meyer claiming that the conduct here could not

³⁶ Tr. 2-224, 3-23, 3-45

³⁷ Tr. 2-224

³⁸ Tr. 5-92, 5-93, 5-94, 5-95

³⁹ Tr. 2-150, 3-180

support a finding of violation of good faith and fair dealing; and Ms. Johnson, because the trial court erred in refusing to allow the jury to decide if a public policy tort occurred, thus depriving her of the right to receive an award for emotional damage and to receive punitive damages.

SUMMARY OF THE ARGUMENT

1. It was correct for the case to go to the jury on the allegation of a violation of the covenant of good faith and fair dealing in plaintiff's employment contract. Firing her, a much-praised employee, so that her supervisor could replace her with a younger and better-looking replacement, without using the company's normal discipline policies, fits all legal criteria for a violation of the covenant.
2. Defendant Fred Meyer had notice of the allegation against it, that it improperly fired Ms. Johnson, from the day the complaint was filed right up through the pretrial motions; it has no valid claim of surprise.
3. The jury had ample evidence to conclude that one of Ms. Johnson's supervisors fired her and that her immediate supervisor -- who wanted to replace her with a younger and better-looking woman -- instigated the firing.
4. The Alaska statute requiring segregation of past and future damages applies only in tort cases, not contract violation cases like this one, by its own terms.
5. The court should have submitted the plaintiff's alternate theory, that defendant violated a public policy tort, to the jury, as it meets all of the state law criteria for such a tort.

ARGUMENT

A. ALASKA LAW FIRMLY SUPPORTS A FINDING OF VIOLATION OF THE DUTY OF GOOD FAITH AND FAIR DEALING WHEN AN EMPLOYEE IS FIRED SO THAT HER SUPERVISOR CAN PURSUE A SEXUAL OR ROMANTIC RELATIONSHIP WITH A YOUNGER AND BETTER-LOOKING REPLACEMENT EMPLOYEE.

Fred Meyer Stores claims that Alaska law allows a supervisor to show “favoritism” in selecting and firing employees in order to favor friends, relatives, and “protegees.” And it would extend this claim to situations like that in this case. In fact, there is no support for this proposition in Alaskan law.

1. Standard of review.

“[If] within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient. We must presume all factual allegations of the complaint to be true and make all reasonable inferences in favor of the non-moving party.”⁴⁰ The jury found that Ms. Johnson was terminated by Fred Meyer in violation of the covenant of good faith and fair dealing. [ER1, p. 16]. On appeal, the court will view the facts most favorably to the party who prevailed at trial.⁴¹ The jury’s verdict must be upheld if any substantial evidence supports it, i.e., such relevant evidence as reasonable minds

⁴⁰ Citing *Belluomini v. Fred Meyer Stores, Inc.*, 993 P.2d 1009, 1014 (Alaska 1999).

⁴¹ *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807, 810 (Alaska 2005).

might accept as adequate to support a conclusion.⁴²

2. Behavior such as that testified to here violates the covenant of good faith and fair dealing.

(a) Established Alaska case law applies here.

The doctrine of good faith and fair dealing has been a feature of Alaska law for at least three decades.⁴³ In its earliest Alaskan statement, the Alaska Supreme Court stated,

In every contract... there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.

Guin v. Ha, 591 P.2d 1281 (Alaska 1979). The court found a basis for the doctrine in Restatement (Second) of *Contracts* § 205 (1981), which provided:

Every contract imposes upon each party a duty of good faith and fair dealing in its performance or its enforcement.

In employment, the doctrine applies to at-will employment as well as to other types of employment.⁴⁴ “At-will employees can be fired for any reason that does not violate the covenant of good faith and fair dealing,” *Era Aviation v. Seekins*, 973 P.2d 1137 (Alaska 1999); *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958, 959 (Alaska 1983).

⁴² *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990).

⁴³ *See Guin v. Ha*, 591 P.2d 1281 (Alaska 1979); *Mitford v. de LaSala*, 666 P.2d 1000, 1007 (Alaska 1983); *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989).

⁴⁴ *Id.*

In the employment contract context, the covenant operates as a check on employers' traditional freedom to terminate at-will employment for any reason; we have held that an employer may not terminate an at-will employee for reasons antithetical to the implied covenant.⁴⁵ ... the covenant prohibits an employer from exercising at-will powers of discharge to unfairly deprive an employee of a benefit contemplated by the employment contract.

Era Aviation, op. cit., at 1139.

In subsequent cases, the Alaska Supreme Court made a more detailed analysis, stating that violations of the duty of good faith and fair dealing could be placed in two categories, either a subjective violation, in which the courts look to whether the violator had the intent to deprive the other party of the benefits of an employment agreement, or an objective violation, in which the violator acts in a way that a reasonable person would regard as unfair.⁴⁶ The court summarized its approach in the following paragraph, from *Pitka v. Interior Regional Housing Authority*, 54 P.3d 785, 789 (Alaska 2002), on which the District Court in the instant case relied heavily:⁴⁷

At-will employees may be terminated for any reason that does not violate the implied covenant of good faith and fair dealing. "[E]very contract is subject to an implied covenant of good faith and fair dealing." Breach of the implied covenant may be either subjective or objective. An employer may violate the implied covenant by acting with a subjectively improper motive, such as when it "discharges an

⁴⁵ *Era Aviation v. Seekins*, 973 P.2d 1137 (Alaska 1999), citing *French v. Jadon*, 911 P.2d 20, 24 (Alaska 1996).

⁴⁶ *Blackburn v. State*, 103 P.3d 900 (Alaska 2004); *Belluomini v. Fred Meyer Stores, Inc.*, 993 P.2d 1009 (Alaska 1999).

⁴⁷ See ER1, pp. 59-61.

employee for the purpose of depriving him or her of one of the benefits of the contract. The subjective element is not based on the employee's personal feelings, but rather on the employer's motives. Therefore, the employee must present proof that the employer's decision to terminate him or her "was actually made in bad faith." An objective breach of the implied covenant may occur where the employer does not "act in a manner which a reasonable person would regard as fair." *Disparate employee treatment, terminations on unconstitutional grounds, and firings that violate public policy are examples of actions that may violate the objective aspect of the implied covenant.* [citations omitted and set out below.⁴⁸ Emphasis added.]

Fred Meyer now implies that these cases limit application of the covenant to the precise factual circumstances in each of these prior cases. On the contrary, the Alaska Supreme Court has held in several cases that it is incapable of "precise definition."⁴⁹ Moreover, the language in *Pitka*, quoted above, states that the cited cases are "examples" of breaches of the covenant, not the sole instances in which a breach may be found.

(b) More recent cases even more clearly support the covenant here.

Fred Meyer's opening brief failed to mention the most recent cases on the covenant. *Willard v. Khotol Services Corp.*, 171 P.3d 108 (Alaska 2007), involved a plaintiff who was fired with no prior warnings or counseling, as in this case. The

⁴⁸ The court cited the following cases: *Luedtke v. Nabors Alaska Drilling, Inc.* (Luedtke I), 768 P.2d 1123, 1131 (Alaska 1989); *Era Aviation v. Seekins*, 973 P.2d 1137, 1139 (Alaska 1999); *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997); *Mitford v. de Lasala*, 666 P.2d 1000, 1007 (Alaska 1983).

⁴⁹ *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751 (Alaska 2008); *Holland v. Union Oil Co. of California*, 993 P.2d 1026 (Alaska 1999); *Belluomini v. Fred Meyer Stores, Inc.*, 993 P.2d 1009 (Alaska 1999).

court cited both the subjective and objective approaches to the covenant of good faith and fair dealing and said both of them fit. It found that the plaintiff should have been able to present evidence that he was fired unfairly, without the appropriate warnings, and for an improper reason, i.e., in retaliation for legitimate actions the company did not like. Similarly, in this case, Ms. Johnson presented evidence that her supervisor and his boss, the store manager, failed to give her warnings or counseling and instead summarily fired her when she left the meeting at which she was berated unfairly to regain her emotional stability; as well as evidence of an improper intent, i.e., to deprive her of her job so the supervisor could pursue a younger and better-looking replacement employee. There was ample evidence for the jury to conclude, as it did, that Fred Meyer unfairly fired her in breach of the covenant of good faith and fair dealing.

The most recent Alaska case in this area is *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751 (Alaska 2008). The case involved an employee who was fired for sexual harassment and who claimed the employer failed to give him an opportunity to present his side of the story and that it treated other workers more leniently for similar conduct. The court first noted that the version of the facts most favorable to the non-movant must be accepted as true, and that appellate courts make no attempt to weigh the evidence or evaluate witness credibility. It held that the failure of the company to give him an opportunity to tell his side of

the story created a triable issue of fact of whether the company conducted a “fair and reasonable” investigation. And it found a triable issue as to whether he was treated more harshly than similarly situated employees. The parallel to the instant case is that evidence showed that other employees were given progressive discipline rather than being summarily fired as Ms. Johnson was;⁵⁰ that when she complained to the area human resources manager, nothing was done;⁵¹ and that other employees, including the supervisor whose sexual/romantic maneuverings precipitated the firing, were allowed to leave work during times of personal stress without being punished or fired.⁵² Thus there were at the very least “triable issues of fact” concerning breach of the covenant, and so the jury’s conclusion must be respected.

Another close parallel to this case is *Alaska Marine Pilots v. Hendsch*, 905 P.2d 98 (Alaska 1997), in which the court held that the covenant is breached when the employer fails to “treat like employees alike and to act in a manner which a reasonable person would regard as fair”. The court found that the jury could reasonably have concluded that, although it was proper to terminate the plaintiff, it was not proper to do so without a promised 30-day notice period, and that termination without the notice period violated the covenant of good faith and fair

⁵⁰ Tr. 2-221, 2-86, 2-133

⁵¹ Tr. 230-231, 234

⁵² Tr. 2-221, 2-225

dealing. In Ms. Johnson's case, the jury heard evidence that it was standard practice at Fred Meyer to do phased discipline, with counseling, verbal warning, then written warning, before a termination, and that the company failed to take any of those steps here;⁵³ thus the objective approach to the covenant was breached. And it heard the evidence of her supervisor's improper goal to fire her to promote his own sexual or romantic adventures, which would violate the subjective prong of the covenant.

3. Fred Meyers' claim that it can fire one employee so a preferred employee can be hired stretches a small point beyond breaking.

Fred Meyer Stores claims that the courts recognize the right of an employer to fire one employee to replace him or her with another person, such as a relative, protegee, or friend, and implies that this is all that happened in this case.

The store's argument is largely based on a few decisions from which elements are lifted out of context. It cites *Era Aviation v. Seekins*, 973 P.2d 1137 (Alaska 1999), as the case closest to this one. *Era* involved a "personality dispute" between a supervisor and an employee; after being fired, the employee sued claiming, inter alia, that the covenant of good faith and fair dealing was violated when she was fired for a reason other than poor performance. The court noted that the covenant cannot be used to convert at-will employment to "for cause" employment. It held that the employer's desire to avoid a personality conflict

⁵³ Tr. 1-185, 2-221, 3-86, 2-133, 2-139

between two employees “would not amount to an impermissible motive for firing Seekins,” 973 P.2d at 1141.

This is an unremarkable result with no application here. There was never any evidence of an improper motive in the *Era* case and no evidence that the plaintiff’s work performance was even a factor. In contrast, in this case there was ample evidence of a bad motive that resulted in termination in spite of the fact that Ms. Johnson had been an exemplary employee. Personalities had nothing to do with it. Nor is there anything in the decision that supports Fred Meyer’s claim that there is some sort of safety zone for employers who fire employees to replace them with others who are preferred for reasons other than work performance. Fred Meyer has not cited a single case for the proposition that replacing an employee with a relative never violates the covenant, and has offered no legal support for its claim that it is legitimate to fire an older employee so a supervisor can pursue a sexual or romantic relationship with a younger and better-looking replacement. Instead, the jury must examine whether the firing was the result of an unfair intent or was objectively unfair.

A good contrast is *Blackburn v. State*, 103 P.3d 900 (Alaska 2004), in which a fired employee claimed that the employer hired him under false pretenses and kept him only until it could find someone with superior mechanical skills to replace him. The court found that, although Blackburn did not produce the needed

proof, if he had, “it arguably would have violated public policy” (and hence violate the covenant) if it had done so. Thus hiring a person and firing him so he could be replaced by a better worker would itself violate the covenant, so it makes little sense to claim, as Fred Meyer does, that it is legitimate to replace an excellent worker with another when the motive is one that most people would condemn as dishonorable.

4. A violation of public policy occurred here and is a separate basis for sending the case to the jury to determine whether the covenant was breached.

As noted, the objective prong of the covenant is breached when an employer fails to act in a manner that a reasonable person would consider fair, which includes a) treating similarly situated employees disparately, b) terminating employees on unconstitutional grounds, and c) terminating employees in violation of public policy.⁵⁴ This case obviously involves an allegation that Fred Meyer treated Ms. Johnson disparately from other employees, both as to a) motivation (being fired because she was not as young and good-looking as her intended replacement) and b) the process to which she was subjected (no progressive discipline, no warnings, and a star-chamber proceeding behind a closed door in violation of standard store policy; and c) for taking time to recover emotionally

⁵⁴ *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751 (Alaska 2008); *Willard v. Kohotol Services Corp.*, 171 P.3d 108 (Alaska 2007); *Blackburn v. State*, 103 P.3d 900 (Alaska 2004); *Alaska Marine Pilots v. Hendsch*, 950 P.2d 98 (Alaska 1997).

when she believed that her career was being ended, while others had not been disciplined for taking time to recover emotionally when troubles hit them).

This case also involves the allegation that the firing violated public policy, i.e., the policies against discrimination in employment based on sex, age, and marital status, as well as the strong laws in this state and nation against sexual harassment in the workplace. However, the trial judge declined to allow the “public policy” violation allegation to be presented to the jury. That ruling is the basis for the cross-appeal, which is argued in the final portion of this brief, and will not be duplicated here, except to note that breach of public policy is a subset of breach of the covenant as well as a separate cause of action (see *Luedtke v. Nabors Drilling*, 768 P.2d 1123 (Alaska 1989); *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (Alaska 2004)). A violation of public policy is an independent basis for upholding the jury’s verdict.

B. FRED MEYER IS FLAT WRONG THAT MS. JOHNSON FAILED TO CLAIM SHE WAS FIRED UNTIL LATE IN THE LITIGATION.

Fred Meyer Stores claims that it was surprised that at trial Ms. Johnson alleged she was fired by Fred Meyer. It says its attorney thought the case would be litigated only under the theory of constructive discharge, and that it was somehow unable to anticipate and prepare for the plaintiff’s argument.

This claim is breathtakingly wrong. There was no surprise.

1. The Complaint stated *both* direct termination and constructive termination as alternative allegations, and Fred Meyer's Answer acknowledged it.

The complaint, filed in 2004, is explicit that Ms. Johnson alleged she had been *directly* fired:⁵⁵

-- Paragraph 75 states that Fred Meyer "terminated" Ms. Johnson.

-- Paragraph 78 alleges that Fred Meyer claimed Ms. Johnson "automatically quit" when she left the store on March 13th, i.e., that the store fired her when she left.

-- Paragraph 81 states, "...after her termination, or alternatively, her constructive discharge...."

-- Paragraph 100 refers to "...wrongful discharge, or alternatively, her constructive discharge..."

-- Paragraph 117 alleges Fred Meyer "...breached their common law duty of good faith and fair dealing by terminating plaintiff when she left work because she was emotionally distraught over Defendants' unlawful discriminatory, harassing, and retaliatory conduct toward her."

Then, in its Answer, Fred Meyer Stores *acknowledged* that the complaint alleged both direct termination and constructive termination: The Response to Paragraph 54 states, "Plaintiff fails to state a cause of action for wrongful

⁵⁵ 2-ER 139-160

termination, constructive discharge ... "

2. The District Court's pretrial rulings were explicitly based on the fact that Ms. Johnson alleged she had been directly terminated.

A full year before trial, on October 5, 2007, the court ruled that as an at-will employee, Fred Meyer "could have terminated Plaintiff for any legitimate reason, or no reason at all, but not for an improper reason. The issue for trial, then, is whether Plaintiff was terminated for an improper reason or under unfair circumstance [pp. 5-6]. *Plaintiff must first prove that she was actually or constructively terminated.*" [p. 6.][Emphasis added, Doc. 118, 1ER 53].

The court also held, in an order dated February 9, 2007 [1ER 95], that Ms. Johnson denied being told by Fred Meyer that she would be resigning if she left the store. This also was clear notice to Fred Meyer that the plaintiff was alleging she was terminated and did not resign.

3. Fred Meyer itself acknowledged her theory of direct termination multiple times before trial.

Over two years before trial, Fred Meyer acknowledged that Ms. Johnson was alleging she was terminated "when she left work because she was emotionally distraught over defendant's unlawful discriminatory, harassing, and retaliatory conduct towards her...." [Defendants' Motion for Summary Judgment, Docket 45, p. 25, July 31, 2006].

Then, in July of 2007, Fred Meyer acknowledged that both direct termination

and constructive termination were being pled [Docket 86, p. 5].

Finally, a month before trial, in arguing against Ms. Johnson's position, Fred Meyer itself characterized her claim as that "she was *terminated* in order to replace her with a more attractive woman." [Doc. 116, pp. 3-5, emphasis added.]

4. Fred Meyer failed to ask for a continuance as a remedy for its alleged lack of preparedness.

Despite these repeated references to the allegation of direct termination, Fred Meyer now claims it was disadvantaged by its failure to realize the nature of her claim. Yet it has not set out a single reason why its preparation for the theory of direct discharge was any different from the preparation it performed for the theory of constructive discharge. There is nothing in the record, and nothing apparent outside the record, that Fred Meyer would or could have done differently. If it had needed to do extra discovery, as it claims, Fred Meyer could have asked for a continuance for that purpose; but it did nothing.

At this point, Fred Meyer has only itself to blame if it failed to prepare adequately for both theories by Ms. Johnson. They were explicitly presented in the complaint, acknowledged in the answer, and referred to by both court and Fred Meyer's own counsel a full year before trial. This point on appeal has no merit.

C. INSTRUCTION 17 PROPERLY ALLOWED THE JURY TO DETERMINE THE ROLE OF ANY OF MS. JOHNSON'S SUPERVISORS IN HER FIRING AND IMPUTE THE RESULT TO FRED MEYER STORES.

Fred Meyer Stores claims that there was no evidence to support a finding of liability under Jury Instruction 17. The first sentence of the instruction says "an employer violates the covenant of good faith and fair dealing when it acts with improper motive or in bad faith." [1 ER 19] The second sentence states that it is a breach of the covenant if a "supervisor" terminates an employee "for the purpose of hiring another employee for whom he had a hoped-for romantic interest." Fred Meyer claims that San Miguel, Ms. Johnson's immediate supervisor, did not do the firing *himself*, so there is no support for the verdict.

1. The jury was free to look at all of Ms. Johnson's supervisors.

The instruction did not limit the jury to finding a violation only if the offending supervisor did the firing personally. The first sentence of Instruction 17 is complete in itself and allowed the jury to find liability if the employer -- including *any* of her supervisors -- acted in violation of the covenant. The second sentence is obviously an attempt to give the jury a pertinent example of such a violation, but does not limit the first sentence, which was a sufficient basis by itself for the jury verdict.

2. Fred Meyer neglects the logic of its own statement.

Fred Meyer neglects the logic of its own statement that Mary Lucas, the

regional human resources manager, and the Juneau store manager were the persons with firing authority, namely, that their authority placed them among Ms. Johnson's supervisors. The fact that they had authority to fire her could easily lead jurors to classify Ms. Lucas and the store manager as her supervisors. Indeed it is well within the province of the jury to conclude that Fred Meyer Stores violated the covenant of good faith and fair dealing by being "unfair" to Ms. Johnson through the maneuver of having her firing come from someone other than the immediate supervisor who caused the problem in the first place, Mr. San Miguel.

3. Fred Meyer breezes past the issue of whether the input to a firing decision by a biased supervisor or one with an animus against the plaintiff, but leaving the actual firing to someone else, can ever insulate the company that employs all of them.

Fred Meyer urges the so-called "cat's paw" theory. The Ninth Circuit rejected the version of "cat's paw" offered here by Fred Meyer in the case of *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007).⁵⁶ In that case the court considered several different approaches that federal and state courts have taken to the problem of adverse employment actions taken by a person or group connected to the employer but not the person with the discriminatory bias that began the string of events. The court stated:

We hold that if a subordinate, in response to a plaintiff's protected activity, sets in motion a proceeding by an independent decision maker that leads to an adverse employment action, the subordinate's bias is

⁵⁶ There are no Alaska Supreme Court cases construing the cat's paw doctrine.

imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decision-making process. [494 F.3d at 1183.]

...even if the biased subordinate was not the principal decision maker, the biased subordinate's retaliatory motive will be imputed to the employer if the subordinate influenced, affected, or was involved in the adverse employment decision. *Bergene*, 272 F.3d at 1141. [494 F.3d at 1184]⁵⁷

Here, there was no doubt that San Miguel was intimately involved in the process that led to the firing: He was the individual who became hypercritical of her work even when others praised it, who began investigating Ms. Johnson, who arranged the closed-door meeting with her, himself, and the store manager, and who berated her so severely that she had to leave to regain her composure and keep from fainting, a departure that San Miguel and the store manager then reported to Ms. Lucas as grounds for firing her. The store manager testified that it

⁵⁷ See also *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005), fn 9, in which the court held:

Title VII may still be violated where the ultimate decision-maker, lacking individual discriminatory intent, takes an adverse employment action in reliance on factors affected by another decision-maker's discriminatory animus. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232-35, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (*describing process by which the employer's "Policy Board," informed by various comments from partners, some of which demonstrated an illegal bias based on sex, took an adverse employment action*); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990) (*holding that company decisionmaker that acts as "the conduit of [a lower-level supervisor's] prejudice — his cat's paw" — is liable under Title VII*).

was San Miguel who brought his concerns about Ms. Johnson to him during that final week of work,⁵⁸ that San Miguel asked for the meeting in the office, and that all of the information related to that meeting came from San Miguel.⁵⁹ Ms. Lucas, the human resources manager, made or confirmed the firing decision based solely on what she had been told by those two individuals: Lucas never contacted Myrna Johnson -- even after Ms. Johnson asked her to look into it -- or did any independent investigation.⁶⁰ Thus there was no input from Ms. Johnson, no independent investigation, and every reason to impute the bias of San Miguel to the employer. It was perfectly proper for the jury to conclude that San Miguel's bad faith was the basis for the information he conveyed to the store manager and to Ms. Lucas, and therefore was part of the manager's and Ms. Lucas's decision to fire Ms. Johnson. Hence, under the holding in *Poland v. Chertoff* quoted above, San Miguel's bias and bad faith must be imputed to whichever level of "supervisor" made the final firing decision, and Fred Meyer can legally be held liable. The jury's finding under Instruction No. 17 was therefore proper.

⁵⁸ Tr. 5-33

⁵⁹ Tr. 5-60

⁶⁰ Tr. 1-234

D. THE STATUTE THAT REQUIRES THE VERDICT FORM TO SEGREGATE FRONT AND BACK PAY FOR CALCULATION OF INTEREST IS INAPPLICABLE TO CONTRACT ACTIONS.

Fred Meyer Stores points to Alaska Statute 09.17.040 as requiring segregation of front and back pay damages in the verdict form, for purposes of calculating interest.

1. Fred Meyer failed to raise this argument below, and therefore may not raise it now for the first time on appeal. Fed. R.Civ. P. 51(d)(1); *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991).

2. The statute does indeed require separating past and future economic loss, *but only in personal injury cases*. This case, however, went to the jury solely as a contract claim.⁶¹

AS 09.17.040(a) provides:

(a) In every case where *damages for personal injury* are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, as follows:

- (1) past economic loss;
 - (2) past noneconomic loss;
 - (3) future economic loss;
 - (4) future noneconomic loss; and
 - (5) punitive damages.
- (Emphasis added.)

By its own language, this statute only applies to personal injury cases, not to

⁶¹ Fred Meyer successfully argued that the parallel tort claims be dismissed, leaving only the contract claim to go to the jury.

contract claims. The Alaska Supreme Court recently held:

[The appellant] argues that the trial court should have awarded Gregory a lump sum judgment, rather than specific performance, based on [AS 09.17.040](#). *That statute applies only to tort cases, not contract cases like this one.* The statute requires that if a court awards damages for personal injury, the court must award future damages as a lump sum at current value. The court in this case has not awarded damages for personal injury, and the statute plainly does not apply to contract cases such as this one.

Wagner v. Wagner ___P.3d. ___, 2009 WL 1039835, at page 3, n. 7 (Alaska April 17, 2009)(Emphasis added).

This holding is logical: Under Alaska law the right in tort cases to pre-judgment interest accrues from the date that written notice of the claim is given or the date of service of process, AS 09.30.070(b). But in contract claims the right to prejudgment interest accrues with the breach of the contract. *Little Const. Co. v. Soil Processing Inc.*, 944 P.2d 20, 28 at n. 9 (Alaska 1997). So there is no reason for contract claim juries to render a verdict that differentiates between past damages and future damages, as Fred Meyer argues. In fact Alaska law is exactly the opposite.

ARGUMENT ON CROSS-APPEAL

IT IS A PUBLIC POLICY TORT IN ALASKA FOR A SUPERVISOR TO ARRANGE THE TERMINATION OF AN EMPLOYEE TO REPLACE HER WITH A BETTER LOOKING REPLACEMENT WITH WHOM THE SUPERVISOR WISHED TO PURSUE A SEXUAL OR ROMANTIC RELATIONSHIP.

Initially the District Court found that such a tort existed under Alaska law, but later changed his mind.⁶² The court certified the question to the Alaska Supreme Court, which declined to answer it.

The existence of a public policy tort is a central part of the plaintiff's case. The case went to the jury solely on a contract violation theory, which means that the plaintiff could not claim emotional distress damages, punitive damages and damages for consequential losses after the tort.

1. Alaska law recognizes the existence of public policy torts in employment matters.

The existence of public policy torts in Alaska is firmly established. At first, the Supreme Court noted it as a type of violation of the contractual duty of good faith and fair dealing. In *Luedtke v. Nabors Drilling*, 768 P.2d 1123 (Alaska 1989), the court said,

We have never rejected the public policy theory. Indeed, it seems that the public policy approach is largely encompassed within the implied covenant of good faith and fair dealing...

⁶² Doc 118, p. 10, 1ER 81; Doc 127, p.2, 1ER69.

768 P.2d at 1130. Since then the court has repeatedly stated that a public policy tort is one way to violate the duty of good faith and fair dealing.⁶³

The court has gone on to find public policy torts separately from violations of the covenant. In *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427 (Alaska 2004), the employee alleged he was fired in retaliation for filing a safety-related complaint, and that this gave rise to a tort. The court found that there was indeed a tort action to recover damages based upon discharge in violation of public policy, holding that

In the present case violations of explicit public policies — protection of whistleblowers who file safety complaints or workers who file workers' compensation claims — are alleged. In these circumstances we believe that it is appropriate to allow a tort remedy to more effectively deter prohibited conduct. We thus join the numerous authorities that have so ruled. [93 P.2d at 438, citations omitted.]

Then, in *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807 (Alaska 2005), the court considered a plaintiff's claim that he had been hired but then fired when the employer learned he had testified against the company in an earlier matter. The plaintiff won past and future wages, emotional damages, and punitives. On appeal, the court relied on *Kinzel* as holding that a public policy tort

⁶³ *Willard v. Kohotel Services Corp.*, 171 P.3d 108 (Alaska 2007); *Blackburn v. State*, 103 P.3d 900 (Alaska 2004); *Era Aviation v. Seekins*, 973 P.2d 1137 (Alaska 1999). The Ninth Circuit interpreted Alaska law the same way in *Eldridge v. Felec Service, Inc.*, 920 F.2d 1434 (9th Cir. 1990) (“In Alaska a breach of good faith and fair dealing occurs if an employer discharges an employee in retaliation for conduct protected by public policy,” 920 F.2d at 1439).

existed because the state has explicit policies to protect whistleblowers and workers comp claimants, and said that there is also an explicit state policy in favor of protecting witnesses in legal proceedings against retaliation. It cited several statutes with witness protection provisions, even though they were not directly applicable in that case:

Even though APC's alleged conduct probably does not violate the letter of any of these laws, its actions are contrary to the policy reflected in the statutes. Thus, we hold that there is an actionable public policy tort in Alaska for retaliation against witnesses in legal proceedings. [127 P.3d at 813, citations omitted.]

Finally, in *Blackburn v. State*, 103 P.3d 900 (Alaska 2004), the court held, in a case involving a misrepresentation claim, after an employee was hired and then quickly fired to make room for someone with better skills, "...It arguably would have violated public policy if, as Blackburn alleges, the state had only hired him until it could find someone with mechanical skills to replace him." (103 P.3d at 907). The court found that Blackburn had failed to offer evidence of his claim, and it did not elaborate on the source of the public policy it found regarding misrepresentation in an employment offer, apparently finding it in fundamental principles of fairness.

These cases stand for the propositions a) that there is a public policy tort in Alaska independent of contractual claims; b) that commission of such a tort in the employment context subjects the defendant to past and future economic damages, emotional damages, and punitive damages; and c) a public policy tort can arise

from policies that do not give rise directly to a cause of action but are found somewhere in law or the court's own concept of the public interest.

2. The Alaska Supreme Court has not limited public policy torts to instances where the policy is stated in statute or in the constitution.

The District Court appears to have based its rejection of a public policy tort in this case on its belief that such a policy must be found in some explicit statute or constitutional provision. This is the law in California, but not in Alaska or most other jurisdictions.

In California, a public policy tort exists only when the policy is stated in statute or in the state constitution, *Freund v. Nycomed Amersham*, 347 F.3d 752 (9th Cir. 2003) (based on California law). Nowhere in Alaska law is this formula found; indeed it is contrary to Alaska law in that the cases cited above permit protective public policies that are not “stated” in statute or the constitution, i.e., a common law statement of law is sufficient.

The closest the Alaska Supreme Court has come to defining acceptable sources of public policy is what it did in *Reust*, namely, to find statutes that form some recognition of a general principle – such as protection of whistleblowers from retaliation – even though the statutes do not themselves give a cause of action to a particular plaintiff.⁶⁴ The court went beyond deriving a policy from statutes and

⁶⁴ The state legislature has limited the reach of the Alaska Whistleblower Protection Act, Alaska Statute 39.90.100- 39.90.140, to protect only public

also found a source in a more amorphous need not connected to statutory declarations:

Allowing a tort remedy under these circumstances also furthers the state's interest in maintaining an effective method of judicial dispute resolution. Subjecting employers to tort liability for retaliating against employees who testify in legal proceedings dissuades retaliatory conduct. It also reduces the temptation for employees, fearing adverse responses from their employers, to provide false testimony or disobey a subpoena.

[127 P.3d at 813.] Thus the court found an enforceable public policy both in the penumbra of statutes that were not directly applicable, and in its own notion of “effective judicial dispute resolution.”

Likewise, the court found in *Blackburn* an apparently common law basis for concluding that the unfairness of an employer's misrepresentation provides the basis for a public policy tort, as misrepresentation is a known basis for legal actions in other contexts.

In summary, the Alaska Supreme Court has not embraced the narrow California approach of requiring that there be a precise statement of the enforceable policy in statute or in the constitution. Instead, Alaska looks at statements of general principles in statutes, constitutional materials, and the common law, even when they do not directly apply, as well as the court's own common sense regarding

employees, not to private sector employees. In *Reust*, the Supreme Court used the policy implicit in the Act to protect private sector whistleblowers despite the legislature's decision not to do so.

judicial principles such as efficient dispute resolution, and uses all these sources to determine whether a principle of public policy exists and can be applied in a given instance. Nothing in the way the Alaska Supreme Court has dealt with public policy torts would limit their application here.

3. The facts in this case bring it within explicitly recognized public policy protections.

Applying the same approach used by the Alaska Supreme Court in the above cases, there are clear public policy principles involved here.

a) sexual discrimination. It is beyond any doubt that Alaska law prohibits sexual discrimination. Article I, Sec. 3 of the Alaska Constitution, prohibits discrimination based on sex, and Article I, Sec. 1, requires that all persons are equal and entitled to equal “rights, opportunities, and protection under the law,” and that all persons have the right to the rewards of their own industry.” Alaska Statute 18.80.200, 18.80.210, and 18.80.220(a)(1) all prohibit discrimination based on sex.⁶⁵ Likewise, in federal law, Title VII protects against sexual harassment and discrimination in employment. There is no doubt that all of these statutes create a strong public policy against use of sex as a factor in hiring and firing in employment. And there is no doubt, from the evidence and the jury’s

⁶⁵ “Sex” as used here refers not only to gender discrimination but to hostility or other adverse job actions based on sexuality. See *French v. Jadon*, 911 P.2d 20 (Alaska 1996).

determination, that Ms. Johnson's constructive termination was the result of her supervisor's sexual pursuit of a better looking substitute for her.

b) age discrimination. The same statutes prohibit discrimination on the basis of age. See Alaska Statutes 18.80.220(a)(1), 18.80.200(a), and the federal Age Discrimination in Employment Act, Pub. L. 90-202. The record established that Mr. San Miguel hired only younger women. If Ms. Johnson, who was hired before Mr. San Miguel became her supervisor, had not been in her fifties or had looked like a twenty-year old, her supervisor would likely not have been motivated to remove her.

c) marital status discrimination. Alaska Statutes 18.80.200, 18.80.210, and 18.80.220 all explicitly prohibit discrimination based on marital status. In the facts as presented to the jury, Ms. Johnson – a woman with a stable marriage – was of no interest to Mr. San Miguel, who wanted an available partner. The record shows he courted her replacement, Ms. Havard, until he found out she was dating someone else, at which point he abruptly stopped his favorable treatment and began doing to her some of the same discriminatory acts he did to Ms. Johnson.

Thus the actions of Fred Meyers' supervisor ran directly against clear and explicit public policies against sex discrimination, age discrimination, and discrimination on the basis of marital status, in both state and federal law and in the case law. These sources provide as strong a basis for finding enforceable

public policies as was found in cases involving retaliation in the workplace and protection of privacy in the workplace. The District Court committed error by not permitting the tort of public policy violation to go to the jury.

CONCLUSION

The case was fairly tried to a jury, which properly found for the plaintiff, Ms. Johnson. The only flaw was the refusal of the District Court to submit the allegation of a violation of a public policy tort, an error that deprived Ms. Johnson of an award of emotional damages and punitive damages. The jury's verdict should be affirmed and the case should be remanded for a new trial on the public policy tort allegation.

May 20, 2009

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CERTIFICATION AS TO BRIEF FORMAT
(Circuit Rule 32(a)(7))

I hereby certify that the attached Brief of Appellee/Cross-Appellant Myrna I. Johnson is proportionately spaced, has a typeface of 14 point, and contains fewer than 14,000 words.

May 20, 2009

/s/ Douglas K. Mertz
Douglas K. Mertz
Attorney for Appellee/Cross-Appellant
Myrna I. Johnson

CERTIFICATE OF SERVICE

I hereby certify that this brief was electronically filed 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 May 20, 2009

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

/s/ Douglas K. Mertz

Douglas K. Mertz
Attorney for Appellee/Cross-Appellant
Myrna I. Johnson

CERTIFICATE OF RELATED CASES

I hereby certify that there are no other pending cases known to the undersigned that are related to this case or the issues therein.

May 28, 2009

s/ Douglas K. Mertz
Douglas K. Mertz
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