

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

REPLY BRIEF OF CROSS-APPELLANT FRED MEYER

James R. Dickens
Miller Nash LLP
4400 Two Union Square
601 Union Street
Seattle, Washington 98101-2352
(206) 622-8484

Attorneys for Cross-Appellant
Fred Meyer Stores, Inc.

TABLE OF CONTENTS

	Page
I. SUMMARY OF REPLY	1
II. ARGUMENT IN REPLY	3
A. Instruction No. 17 was in error.....	3
B. Johnson’s supervisor did not terminate her.....	8
C. Johnson’s theory of termination should not have gone to the jury.....	12
D. The district court erred in awarding Johnson prejudgment interest on a non-segregated claim of past and future lost wages.....	13
III. REPLY TO CROSS-APPEAL	17
A. Disposition in district court	17
B. Course of proceedings	18
C. No Alaska public policy precludes termination of one employee in order to replace her with someone in whom the supervisor might have a personal interest.....	22
IV. CONCLUSION.....	26

TABLE OF AUTHORITIES

	Page
CASES	
<i>Ackel v. Natl. Commun., Inc.</i> , 339 F.3d 376 (5 th Cir. 2003)	25
<i>Alaska Marine Pilots v. Hendsch</i> , 950 P.2d 98 (Alaska 1997).....	6
<i>Autry v. North Carolina Dept. HR</i> , 802 F.2d 1384 (4 th Cir. 1987)	25
<i>Balazs v. Liebenthal</i> , 32 F.3d 151 (4 th Cir. 1996)	25
<i>Becerra v. Dalton</i> , 94 F.3d 145 (4 th Cir. 1996), <i>cert. denied</i> , 137 L. Ed. 2d 221 (1997).....	25
<i>Belluomini v. Fred Meyer</i> , 993 P.2d 1009 (Alaska 1999).....	4
<i>Blackburn v. State</i> , 103 P.3d 900 (Alaska 2004)	4, 7
<i>Burgess v. Gateway Communications, Inc.</i> , 26 F. Supp. 888 (S.D. W. Va. 1998).....	25
<i>Candelore v. Clark County Sanitation Dist.</i> , 975 F.2d 588 (9 th Cir. 1992)	25
<i>Chijide v. Maniilaq Assoc. of Kotzebue</i> , 972 P.2d 167 (Alaska 1999).....	6, 23
<i>De Cintio v. Westchester Cty. Med. Ctr.</i> , 807 F.2d 304 (2d Cir. 1986).....	25
<i>EEOC v. Concentra Health</i> , 496 F.3d 773 (7 th Cir. 2007)	24
<i>Era Aviation v. Seekins</i> , 973 P.2d 1137 (Alaska 1999).....	4
<i>Holland v. Union Oil</i> , 993 P.2d 1026 (Alaska 1999).....	4

TABLE OF AUTHORITIES

(continued)

	Page
<i>Hutson v. McDonnell Douglas</i> , 63 F.3d 771 (8 th Cir. 1995)	19
<i>Korslund v. Dyncorp Tri-Cities Servs.</i> , 156 Wash. 2d 168, 125 P.3d 119 (2005).....	22, 24
<i>Little v. Windermere Relocation, Inc.</i> , 301 F.3d 958 (9 th Cir. 2002)	23
<i>Luedtke v. Nabors Alaska Drilling, Inc.</i> , 768 P.2d 1123 (Alaska 1989).....	22-23
<i>Mitchell v. Teck Cominco Alaska Inc.</i> , 193 P.3d 751 (Alaska 2008).....	6
<i>Mitford v. de Lasala</i> , 666 P.2d 1000 (Alaska 1983).....	5, 7
<i>Municipality of Anchorage v. Gregg</i> , 101 P.3d 181 (Alaska 2004).....	15
<i>Palmateer v. International Harvester</i> , 421 N.E.2d 876 (Ill. 1981)	22
<i>Palmateer v. International Harvester</i> , 421 NE 2d 876 (Ill. 1981).....	20, 22
<i>Pitka v. Int. Reg. Housing Auth.</i> , 54 P.3d 785 (Alaska 2002).....	4-5
<i>Poland v. Chertoff</i> , 494 F.3d 1174 (9 th Cir. 2007)	11
<i>Preston v. Wisconsin Health Fund</i> , 397 F.3d 539 (7 th Cir. 2005)	24
<i>Ramsey v. City of Sand Point</i> , 936 P.2d 126 (Alaska 1997).....	5
<i>Richardson v. Sugg</i> , 448 F.3d 1046 (8 th Cir. 2006)	11

TABLE OF AUTHORITIES

(continued)

	Page
<i>Roberts v. Dudley</i> , 140 Wash. 2d 58, 993 P.2d 901 (Wash. 2000)	22-23
<i>Schobert v. Illinois Dept. of Transp.</i> , 304 F.3d 725 (7 th Cir. 2002)	25
<i>State v. APEA</i> , 199 P.3d 1161 (Alaska 2008).....	14
<i>State v. Employees Assoc.</i> , 190 P.3d 720 (Alaska 2008).....	14
<i>Succor v. Dade County</i> , 229 F.3d 1343 (11 th Cir. 2000)	25
<i>Taken v. Oklahoma Corp. Comm.</i> , 125 F.3d 1366 (10 th Cir. 1997)	25
<i>United States v. Whitten</i> , 706 F.2d 1000 (9 th Cir. 1983), <i>cert. denied</i> , 456 U.S. 1100 (1984).....	11
<i>Van Huff v. Sohio Alaska Petroleum Co.</i> , 835 P.2d 1181 (Alaska 1992).....	19
<i>Wagner v. Wagner</i> , 205 P.3d 306 (Alaska 2009).....	14
<i>Willard v. Khotol Services Corp.</i> , 171 P.3d 108 (Alaska 2007).....	6
<i>Witt v. State</i> , 75 P.3d 1030 (Alaska 2003).....	4
<i>Womack v. Runyon</i> , 147 F.3d 1298 (11 th Cir. 1998)	25

STATUTES

Federal Family and Medical Leave Act of 1993	18
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e <i>et seq.</i>	24-25

I. SUMMARY OF REPLY

1. Cross-Appellant Fred Meyer contends that the district court erred in submitting to the jury the implied covenant claim under the subjective prong. In response, cross-appellee Johnson improperly relies on cases discussing the objective prong. Johnson provides this Court no Alaska authority to support her contention there was a violation of the covenant of good faith and fair dealing under the subjective prong if she was terminated for the purpose of replacing her with someone else in whom her supervisor had a possible romantic interest.

2. Fred Meyer contends Johnson's "supervisor" did not terminate her in order to replace her with another employee, and no reasonable jury could have so found. Johnson improperly argues that the sentence with "supervisor" in Instruction No. 17, followed by the pronoun "he" in the same sentence ("he had a hoped-for romantic interest"), could be read to include "the store director" or the female "human resources representative" as the "supervisor" and it was never argued that either of them had a hoped-for romantic interest in Johnson's successor. The argument is contrary to the plain language of the instruction and the undisputed facts. Johnson's only "supervisor" was Jaime San Miguel, and "he" did not have authority to terminate Johnson; "he" did not recommend termination; and "he" was not present when the store director (Fred Sayre) advised the human resources representative (Mary Lucas)

that Johnson had walked out of the counseling session. No evidence was presented or argument made by Johnson that “he” was anyone other than San Miguel.

3. Fred Meyer contends that Johnson’s alternative theory that she was “terminated” rather than “constructively discharged” should not have been submitted to the jury. Johnson argues that “termination” was an alternate theory throughout her case.

Fred Meyer acknowledged in its opening brief that Johnson’s original complaint had an allegation of wrongful discharge. What Fred Meyer contends, however, which contention Johnson failed to address, is that her potential termination claim was abandoned long before trial. Her only contention throughout discovery; pretrial dispositive motions; and jury instructions and trial brief before trial was that she was “constructively discharged.” Johnson’s trial brief and jury instructions proposed before the first trial date in September 2007 and the re-set trial in August 2008, was that she was “constructively discharged.” In her appeal brief she fails to point to any of her pleadings within one year of trial in which she contended she was “terminated.” This theory, never raised at pretrial or trial until Fred Meyer’s motion to dismiss at the close of Johnson’s case, should not have been submitted to the jury.

4. If this issue is reached, Fred Meyer contends Johnson should not have received an award of prejudgment interest where she requested both front pay and back pay, but did not segregate her claims. Johnson contends the Alaska state statute

on segregation only applies to tort damages. However, back pay and front pay are tort-type damages, even if the underlying theory is contractual. Moreover, Alaska law is consistent that prejudgment interest may not be awarded for future economic damages regardless of whether pursued under a contract or tort theory. Johnson failed to segregate her claim for back pay from her claim for nine years of future lost promotions and pay. Therefore, she was not entitled to prejudgment interest on the lump sum awarded by the jury.

II. ARGUMENT IN REPLY

A. Instruction No. 17 was in error.

Johnson never quotes Instruction No. 17 or discusses specifically the issue on the legal standard for a claim solely under the subjective prong of the covenant of good faith and fair dealing. Again, as she did before the district court, she seeks to divert focus from the very limited facts to which the subjective prong applies. She refers to the concept of implied contract, i.e., progressive discipline (never pled, never a claim at trial), and she argues that her termination was against public policy or constituted disparate treatment. Johnson Br., pp. vii, 13-17. But these latter arguments and the cases cited fall under the *objective* prong of the covenant and are not applicable to the issue raised by Instruction No. 17 under the subjective prong.

The Alaska Supreme Court has held that potential claims for a breach of the covenant of good faith and fair dealing are *very limited* because otherwise such claims

would erode the employment at-will status of employees. Beginning with that limitation, and rejecting contentions that an employer's actions were "unfair" (as Johnson contends), the Alaska Supreme Court consistently has affirmed orders granting motions for summary judgment.¹; for a directed verdict²; and even reversed the denial of a motion for summary judgment regarding a claim that the covenant was breached.³

The claims by Johnson under the objective prong were dismissed because her termination was not based on unconstitutional grounds, or contrary to public policy, or because of disparate treatment. After the September 2007 trial was continued to August 2008, Fred Meyer challenged Johnson on March 12, 2008, to present evidence supporting any claims under the objective prong and, if none, to approve its proposed jury instructions. Doc. 137. Johnson never outlined any such evidence. Doc. 140. This pattern of sidestepping the facts and the law remains Johnson's approach in her appeal brief. Her contentions should be rejected.

Fred Meyer contends that Instruction No. 17 improperly describes the subjective element of the covenant by holding as a matter of law that it is a breach of

¹ *Blackburn v. State*, 103 P.3d 900, 906 (Alaska 2004); *Holland v. Union Oil*, 993 P.2d 1026, 1032 (Alaska 1999); *Pitka v. Int. Reg. Housing Auth.*, 54 P.3d 785 (Alaska 2002); and *Witt v. State*, 75 P.3d 1030, 1034 (Alaska 2003).

² *Belluomini v. Fred Meyer*, 993 P.2d 1009 (Alaska 1999)

³ *Era Aviation v. Seekins*, 973 P.2d 1137 (Alaska 1999)

the covenant to terminate one employee in order to hire another with whom he hoped to develop a romantic interest. If an instruction was submitted, Fred Meyer contended before the district court that it should have stated that the termination had to be for the purpose of depriving Johnson of a benefit contemplated by the employment agreement, which the district court declined to accept. 1 ER 41 (Tr. 4-75). Johnson fails to squarely address these arguments or cite authority for her position that Instruction No. 17 was a proper statement of Alaska law under the subjective prong.

The only case upholding a claim under the subjective prong is *Mitford v. de Lasala*, 666 P.2d 1000, 1006 (Alaska 1983). Johnson does not cite any others. The subjective prong is limited to claims that the plaintiff was deprived of the economic benefits of the contract. *Mitford*; *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997). Instead, while Johnson argues generally that the covenant under the subjective prong is incapable of precise definition, she relies solely upon the discussions in *Pitka v. Interior Reg'l Hous. Auth.*, 54 P.3d 785, 789 (Alaska 2002), of possible claims under the *objective* covenant – disparate treatment, unconstitutional grounds, and violations of public policy. Johnson Br. at 11. Of course such broad concepts as these cannot be precisely defined. But these concepts were not the basis for Instruction No. 17 – which was motive and bad faith under the subjective prong – not “fairness” as Johnson argues.

Johnson cites *Willard v. Khotol Services Corp.*, 171 P.3d 108 (Alaska 2007) and *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751 (Alaska 2008). Again, these are cases which focus on claims under the objective prong. While citing the law on the subjective prong in general, *Willard* emphasized the objective prong and acting in a manner regarded as “fair.” 171 P.3d at 114. The theories alleged in *Willard* only fit within the objective prong (public policy breach and disparate treatment) and the only potential claim recognized by the Alaska Supreme Court was a breach of public policy under the objective prong – retaliatory discharge. 171 P.3d at 116. Accordingly, *Willard* does not support Johnson’s arguments herein.

The theory in *Mitchell* also was under only the objective prong of disparate treatment where Mitchell argued that his investigation was “unfair.” For Instruction No. 17, the subjective prong, “fair” was not an issue. Accordingly, Johnson’s contention that it was not “fair” to terminate her for walking out of the counseling meeting is not relevant and *Mitchell* does not support Instruction No. 17. The same analysis applies to Johnson’s reliance on *Alaska Marine Pilots v. Hendsch*, 950 P.2d 98 (Alaska 1997), i.e., it addressed only the objective prong, and therefore provides no authority for Instruction No. 17.

Johnson continues not to grasp the limits on the subjective prong of the covenant of good faith and fair dealing: it is restricted to claims of termination for the purpose of unfairly depriving an employee of an economic benefit. See *Chijide v.*

Maniilaq Assoc. of Kotzebue, 972 P.2d 167, 172 (Alaska 1999), which Johnson does not cite, or discuss, and *Mitford v. de Lasala*, *supra*, 666 P.2d at 1006, which she fails to discuss or distinguish. Instead, Johnson argues an implied contract theory (never pled, never submitted to the jury) of an alleged obligation by Fred Meyer to follow certain procedural steps before her termination and contends that this supports a breach of “the *objective* approach to the covenant” (Johnson Br. at 14). Again, the “objective prong” was not the basis for Instruction No. 17. Johnson also contends it was a violation the subjective prong to replace her with another woman in whom her supervisor (San Miguel) may have had a romantic interest, but fails to support this contention with any Alaska subjective prong case law because there is none.⁴

Johnson’s final argument in support of Instruction No. 17 is that there was a breach of the *objective* prong by her termination because it was unfair and breached the public policies against discrimination. Johnson Br. at 16-17. But breach of “public policy” is not “a basis for upholding the jury’s verdict” because this was not the issue submitted to the jury because all claims under public policy and the objective prong had been dismissed.

⁴ Johnson did cite *Blackburn v. State*, 103 P.3d 900 (Alaska 2004), a case affirming summary judgment in favor of the employer on the implied covenant and other claims. But *if* there had been a claim, the court said it would have been a “public policy” claim – the objective prong, not the subjective prong.

In sum, Fred Meyer contends that Johnson has failed to provide Alaska case law or argument to support Instruction No. 17 which stated, as a matter of law, that it was a violation of the subjective prong of the covenant of good faith and fair dealing if Johnson's supervisor terminated her to hire a hoped-for romantic interest.

Alaska has no public policy prohibiting preferential treatment for someone based on an actual or hoped-for personal relationship. See 1 ER 70 and Fred Meyer Br. at 21, n. 8. Accordingly, there could not have been a subjectively improper motive in doing so. Instruction No. 17 is contrary to Alaska law and the jury verdict based on it should be set aside and judgment entered for Fred Meyer.

B. Johnson's supervisor did not terminate her.

1. San Miguel was the only "supervisor" referenced in instruction No. 17.

Instruction No. 17 states, in relevant part, 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.

(Emphasis added.)

Johnson contends Instruction No. 17 permitted the jury to find in favor of her regardless of who terminated her as all supervisors at Fred Meyer were included in the word "supervisor," and Johnson suggests "he" could have been considered by the jury

to refer to any of the managers and not just to her immediate supervisor – San Miguel – whom she argued wanted to replace her with another woman. This argument makes no sense under the facts of this case, or grammatically.

The pronoun “he” relates to the prior subject noun – “supervisor,” who acted “for the purpose of hiring another employee” and the reason the “supervisor” so acted was because “he” hoped to develop this romantic interest. The sentence is “actor” (supervisor), “action” (terminates) and reason for action (“to hire hoped-for romantic interest”). Therefore, the “supervisor” was a “he” (San Miguel) and not a “she”, which eliminates Mary Lucas. She was the human resources representative who actually made the decision to terminate Johnson based on Lucas’s good faith understanding that Johnson walked off the job, contrary to the Fred Meyer Employee Responsibilities Form.⁵

Next, it makes no sense to suggest that Mary Lucas had a “romantic interest” in Johnson and plaintiff never argued such. Accordingly, there can be no “breach of the covenant” by the actions of Lucas to initiate the termination paperwork when Johnson walked out of the counseling session and off the job.

The store director, Fred Sayre, was not Johnson’s “supervisor.” It also is undisputed that Sayre did not terminate Johnson, or even recommend her termination

⁵ See Ex. B in addendum to Fred Meyer’s opening brief at Section III.1.

to Lucas. 2 ER 118-19. Nor was there any allegation, argument or evidence that Sayre may have had a romantic interest in Johnson's successor. Therefore, the jury could not have found that Sayre terminated Johnson.

Recognizing the weakness of her arguments regarding the jurors concluding that Lucas or Sayre were Johnson's "supervisors" within the language of Instruction No. 17, Johnson then argues (Johnson Br. at 22) that perhaps the jury concluded "that Fred Meyer stores violated the covenant . . . by being 'unfair'" to her by having someone other than her immediate "supervisor" (i.e., San Miguel) fire her. But "unfair" is not an element of the subjective prong of the covenant, and "unfair" was not an element of Instruction No. 17. This argument by Johnson should be rejected.

Johnson's only "immediate supervisor" was San Miguel, and "he" was the only person alleged to have a romantic interest in her replacement. But San Miguel did not have authority to terminate (2 ER 71, 107); he did not recommend terminating Johnson (2 ER 89); and "he" did not fire Johnson (2 ER 89, 119). There is no basis for a reasonable jury to find that San Miguel, Johnson's supervisor, terminated her in order to replace her with a hoped-for paramour. On this alternate basis the jury verdict should be set aside.

2. Cat's paw theory.

Johnson states that “Fred Meyer urges the so-called ‘cat’s paw’ theory.” Johnson Br. at 22. This statement also is wrong as Fred Meyer never referenced the “cat’s paw” theory⁶ in its opening brief because it is not applicable.

Johnson never raised the “cat’s paw” theory with the district court at trial. Accordingly, she has waived her right to raise this argument on appeal. *United States v. Whitten*, 706 F.2d 1000, 1012 (9th Cir. 1983), *cert. denied*, 456 U.S. 1100 (1984); *Richardson v. Sugg*, 448 F.3d 1046, 1059 (8th Cir. 2006).

Second, the cases discussing “cat’s paw” are federal cases involving federal claims of discrimination, with varying analyses and conclusions. *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007); *Richardson v. Sugg*, *supra*, 448 F.3d at 1059-60. The claims by Johnson are not federal discrimination cases and no Alaska decision has applied a “cat’s paw” theory to a state law discrimination claim, much less an implied covenant claim.

Finally, it is undisputed that San Miguel did not recommend Johnson’s termination; he was not present during the discussion with Lucas in human resources over what action to take regarding Johnson; and the action taken against Johnson was not because of poor performance, but for an entirely different reason – she walked off

⁶ “Cat’s paw” refers to the old folk tale of the monkey who duped the cat into using his “paw” to rescue the monkey’s chestnuts from the fire, and burning the paw in the process.

the job during the counseling session contrary to company policy, concluded Mary Lucas in human resources. The cat's paw theory is not applicable to this appeal.

C. Johnson's theory of termination should not have gone to the jury.

Fred Meyer contends the only jury instruction on termination should have been on constructive discharge (on which the jury found for Fred Meyer) and should not have separately included direct termination. Johnson argues that Fred Meyer was on notice she was claiming that she had been wrongfully terminated by the company in addition to being constructively discharged.

Fred Meyer agrees that Johnson alleged both "wrongful discharge" and "constructive discharge" in her complaint, which we acknowledged in our opening brief. Fred Meyer Br. at 26. But Johnson abandoned that theory of termination many months before trial. Johnson refers only to "constructive discharge" in her (1) trial brief (Doc. 102) and (2) proposed jury instructions (Doc. 103), submitted in September 2007, almost a year before trial. Likewise, Johnson does not reference any termination theory by Fred Meyer in its September 2007 trial brief (Doc. 99) or jury instructions (Doc. 98) other than "constructive discharge". On March 12, 2008, Fred Meyer filed a motion re jury instructions and argued that Johnson had to "prove that she was constructively discharged by Fred Meyer." Doc. 137 at 7. Johnson moved to strike Fred Meyer's motion re jury instructions (Dec. 140), but never disputed that her

sole claim was “constructive discharge.” Even the district court’s original instructions distributed the second day of trial only referenced “constructive discharge.”

Johnson elected to go to trial solely on a “constructive discharge” claim. It was an abuse of discretion to permit her to change theories *after* Fred Meyer moved to dismiss her constructive discharge claim at the close of her case. 1 ER 37-39. Requesting a continuance at that point would have been unreasonable to Fred Meyer.

The jury verdict that Johnson was “terminated” by Fred Meyer should be set aside and judgment entered for Fred Meyer because the jury found that Johnson was not constructively discharged.

D. The district court erred in awarding Johnson prejudgment interest on a non-segregated claim of past and future lost wages.

Fred Meyer contends this issue should not be reached by this Court. If it is, however, Johnson should not have been awarded prejudgment interest.

Johnson states that the prejudgment interest on a non-segregated claim was not raised below. Again, Johnson is wrong. Fred Meyer opposed Johnson’s request for an award of prejudgment interest and contended that in the absence of a segregation of past and future damages, it was pure speculation as to the basis for the award and therefore there would be double recovery if the award included the future damages.

Doc. 188.

Fred Meyer did cite AS 09.17.040(a), which the Alaska Supreme Court has concluded is generally for damages for personal injury in tort cases and was not applicable “in contract cases like this one.” *Wagner v. Wagner*, 205 P.3d 306, 312 n. 7 (Alaska 2009). But *Wagner* was not a case like Johnson’s with its tort-like future wage loss.

Alaska case law and statutes set forth a consistent policy that any award of future damages should be reduced to present value and that prejudgment interest may not be awarded for future economic loss. Accordingly, the district court should not have awarded prejudgment interest on the non-segregated jury verdict.

AS 09.30.070. Prejudgment Interest

(c) *Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or punitive damages.*

(Emphasis added.)

In claims against the State of Alaska, *including contract claims*, interest awarded is per AS 09.30.070 cited above. See also AS 09.50.280 and AS 36.30.623. *State v. Employees Assoc.*, 190 P.3d 720, 721 n. 2 (Alaska 2008); and *State v. APEA*, 199 P.3d 1161, 1164 n. 31 (Alaska 2008).

The Alaska Supreme Court has relied upon AS 09.30.070 for the post-judgment interest rate on a claim of wrongful termination under federal law, holding that prejudgment interest should be awarded only from the date of termination until

judgment. *Municipality of Anchorage v. Gregg*, 101 P.3d 181, 194 (Alaska 2004). This decision too is consistent with holding that any verdict for future lost wages damages should not include an award of prejudgment interest.

The evidence at trial and arguments by counsel confirm that the jury award was principally for future damages. Johnson earned \$38,675 in her last full year at Fred Meyer in 2001. 2 ER 127; Ex. O. Johnson argued that she would have been promoted before trial because San Miguel had been promoted to assistant store director in 2007 and she would have succeeded him as apparel manager and her salary would have increased to \$57,000 (\$19,000 more per year). 2 ER 122. She contended that she would have worked for nine more years. 2 ER 123.

Fred Meyer argued that Johnson's tax returns and testimony confirmed that she had no damages for back wages before trial absent any promotion. For example, in 2001 Johnson earned \$38,675 at Fred Meyer and her joint return in 2001 listed earnings of \$92,919 per Trial Ex. O. 2 ER 127. In 2006 Johnson earned over \$50,000 (which exceeded her last full year of earnings at Fred Meyer by over \$11,000) and her joint return listed earnings of \$92,219 (within \$700 of her 2001 return). 2 ER 130. Fred Meyer advised the jury that Johnson had not lost any back pay as of trial. But if the jury concluded that Johnson would have been promoted to apparel manager in 2007 when San Miguel became the assistant store manager, then the jury most likely awarded her the \$19,000 a year for the promotion for the two years (2007 and 2008)

before trial and for the nine years of lost future wages with this promotion. This is because 11 years times \$19,000 equals \$209,000 (almost the exact jury verdict of \$208,000). Therefore, the jury verdict primarily was for nine years of future lost wages. Alaska does not award prejudgment interest on future damages if this Court reaches that issue. The award of \$48,352 in prejudgment interest should be set aside.

III. REPLY TO CROSS-APPEAL

A. Disposition in district court.

The district court, after multiple reviews, correctly decided that there is no Alaska public policy which prohibits termination of an employee in order to replace her with someone in whom her supervisor arguably had a potential romantic interest. 1 ER 68-71 (Doc. 127). Fred Meyer contends this decision was correct.

Johnson moved to certify to the Alaska Supreme Court the issue of whether such a termination was a public policy tort. The district court granted the motion and stated in its October 24, 2007, minute order, 1 ER 66 (Doc. 131):

[B]ecause it appears to the Court that there is no controlling precedent in the decisions of the Alaska Supreme Court, the Court certifies the following question to the Alaska Supreme Court:

Does an at-will employee have a tort public policy claim under Alaska's implied covenant of good faith and fair dealing when an employer discharges that employee in order to replace her with someone with whom her supervisor had a hoped-for romantic interest?

On February 22, 2008, the Alaska Supreme Court declined to answer the certified question. 1 ER 64. Fred Meyer contends the most reasonable interpretation is that the Alaska Supreme Court concluded the district court properly ruled that Johnson failed to state a claim under Alaska law. This Court also should find that the

issue presented in the cross-appeal fails to state a claim under Alaska law.

B. Course of proceedings.

On February 9, 2007, the district court granted Fred Meyer's motion for summary judgment as to Johnson's claims set forth in Count I (gender discrimination and harassment under federal law); Count II (age discrimination under federal law); Count III (federal family and medical leave act of 1993); Count IV (Alaska state law claims for age, gender and parenthood); and Count VI (tortious interference with business relations). 1 ER 92-110 (Doc. 81). The only claim not dismissed was Count V for wrongful termination in violation of the common law duty of good faith and fair dealing. 1 ER 110 (Doc. 81,p. 19). Johnson has not appealed this Order dismissing the various discrimination claims. Accordingly, this Order remains the law of the case, i.e., that Johnson failed to establish issues of material fact which would justify permitting those claims to continue.

After the summary judgment order the parties held differing views as to whether Johnson could pursue her implied covenant claim under either the subjective or objective prongs. The district court pretrial order required trial briefs and jury instructions to be filed by September 17, 2007, and other motions by September 10, 2007. Doc. 85. On July 20, 2007, Fred Meyer moved to dismiss the remaining wrongful termination claim (Doc. 86), but the district court denied the motion on August 21, 2007. Doc. 93. Thereafter, on September 10, 2007, Fred Meyer moved to

exclude certain potential evidence at trial (Doc. 94) (e.g., evidence re the dismissed claims of age and gender discrimination, and affidavits listed as trial exhibits by Johnson). Johnson opposed (Doc. 105), arguing that she should be able to introduce as evidence (1) company policies in support of her “for cause” theory (claims of dismissal only “for cause” and an implied contract claim were never pled in the lengthy complaint); (2) pretrial affidavits and witness statements exhibits (hearsay); and (3) her claims that Fred Meyer’s actions were contrary to the public policy against sex and age discrimination (claims already dismissed). Johnson’s argument was that she needed to be able to introduce such evidence to prove to the jury that her termination was simply “unfair”⁷ (which Fred Meyer again argued was not the correct legal standard). Doc. 106.

The district court held a pretrial conference on September 26, 2007, at which the court expressed a tentative analysis of the remaining claim of an alleged breach of the implied covenant of good faith and fair dealing. Doc. 114. Fred Meyer responded the next day, addressing solely the necessary elements to prove Alaska public policy, and that the proof required had to be more than Johnson’s claim that Fred Meyer’s alleged action against her was “unfair.” Doc. 116.

⁷ This was Johnson’s argument throughout the trial – it was just “unfair” to terminate her. While “unfair” should not have been the standard, in effect it was as Johnson improperly sought to have the jury act as a super personnel department. *Van Huff v. Sohio Alaska Petroleum Co.*, 835 P.2d 1181, 1183 (Alaska 1992); *Hutson v. McDonnell Douglas*, 63 F.3d 771, 781 (8th Cir. 1995).

The district court ruled on October 1, 2007 (a week before the scheduled trial date) that while the dismissed claims (e.g., sex and discrimination)

are not admissible per se, withdrawal or dismissal of these claims does not render the supporting evidence inadmissible as to [Johnson's] claim for the breach of the covenant of good faith and fair dealing. . . . [Johnson] *may introduce the same evidence* to demonstrate that [Fred Meyer] acted with a subjectively improper motive or in a manner which a reasonable person would regard as *unfair* . . . and [a] violation of public policy.

1 ER 81 (Doc. 118 at 10) (emphasis added).

The district court added that:

The jury will be permitted to decide whether [Fred Meyer's] actions comport with “what is just and right” or “strike at the heart of a citizen’s social rights, duties, and responsibilities.

Id., n. 16.

Not surprisingly, Fred Meyer moved for reconsideration the next day (October 2, 2007). Doc. 122. We noted that footnote 16 was only a partial quote from the Illinois court⁸. We argued that if this language was the legal standard in Alaska, then there was no standard or guidance for the jury and every at-will termination claim would result in each jury deciding what it believed was “just and right” – a super personnel department. We further noted that, again, Johnson had cleverly avoided articulating to the court the clear mandate of public policy she was

⁸ *Palmateer v. International Harvester*, 421 NE 2d 876, 878-80 (Ill. 1981), describing the philosophy of why a public policy claim should be recognized, but the language itself was *not* the public policy. Doc. 122 at 2.

pursuing, and as the claims of discrimination had been dismissed as a matter of law, Johnson should not be permitted to contend that any public policy had been violated.

On Friday, October 5, 2007, after receiving Johnson's reply, the district court issued its order regarding Fred Meyer's motion for reconsideration. 1 ER 68 (Doc. 127). The court reversed its prior decision and held that there was not "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." The court directed that footnote 16 of its prior Order be stricken. 1 ER 70 (Doc. 127 at 3). As there was no evidence supporting the claim of a breach of public policy, the district court further held that tort damages were unavailable to Johnson. Id.

Following this October 5, 2007, Order, the trial was continued in order to permit Johnson to certify the issue of a possible tort claim to the Alaska Supreme Court, which declined to answer the certified question. The trial date was then reset for August 11, 2008, on Johnson's claim under only the subjective prong of the implied covenant. Johnson now cross-appeals the dismissal of her alleged claim that it was a breach of Alaska public policy and the implied covenant of good faith and fair dealing for her supervisor to discharge her in order to replace her with someone in whom he might be interested in developing a romantic interest.

C. No Alaska public policy precludes termination of one employee in order to replace her with someone in whom the supervisor might have a personal interest.

The district court correctly ruled on October 5, 2007, that there is no public policy in Alaska prohibiting termination of an employee in order to replace her with someone in whom the supervisor might have a personal interest. Johnson cites no such policy. The claims of age, sex and marital status discrimination were dismissed as insufficient to withstand the motion for summary judgment. As those statutes provide their own liability standards and relief, their dismissal does not provide a claim under some lesser, vague theory of unfairness, as Johnson suggests.

1. Proving public policy.

The Alaska Supreme Court has held that it is a breach of the implied covenant of good faith and fair dealing to discharge an at-will employee in breach of public policy. But such a policy must be found “in the common law, statutes and constitution of this state.” *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989) (*Luedtke I*). In *Luedtke I*, the Alaska Supreme Court relied on *Palmateer v. International Harvester*, 421 N.E.2d 876 (Ill. 1981), for its analysis of how to determine what is public policy. 768 P.2d at 1132. A similar analysis was set forth in *Roberts v. Dudley*, 140 Wash. 2d 58, 993 P.2d 901, 905 (Wash. 2000), in which the Washington Supreme Court also relied on *Palmateer, supra*, and *Korslund v. Dyncorp Tri-Cities Servs.*, 156 Wash. 2d 168, 125 P.3d 119 (2005). The

Washington Supreme Court held that a plaintiff claiming wrongful discharge in breach of public policy must prove four elements of her claim, beginning with proving the existence of a clear public policy (the *clarity* element). As to “what is a clear mandate of public policy,” that “is a question of law.” *Roberts*, 993 P.2d at 905. But “a court may not *sua sponte* manufacture public policy but rather must rely on that public policy previously manifested in the constitution, a statute, or a prior court decision.” *Id.* This is the same analysis noted above in *Luedtke*, and followed in this Circuit in analyzing such claims under state law. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 971 (9th Cir. 2002). Therefore, Johnson’s claim of a public policy tort because some action by Fred Meyer (in her eyes) is “unfair” fails. The legal concept of “unfair” in Alaska applies only when the discharge is contrary to a recognized public policy, or constitution, or different treatment for similarly situated employees. *Chijide v. Maniilaq Assoc. of Kotzebue, supra*, 972 P.2d at 172. Johnson did not present any alleged facts supporting such a claim.

2. Dismissed claims cannot be the basis for a public policy claim.

The district court dismissed with prejudice all of Johnson’s claims of discrimination on whatever theory (age, sex, parenthood, FMLA). 1 ER 92-110. Accordingly, those dismissed claims cannot serve as a basis for Johnson’s tort theory that if San Miguel preferred someone else because of an actual or prospective personal interest, this was in breach of any Alaska public policy.

A claimant also has no claim for wrongful discharge contrary to public policy where the specific statutes, i.e., federal and state statutes prohibiting sex, age, marital status, etc., provide an alternative basis for relief. *Korslund, supra*, 156 Wn.2d at 181. Johnson's claims under the federal and Alaska state discrimination statutes provided a basis for relief, but both because those claims were found not to have any legal merit and because they provided an alternate basis for relief from alleged discrimination, they cannot serve as the basis for a claimed breach of public policy.

In addition to the above analysis, Johnson's reliance on the laws prohibiting sex discrimination for her implied covenant claim of a breach of public policy is misplaced. Federal law prohibits discrimination based on sex (and on other protected categories). Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* As Judge Posner stated, however, a male supervisor's romantically motivated favoritism toward one female over another female employee is not sex discrimination and therefore it does not breach public policy, contrary to Johnson's argument.

Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated as sex discrimination.

Preston v. Wisconsin Health Fund, 397 F.3d 539, 541 (7th Cir. 2005).⁹

The Equal Employment Opportunity Commission policy guideline on sex discrimination states that Title VII does not prohibit preferential treatment based upon

⁹ Followed in *EEOC v. Concentra Health*, 496 F.3d 773, 775 (7th Cir. 2007).

a consensual romantic relationship, as both other men and other women are disadvantaged by reasons other than their genders. Numerous circuit court decisions consistently have followed this EEOC guideline.¹⁰ The law “does not, however, prevent employers from favoring employees because of personal relationships [or] 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, Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992); *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). As explained in *Taken v. Oklahoma Corp. Comm.*, 125 F.3d 1366, 1369-70 (10th Cir. 1997), Title VII’s reference to “sex” means a class delineated by gender, rather than sexual affiliations. *See also Ackel v. Natl. Commun., Inc.*, 339 F.3d 376, 382 (5th Cir. 2003); *Succor v. Dade County*, 229 F.3d 1343, 1345 (11th Cir. 2000); and the discussion in *Burgess v. Gateway Communications, Inc.*, 26 F. Supp. 888, 893 (S.D. W. Va. 1998), regarding *Autry v. North Carolina Dept. HR*, 802 F.2d 1384, 1387 (4th Cir. 1987) and *Balazs v. Liebenthal*, 32 F.3d 151, 159 (4th Cir. 1996), which held that preference or favoritism for a friend, or relative, or

¹⁰ 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 *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996), cert. denied, 137 L. Ed. 2d 221 (1997).

political ally, or paramour (even if perceived as unfair) does not equate to unlawful discrimination. Accordingly, Fred Meyer contends the consistency of these decisions requires a finding that no public policy of Alaska is breached under the allegations Johnson has argued herein on her cross-appeal.

In sum, because Johnson's claims of discrimination based on sex, age, and marital status were the bases for any relief, those statutes provided relief if appropriate, and those claims were dismissed with prejudice, no Alaska public policy was breached by her supervisor's alleged preference for another employee over her. Furthermore, Fred Meyer contends that personal favoritism for one employee over another, whether based on a romantic interest, or because that employee is a family member, or political ally, or friend, or protégé, is not contrary to Alaska public policy. Johnson's cross-appeal claim should be denied.

IV. CONCLUSION

For the reasons described in Fred Meyer's arguments herein, the jury verdict should be set aside and judgment entered in favor of Fred Meyer. Furthermore, Johnson's cross-appeal should be denied.

///

///

///

///

DATED this 19th day of June, 2009.

MILLER NASH LLP

s/ James R. Dickens

James R. Dickens

ABA No. 0610063

MILLER NASH LLP

4400 Two Union Square

601 Union Street

Seattle, Washington 98101-2352

Telephone: (206) 622-8484

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

**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 REPLY BRIEF OF CROSS-APPELLANT FRED MEYER 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 19th day of June, 2009.

MILLER NASH LLP

s/ James R. Dickens

James R. Dickens

ABA No. 0610063

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 on June 19, 2009, by using the appellate CM/ECF system.

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

CERTIFICATE FOR BRIEF IN PAPER FORMAT

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

I, James R. Dickens, certify that this brief is identical to the version re-submitted electronically on April 10, 2009, pursuant to Rule 6(c) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases.

DATED this ____ day of June, 2009.

s/ James R. Dickens

James R. Dickens