

## Chapter Three

# EMPLOYMENT

*Employment discrimination is one of the most common complaints in employment disputes. It can include sex discrimination, sexual harassment, age discrimination, religious discrimination, discrimination because of a physical or mental disability, pregnancy discrimination, or discrimination based upon a person's race, ethnicity, national origin, or religion. If you believe that you are a victim of employment discrimination, you should know about the federal, state, and local laws designed to protect you.*

*In addition to discrimination, other common complaints in employment disputes involve wrongful termination, including breach of contract and breach of the covenant of good faith and fair dealing, wage and hour violations, and violations of whistleblower statutes.*

## EMPLOYMENT DISCRIMINATION

### What is employment discrimination?

Discrimination occurs when an employer treats an employee differently in hiring, firing, paying wages, promotions, work assignments, awarding benefits, or other terms and conditions of employment because of certain attributes of the employee, such as the employee's sex, race, or age.

### How can this chapter be helpful?

The following is an overview and general discussion of employment law. If you think that you have been a victim of an illegal employment practice, including discrimination, you should discuss the facts of your situation with someone who is familiar with these laws. You can contact your human resources or personnel representative, a private attorney through the Lawyer Referral Service of the Alaska Bar Association, and/or one of the local, state, or federal agencies listed at the end of this chapter and in the Resource Directory at the end of handbook. There are important time limits on filing a complaint of employment discrimination. You should file your complaint as soon as possible with one of the local, state, or federal agencies. In general, you must file your complaint within 300 days for the Equal Employment Opportunity Commission (EEOC) and 180 days for the Alaska State Commission on Human Rights (ASCHR).

### What are the Alaska laws regarding employment discrimination?

Alaska's comprehensive Human Rights Act provides protection from a wide variety of discriminatory practices. It prohibits the following:

- The Alaska Human Rights Act (AS 18.80.220) prohibits discrimination on the basis of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, and pregnancy or parenthood. These are the protected classes under state law.
- Employers may not discriminate in compensation or in a term, condition, or privilege of employment because a person is a member of one of the protected classes, unless the reasonable demands of the job require a distinction. [AS 18.80.220 (a) (1).]
- Labor organizations may not discriminate against members of the protected classes. [AS 18.80.220 (a) (2).]
- Employers, employment agencies or others, such as newspapers, may not advertise jobs in such a way

as to discriminate against members of the protected classes. [AS 18.80.220 (a) (3) & (6).]

- Employers, labor organizations or employment agencies may not retaliate against a person who has opposed practices forbidden under the Human Rights Act. [AS 18.80.220 (a) (4).]
- Employers may not pay women less than men for the same work. [AS 18.80.220 (a) (5).]

Under Alaska law, discrimination is prohibited by any employer (even with only one employee), labor union, or employment agency. However, certain non-profit clubs, including fraternal, charitable, educational, or religious associations or corporations may be excluded from the definition of employer in the statute. [AS 18.80.300.]

### **What are the federal laws regarding employment discrimination?**

The following laws prohibit a variety of discriminatory practices:

- Federal laws, such as Title VII of the Civil Rights Act of 1964;
- the Age Discrimination in Employment Act (ADEA) of 1967;
- the Americans with Disabilities Act (ADA) of 1990;
- the Equal Pay Act (EPA) of 1963;
- the Rehabilitation Act of 1973;
- Title IX of the Education Amendments of 1972; and
- Title VI of the Civil Rights Act of 1964

### **What is Title VII of the Civil Rights Act of 1964?**

This comprehensive Act prohibits discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment on the basis of race, color, religion, sex, or national origin by employers with 15 or more employees.

### **What is the Pregnancy Discrimination Act?**

This is an amendment to Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. Women who are pregnant must be treated in the same manner as other applicants or employees with similar abilities or limitations. An employer cannot refuse to hire a woman because of her pregnancy-related condition as long as she is able to perform the major functions of the job. An employer cannot refuse to hire her because of prejudices against pregnant workers, or the prejudices of co-workers, clients, or customers. *See Chapter 11 for more information about pregnancy discrimination.*

### **What is the Age Discrimination in Employment Act (ADEA) of 1967?**

This Act protects applicants and employees 40 years of age or older from discrimination on the basis of age in hiring, promotion, discharge, compensation, terms, conditions, or privileges of employment.

### **What is the Americans with Disabilities Act of 1990?**

Title I of the Americans with Disabilities Act (ADA) protects qualified applicants and employees with disabilities from discrimination in hiring, promotion, discharge, pay, job training, fringe benefits, classification, referral, and other aspects of employment on the basis of disability. The law also requires

that covered entities provide qualified applicants and employees with disabilities with reasonable accommodations that do not impose undue hardship.

**What is the Equal Pay Act of 1963?**

This Act prohibits sex discrimination in payment of wages to women and men performing substantially equal work in the same establishment.

**What is the Rehabilitation Act of 1973?**

This Act prohibits employment discrimination on the basis of a handicap in any program or activity that receives federal financial assistance, such as the federal government, state agencies, or federal contractors.

**What is Title IX of the Education Amendments of 1972?**

This Act prohibits discrimination on the basis of sex in educational programs or activities that receive federal financial assistance.

**What is Title VI of the Civil Rights Act of 1964?**

This Act prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.

Retaliation against a person who files a charge of discrimination, participates in an investigation, or opposes an unlawful employment practice is prohibited by all of these federal laws.

**What happens if the employment practice is found to be discriminatory?**

If discrimination is found under either federal or state law, the employee may be entitled to hiring, promotion, reinstatement, back wages and benefits, and future wages and benefits if she can show a reduction in her earning capacity. Compensatory damages for emotional distress or pain and suffering and punitive damages may also be granted.

There are caps under federal law on the amount of combined compensatory, future, and punitive damages. The caps range from \$50,000 to \$300,000 depending on the size of the employer. In 1997, the Alaska State legislature passed a “tort reform” bill that put caps on compensatory and punitive damages under state law ranging between \$200,000 to \$500,000 depending on the size of the employer. [AS 9.17.020.] Check with an attorney to find out the possible tax consequences for awards of lost income.

**What type of conduct is prohibited under Title VII?**

Title VII prohibits sex discrimination and sexual harassment in employment. In 1972, The United States Supreme Court ruled that an employer violated Title VII of the Civil Rights Act when it refuses to hire women with children while hiring men who are similarly situated. *Phillips v. Martin Marietta*, 400 U.S. 541 (1971). In 1977, the United States held that a state’s height and weight requirements that had the effect of excluding most qualified women from being eligible to be prison guards violated Title VII. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Since then, courts have found liability in a variety of situations including discrimination and harassment. Title VII claims can be brought in state courts as well as federal courts. *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820(1990)

### **Who is responsible for enforcing anti-discrimination and other employment laws?**

There are local, state, and federal agencies responsible for enforcing anti-discrimination laws and other employment laws. Usually the state agencies will refer you to the appropriate federal agency when necessary. *See the Resource Directory at the end of this handbook for contact information.*

### **SEX DISCRIMINATION**

#### **What is sex discrimination?**

Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex. Sex discrimination also can involve treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex.

Discrimination against an individual because that person is transgender is discrimination because of sex in violation of Title VII, also known as gender identity discrimination. In addition, lesbian, gay, bisexual, transgender, and queer individuals may bring sex discrimination claims. These may include, for example, allegations of sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person's non-conformance with sex-stereotypes. State law also prohibits discrimination on the basis of sex.

Although there are a variety of circumstances in which courts impose liability on employers for sex discrimination, courts have also limited the scope of employer liability. When an employer can show that it had enough non-discriminatory reasons for an adverse employment action that it would have taken the same action in the absence of discrimination, it can avoid Title VII liability. *Price-Waterhouse v. Hopkins* 490 U.S. 228 (1989).

Following *Price-Waterhouse*, the United States Supreme Court held that a plaintiff employee need not show direct evidence of sex discrimination to present a case to a jury as a “mixed motive” case of sex discrimination. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)

#### **What is sexual harassment?**

Sexual harassment is a form of sex discrimination and is prohibited under both state and federal laws. *French v. Jadon, Inc.*, 911 P.2d 20 (Alaska 1996); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Sexual harassment violates Title VII of the Civil Rights Act of 1964 and AS 18.80.220. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to, or rejection of, this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

A person does not have to prove psychological damage to show sexual harassment, but can win based on evidence of conduct that would reasonably be perceived to be hostile and sexually abusive. *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

Sexual harassment can be found where men and women are working together and the women find vulgarities directed at them as offensive sexually, while the men are more tolerant and join with the sexual bantering among men. In *EEOC v. NEA, Alaska*, 442 F.3d 840 (9<sup>th</sup> C. 2005), the 9<sup>th</sup> Circuit held that harassing conduct need not be sexual in nature to violate Title VII if the harasser treats men and women differently; and adopted the “reasonable woman” standard to determine whether men and women

were treated differently even though the conduct is not facially sex- or gender-specific.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim and/or the harasser may be a woman or man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, a customer/client of the employer, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to, or discharge of, the victim.
- The harasser's conduct must be unwelcome.
- The harassment must be due to the victim's sex.

If it is safe, it is best for the victim to directly inform the harasser that the conduct is unwelcome and must stop. It is important to promptly use any employer complaint mechanism or grievance system available if possible.

Gender harassment, whether sexual or not, is unlawful. Harassment based on age, disability, race, or any other protected ground is also unlawful.

The federal Equal Employment Opportunity Commission (EEOC) has issued guidelines to prevent and define sexual harassment as: "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." [29 C.F.R. 1604.11.]

Alaska law requires certain employers to post information on inquiries and complaints concerning sexual harassment. [AS 23.10.440.] Employers with 15 or more employees are required to post a notice, prepared by the State Commission for Human Rights, that:

- states the federal definition of sexual harassment;
- advises employees of the name, address, and telephone number of the state and federal agencies to which inquiries and complaints concerning sexual harassment may be made; and
- sets out the deadlines for filing a complaint of sexual harassment with the agencies listed above.

### **What are the two types of sexual harassment?**

"Quid pro quo" and "hostile environment" are the two types of sexual harassment. "Quid pro quo" sexual harassment is the easiest to identify. It occurs when a supervisor who controls an employee's terms and conditions of employment attempts to exchange benefits at work for sexual favors from the employee. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). "Hostile environment" sexual harassment is unwelcome behavior that happens because of your sex. The conduct must be severe or pervasive enough so that it interferes with work performance or creates a hostile or unpleasant work place. Verbal conduct such as jokes, remarks, or bantering, in addition to touching, visuals, gestures, and other conduct that may be sexual in nature can create a hostile work environment.

In the past, the distinction between "quid pro quo" and "hostile environment" sexual harassment was

important in determining employer liability for a supervisor's acts. Two United States Supreme Court decisions have made it easier for employers to be held liable for a supervisor's discriminatory acts. The labels of "quid pro quo" and "hostile environment" are no longer controlling for employer-liability purposes.

### **How can a woman show she has been sexually harassed?**

To show sexual harassment, a woman must show that she is a member of a protected class and that she is being harassed because of her sex. Even if harassing behavior lacks sexually explicit content, if the conduct is directed at or motivated by hostility against women, there can be a hostile environment claim. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991). In a hostile environment claim, the harasser can be a supervisor, co-worker, subordinate, or even a customer or subcontractor of the employer. The victim is not required to have a wage loss because of the sexual harassment; that is, you are not required to be terminated or turned down for a promotion or raise in order to have a valid claim. In all hostile environment cases, the conduct complained of must be so severe or pervasive that it created a hostile workplace.

### **What makes an employer legally responsible for sexual harassment by co-workers and non-employee harassment?**

If an employer has notice, or should have had notice, of sexual harassment, the employer must take action. It is this failure to take action that makes the employer legally responsible for sexual harassment. An employer will be deemed to have "constructive notice" if the workplace is permeated with sexual conduct.

### **What is an employer's liability for supervisor sexual harassment?**

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), the Supreme Court held that employers are liable for sexual harassment by a supervisor, regardless of whether the employer knows about specific incidents of harassment, if it resulted in a tangible employment action such as firing, failure to promote, or loss of job benefits. The employer can assert an affirmative defense if the harassment did not cause a tangible employment action. The employer must show that they exercised care to prevent and correct promptly any sexually harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. This is one of the reasons it is important to use an employer complaint mechanism or grievance system, if possible.

In *Faragher v. City of Boca Raton*, the United States Supreme Court identified the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination. The court held that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim."

In *Burlington Industries v. Ellerth*, the United States Supreme Court held that employers are vicariously liable for supervisors who create hostile working conditions for those over whom they have authority. In cases where harassed employees suffer no job-related consequences, employers may defend themselves against liability by showing that they quickly acted to prevent and correct any harassing behavior and that the harassed employee failed to utilize their employer's protection. Such a defense, however, is not available when the alleged harassment culminates in an employment action, such as Ellerth's.

The United States Supreme Court substantially narrowed the applicability of Title VII to harassment cases in its decision in *Vance v. Ball State University*, 570 U.S. \_\_\_\_\_. (2013) the United States Supreme Court held that an employee is a “supervisor” for purposes of vicarious liability under Title VII of the Civil Rights Act only if he is empowered by the employer to take tangible employment actions against the victim.

**How can a woman show that the harassment is unwelcome?**

The victim will be required to establish that the conduct of the harasser was unwelcome. In *French v. Jadon, Inc.*, 911 P.2d 20 (Alaska 1996), the Alaska Supreme Court held that a woman must report that the conduct was unwelcome by reporting the harassment, keeping a diary, or telling someone.

**What if a woman engages in sexual conduct for fear of losing her employment?**

If an employee submits to unwelcome advances or participates in sexual banter out of fear of being ostracized from the work group or of losing her job, she may still have a valid claim for sexual harassment. For example, the EEOC guidelines clarify that even if a woman has participated in sexual banter with co-workers, unwelcome sexual touching by a supervisor may still constitute a valid sexual harassment claim.

**Does the sexual harassment need to be directed at the victim?**

The sexual harassment does not need to be directed at the victim to be offensive, unwelcome and actionable. That is, if sexual harassment directed at others is so pervasive as to offend others in the workplace, those employees may have a claim.

**Can you have a claim of sexual harassment against someone of the same sex?**

Yes. Sex discrimination consisting of same-sex sexual harassment is actionable under Title VII and AS 18.80.220. *Joseph Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, (1998).

**Is it considered sexual harassment if you are denied benefits in favor of those who participate in exchanging sexual relations for job benefits?**

Possibly. One case decided by the United States Court of Appeals involved a hostile work environment at the Securities and Exchange Commission. The court held that third parties can be injured by a sexual relationship between two other parties if they are denied job benefits. Widespread sexual favoritism can thus support a claim of hostile environment or an implied quid pro quo sexual harassment claim. *Broderick v. Ruder*, 685 F.2d 1269 (D.DC 1988).

**What should you do if you are a victim of sexual harassment in the workplace?**

If you are faced with sexual harassment in the workplace, take steps to deal with the situation before quitting your job. Review your employer’s policy on sexual harassment if there is one, and try to follow the procedures regarding reporting sexual harassment.

If you are being treated unfairly, make sure to document incidents to support a complaint. Brief written notes on what happened, when the incident happened, and who was there are useful in refreshing your memory at a later date and showing a pattern of unfair treatment.

You may also want to contact the Alaska State Commission for Human Rights, the Anchorage Equal Rights Commission, the United States Equal Employment Opportunity Commission, or the Alaska Bar Association Lawyers' Referral number. [See the Resource Directory at the end of this handbook for contact information.] There are important time limits on filing an employment discrimination complaint. It is important to contact one of the local, state, or federal agencies as soon as possible to determine your legal rights and options.

## **WAGE DISCRIMINATION**

### **What are Alaska's laws regarding wage discrimination?**

Alaska's comprehensive Human Rights Act makes it illegal to pay people differently because of race, religion, color, national origin, age, sex, marital status, changes in marital status, pregnancy or parenthood, or mental or physical disabilities (protected classes). This includes benefits and overtime. [AS 18.80.220 (a) (1) & (5).]

### **What are the federal laws regarding wage discrimination?**

At the federal level, the Equal Pay Act of 1963 amended the Fair Labor Standards Act (FLSA) to prohibit pay discrimination because of sex. This requires employers to pay equal wages to men and women working under similar working conditions where they are performing equal work on jobs requiring equal skill, effort, and responsibility. Pay differences based on a seniority or merit system that measures earnings by quantity or quality of production are permitted. Employers may not reduce the wage rate of any employee in order to eliminate illegal wage differences. The law is interpreted as applying to "wages" in the sense of all employment-related payments, including overtime, uniforms, travel, and other fringe benefits.

### **In what way do jobs have to be equal to qualify under the equal pay act?**

In 1974, the United States Supreme Court held for the first time that an employer who paid women less than men for the same work violated the Equal Pay Act. *Corning Glass Works v. Brennan*, 417 U.S. 488 (1974). A number of court cases have established that jobs need be only substantially equal, not identical, in order to be compared for purposes of the Act. Job descriptions or classifications are irrelevant in showing that work is unequal unless they accurately reflect job content and mental as well as physical effort must be considered.

Some typical defenses that are raised by the employer under equal pay act claims include a factor other than sex such as education or training differences.

## **PREGNANCY DISCRIMINATION**

### **What is the federal law regarding pregnancy discrimination?**

At the federal level, the Pregnancy Discrimination Act of 1978 amended Title VII to include under the definition of sex any discrimination based upon pregnancy, childbirth, or related medical conditions. This Act makes it unlawful for an employer to refuse to hire a woman because she is pregnant unless pregnancy interferes with the major tasks associated with the job. [42 U.S.C. § 2000e (k).] The US Supreme Court is currently reviewing the 4<sup>th</sup> Circuit's dismissal of a claim of pregnancy discrimination in *Young v. UPS*, 707 F.3d 437, 446-451 (4th Cir. 2013). In *Young*, the Supreme Court will consider the

question of whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are “similar in their ability or inability to work.”

### **What is Alaska’s law regarding pregnancy discrimination?**

State law also makes it illegal to discriminate on the basis of pregnancy or parenthood. [AS 18.80.220 (a) (1).] For the most part, Alaska State law provides the same coverage as the federal legislation, but is to be more liberally interpreted than federal law for the purpose of eradicating discrimination. [AS 18.80.220 (a) (1).] Public employers must treat pregnancy-related conditions the same as they treat other types of temporary disabilities. [AS 39.20.500(a).] Public employers with at least twenty-one employees are required to transfer a pregnant employee to a vacant, existing position that is less strenuous or less hazardous, upon the employee's request. [AS 39.30.520.]

### **What is the federal law regarding pregnancy and medical leave?**

The federal Family and Medical Leave Act (FMLA) requires that an employer must keep a woman’s job open in accordance with the same conditions afforded fellow employees on disability or sick leave if she is on leave for a pregnancy-related condition. [29 U.S.C. § 26.] An Alaska law applying to state employees has similar requirements for pregnant employees. [AS 23.10.500 *et seq.*] State and federal law also require employee benefit and leave programs to treat pregnancy like any other medical condition.

### **Must an employer provide the same benefits to married and unmarried employees?**

In *University of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997), the Alaska Supreme Court stated that the University’s health care benefits plan, which provided benefits to employees and their dependents, discriminated on the basis of marital status by providing greater benefits to married employees than unmarried employees. Thus, this was a violation of AS 18.80.220. However, the Alaska legislature amended AS 18.80, providing that “an employer may . . . provide greater health and retirement benefits to an employee with a spouse or dependent children than are provided to other employees.” [AS 18.80.220 (c).] Another Alaska Supreme Court case clarified that marital discrimination does not cover a situation where an employee is treated adversely because of the particular individual to whom she is married. *Muller v. BP Exploration, Inc.*, 923 P.2d 783 (Alaska 1996).

The Alaska Supreme Court also held that the United States Constitution prohibits a landlord’s discrimination against unmarried couples. *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska) (per curiam), *cert. denied*, 115 S. Ct. 460 (1994).

### **What is the current federal law regarding employer’s coverage of pre-existing conditions?**

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) helps those with preexisting conditions get health coverage. In the past, some employers' group health plans limited, or even denied, coverage if a new employee had such a condition before enrolling in the plan. Under HIPAA, that is not allowed. If the plan generally provides coverage but denies benefits to you because you had a condition before your coverage began, then HIPAA applies.

## **AMERICANS WITH DISABILITIES ACT**

### **What is the Americans with Disabilities Act?**

Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits an employer from discrimination on the basis of physical or mental disability. [42 U.S.C. § 12101 *et seq.*] The ADA also prohibits discrimination in public accommodations and transportation, which are beyond the scope of this section. You may contact the U.S. Department of Justice or the local Disability Law Center if you need assistance in this area. [See the *Resource Directory at the end of this handbook for contact information.*] The ADA prohibits discrimination against qualified individuals with disabilities who can perform the essential functions of the job with or without reasonable accommodations. The federal Rehabilitation Act of 1973 also prohibits discrimination on the basis of a physical or mental disability by the federal government and its agencies, federal contractors, state governments, and other programs that receive federal funds. [29 U.S.C. § 701 *et seq.*] The ADA Amendments Act of 2008 makes changes to the definition of the term "disability," clarifying and broadening that definition—and therefore the number and types of persons who are protected under the ADA and other Federal disability nondiscrimination laws. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment.

### **What is the Alaska law on disability discrimination?**

Alaska state law prohibits discrimination against an employee with a physical or mental disability if “the reasonable demands of the position do not require such a distinction.” [AS 18.80.20; (see also 6 AAC 30.910.)] The Alaska courts will use federal law as guidance in interpreting state laws on disability discrimination. *Moody-Herrera v. State Dept. of Natural Resources*, 967 P.2d 79 (Alaska 1988).

### **What can I do if I believe I am being discriminated against on the basis of a disability?**

If you feel that you have experienced discrimination in the workplace because of a disability, there are a number of agencies with which you may file a complaint, including the Equal Employment Opportunity Commission, the Alaska State Commission for Human Rights, and the Alaska Office of Equal Employment Opportunity (if you work for the state). If you are alleging a violation of Title I of the ADA, you *must* file a complaint with an appropriate agency before you can file a lawsuit. There are deadlines for filing agency complaints. If you miss the deadline, you may lose your right to file a lawsuit. This is a complicated area of the law, and you should consult with an attorney with experience in employment law as soon as possible. For more information, contact the Disability Law Center. See the *Resource Directory at the end of this handbook for contact information.*

## **FEDERAL FAMILY AND MEDICAL LEAVE ACT**

### **What is the federal Family and Medical Leave Act?**

The federal Family and Medical Leave Act (FMLA) of 1993 requires certain employers with 50 or more employees to provide up to 12 weeks of leave per year for eligible employees for the birth or adoption of a child or due to a serious health condition of the employee or close family member. [29 U.S.C. § 2612 (a) (1).] An employee is eligible for FMLA leave if she has worked 12 months for the employer for at least 1250 hours. [29 U.S.C. § 2611 (2).] This law requires employers to return employees to the same or an equivalent position after the leave. [29 U.S.C. § 2614 (a).] However, an employer may deny restoration to the same or similar position if the employer would suffer “grievous economic injury” and notifies the employee of the harm. [29 U.S.C. § 2614 (b) (1).] Also, leave may be denied to a salaried employee among the highest paid ten percent of employees within 75 miles of the facility in which employee is employed. [29 U.S.C. § 2614 (b) (2).]

**What are the requirements for employers and employees regarding FMLA leave?**

An employee is required to provide the employer with notice prior to the leave and to make efforts to schedule treatment so as not to “unduly” disrupt the operations of the employer. [29 U.S.C. § 2612 (e).] The employer may require medical certification from the employee regarding the leave. During FMLA leave, an employer must maintain coverage for an eligible employee for the duration of her leave. [29 U.S.C. § 2614(c).] There is no comparable state law requiring employers to provide leave to private sector employees. However, state law does provide leave benefits to state employees under AS 23.10.500 *et. seq.* This law allows state employees up to 18 weeks of leave, contrasted with 12 under federal law.

**What should I do if I have questions about these family leave acts?**

Check your employer’s policies and procedures regarding leave or contact the state or federal Departments of Labor, which are the agencies responsible for enforcement of these laws or seek advice from an attorney.

**WRONGFUL TERMINATION/  
BREACH OF EMPLOYMENT CONTRACT**

**When can an employer take action against an employee?**

An employer is not prevented from disciplining or discharging people who are not performing up to the employer’s expectations. Likewise, employers are not required to hire people who are not qualified for the job.

**What should I do if I think my employer has breached my employment contract?**

Alaska State law provides that the employment relationship constitutes a contract between the employee and the employer.

If you are a union member, usually you will have a collective bargaining agreement, which is a special type of employment contract. If you are a union member and have a dispute with your employer, you should check the collective bargaining agreement or contact your union representative immediately. The time frames for filing a union grievance are very short – sometimes just a few days. You should ask your union representative to grieve any adverse employment action. If your union refuses to do so, you should ask for the reasons in writing. Even if your union will not file a grievance for you, you may be required to file it yourself. If you fail to file a grievance, you may be precluded from filing a claim in court. In most cases, if you or your union does file a grievance, you may be required to exhaust your union remedies before you file an action in court. Thus, you will be required to take such a claim to arbitration, if allowed. After the arbitration, you may be limited to an appeal of the arbitration only; you may not be able to file an original suit. It is very important that you are well prepared for the arbitration with your testimony and documentary exhibits. If you do not have a union assisting you or if your union fails to fairly represent you, you may want to contact an attorney. The Lawyer Referral Service of the Alaska Bar can refer you to an attorney who handles these types of matters. *See the Resource Directory at the end of this handbook for contact information.*

**What if I am not a union member?**

If you are not a member of a union with collective bargaining agreement remedies, your employment contract is governed by the employer’s personnel policies and procedures and possibly other promises

your employer made to you. These promises may include those made prior to your accepting employment, or if you made a substantial change in your position to take the employment, you may have an enforceable contract. The Alaska Supreme Court has said that an employer need not have employment policies and handbooks; if they do, however, the rules and policies constitute a contract and must be followed.

**In what other situations can an employee bring a claim against an employer?**

Employees in Alaska may also bring a claim against the employer for breach of the covenant of good faith and fair dealing. Among other things, the covenant requires an employer to follow any policies and procedures it has established, to treat like employees alike, and to not terminate employees for false reasons. An employer is not allowed to deprive the employee of benefits earned under the contract and is required to act in good faith and deal fairly with employees. Employees also cannot be terminated for reasons that are against public policy, *e.g.*, discharge for jury duty or filing a workers' compensation claim.

**What should I do if I am not a member of a union and my employer takes action against me?**

If your employment is covered by personnel policies and procedures and your employer takes action against you, you should review those policies and procedures since your employer is required to follow them. If you are required to take steps under the policy to object to adverse action, you should do so within the time frames allowed. If you do not understand the policies and procedures, you may want to contact your human resources representative or an attorney.

**What are the laws in Alaska regarding personnel files?**

Alaska law allows employees to obtain copies of their personnel files and any other records that the employer maintains regarding the employee. If you want a copy of your personnel file, you should send or hand deliver a letter to the employer, addressed to the person in charge of personnel, and state in your letter: "Please consider this a formal request for a copy of my personnel file and any other records you maintain regarding me pursuant to AS 23.10.430. I am willing to pay reasonable copying costs. I would like to pick up a copy of the file by [fill in the date]."

**WHISTLEBLOWER PROTECTION**

**Are there laws that will protect me if I report matters of public concern?**

There are state and federal laws that protect employees from adverse employment action based on the employee's reporting matters of public concern. Under federal law, employees are protected from adverse employment actions when they report environment violations. These claims must be filed through the federal Department of Labor, and the timelines for filing are short – usually 30 days. You should contact an attorney or the federal Department of Labor if you are an "environmental whistleblower."

Under state law, state and other government employees are protected from adverse employment action if they report matters of public concern. Alaska Statutes §39.90.100(a). These claims could include reporting discrimination or abuses in the government office in which you work. There is currently a two year statute of limitations for filing a state whistleblower's claim. You may be required to inform your employer in writing concerning the matter. AS §39.90.110(c).

## **VICTIMS OF DOMESTIC VIOLENCE OR SEXUAL ASSAULT & THE WORKPLACE**

(This section is adapted from *The Impact of Violence in the Lives of Working Women: Creating Solutions-Creating Change*. Copyright ©2000 by NOW Legal Defense and Education Fund, 395 Hudson, Street, New York, NY 10014, Tel. 212-925-6635.)

Domestic violence does not always stop when a victim/survivor leaves home in the morning to go to work. For example, the victim and the batterer may work together, or the batterer may come to the victim's job and harass or assault her at work. Laws regarding discrimination, harassment, wrongful termination, and leave may all be particularly important for working women dealing with domestic or sexual violence.

### **Can sexual harassment laws cover workplace violence?**

Sexual harassment may involve domestic violence, such as when intimate relationships between co-workers become violent and physical or verbal abuse is brought into the workplace. For example, the U.S. Supreme Court's landmark 1986 decision outlawing sexual harassment, *Meritor Savings Bank v. Vinson*, concerned the bank's liability for a supervisor's repeated unwelcome sexual advances toward, and the sexual assaults of, a female employee (with whom he had had a prior social relationship). [477 U.S. 57, 73 (1986).]

### **Does workers' compensation cover injuries related to domestic or sexual violence?**

Workers' compensation provides no-fault, generally exclusive coverage for work-related injuries as defined by state laws. The amount of recovery is limited by state statute. Some women and their families have recovered workers' compensation awards for injuries resulting from sexual assaults, rapes, and murders that occurred at work, whether they were committed by a supervisor, a customer, or an intimate partner who tracked the victim on her job, e.g., *Williams v. Munford, Inc.*, 683 F.2d 938, 940 (5th Cir. 1982). Where injuries are found to be exclusively covered by workers' compensation, employees are not permitted to bring negligence claims against their employers in court and are limited to the damages available under the state workers' compensation statute.

Exceptions in workers' compensation laws in many states allow women to pursue tort claims against employers for damages resulting from violent incidents such as rape and sexual assault. In addition, a number of courts have refused to restrict a woman's recovery to the more limited amounts generally available under workers' compensation laws, holding instead that workers' compensation statutes only apply when the employee's status as an employee precipitated the attack or rape. Thus, if an assault or rape is found to be committed for "personal" reasons (e.g. the victim knew her attacker), workers' compensation limitations may not apply.

### **Can an employer be liable for domestic or sexual violence against an employee?**

Where workers' compensation does not limit recovery, women may pursue state tort claims for their employers' role in the violence. For example, employers may be liable for rapes and sexual assaults if the perpetrator used the authority his employer vested in him to commit the attack. A company also could be liable for its failure to take prompt and remedial action once it knew or should have known of the risk of the attack.

An employer may be liable for negligently hiring or retaining an employee who later injured someone in the course of the job. Some courts have held companies liable when they knew or should have known that

the employee might commit a violent act or when they could foresee that the employee, through his employment, would create a risk of danger, *e.g.*, *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1537 (S.D. Fla. 1993), *aff'd*, 84 F.3d 438 (11th Cir. 1996). For example, one court found that an employee's record (sexual harassment of female co-workers, threats to male co-workers, and sexual advances and threats to the female employee he ultimately killed) made it foreseeable that he could act violently and created a duty of care by the company to take steps to prevent further harm to the victim. *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 424 (Minn. Ct. App. 1993). In responding to complaints that their employees committed violent acts, however, company officials must take care not to violate other legal obligations or to jeopardize the rights of the accused. For example, in many jurisdictions, companies may not discriminate against employees who have criminal records unless the employer's action was based on job-related factors.

### **Do occupational safety and health laws apply when there is violence in the workplace?**

Federal and state occupational safety and health laws require employers to make sure their employees work in safe environments. The federal Occupational Safety and Health Act of 1970 ("OSHA") contains a "general duty clause" that requires every employer to provide a workplace free from recognized safety hazards. [ 29 U.S.C. § 654(a) (2000).] State laws impose similar requirements. OSHA's general duty clause may be interpreted to require employers to take reasonable steps to protect workers from violent attacks in the workplace.

### **Is an employee who has to leave work because of domestic or sexual violence eligible for unemployment compensation?**

Women who have left their jobs as a result of domestic violence, workplace rapes, or other forms of sexual harassment may be eligible for unemployment benefits in some states if they can prove that they quit for "compelling" reasons that constituted "good cause." Each state has its own definition of what constitutes "good cause." In an increasing number of states, women who have left their jobs because of domestic violence are able to receive unemployment compensation, in most circumstances, under a "good cause" provision that explicitly covers domestic violence.

### **Can the Americans with Disabilities Act of 1990 apply when an employee is a victim of domestic or sexual violence?**

An employee who has a disability due to domestic or sexual violence and is able to perform the essential functions of a job may not be terminated, demoted, harassed, or otherwise disadvantaged because of her disability and may be entitled to "reasonable accommodations" under the Americans with Disabilities Act (ADA), as discussed elsewhere in this chapter. Employees who are dealing with domestic violence may experience many forms of abuse that cause mental and/or physical disabilities which would qualify them for protection under the ADA. Reasonable accommodations may include time away from the office for appointments with doctors, modified work schedule, additional training or supervision, a transfer, or medical leave.

### **Can the Family and Medical Leave Act apply when an employee is a victim of domestic or sexual violence?**

An employee who needs time off from work for herself or a family member for a "serious health condition" resulting from domestic or sexual violence may be entitled to job protected leave under the federal Family and Medical Leave Act as discussed in this chapter.

## RESOURCES

### **What do I do if I am the victim of discrimination?**

If you think you have been the victim of discrimination, you can hire an attorney to advocate for you, and/or you can pursue a claim through one of the local, state, or federal agencies responsible for enforcing the laws that cover discrimination.

### **How do I make a complaint if I have been discriminated against?**

Complaint procedures can vary considerably depending on the type of claim being made and how it is being pursued. It is important to file your complaint promptly. Check with an attorney or the agency you are working with early in the process to establish the deadlines for filing a claim in court. A written complaint is necessary under most discrimination laws. If you decide to pursue a claim of discrimination, you should be aware that the deadlines for certain actions are very short and strict. If you are unsure about how the law might apply to a specific situation, call the agency that handles those complaints. They either will know the law or refer you to the agency that does. With requests for grievances or investigations by your union or your employer, it is safest to file written complaints or requests.

### **Where can I file a charge of discrimination?**

You may file a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC) or the Alaska State Commission for Human Rights (ASCHR) if you believe you have been discriminated against by an employer, labor union, or employment agency when applying for a job or while on the job because of your race, color, sex, religion, national origin, age, disability, marital status, pregnancy, or parenthood. You also may file a charge of discrimination with EEOC or ASCHR if you believe that you have been discriminated against because of whistleblowing or participating in an equal employment opportunity matter. *See the Resource Directory at the end of this handbook for contact information.*

### **How do I file a charge with the Alaska State Commission for Human Rights?**

An individual aggrieved by an alleged discriminatory practice prohibited by AS 18.80.100-145 may file a written complaint with the Commission. Complaints must be filed with the Alaska State Commission for Human Rights (ASCHR) within 180 days of the alleged discriminatory act. It may be filed in person or by mail at any Commission office. The Commission's staff will assist you with drafting and filing the complaint. You can contact ASCHR at 1-800-478-4692 for more information.

### **How do I file a charge with the EEOC?**

Charges may be filed in person, by mail, or by telephone by contacting the nearest EEOC office. *[See the Resource Directory at the end of this handbook for contact information.]* To avoid delay, call or write beforehand if you need special assistance to file a charge.

### **What is a Notice of Right to Sue letter issued by EEOC?**

The issuance of a Notice of Right to Sue letter ends EEOC's process with respect to your charge. You may file a lawsuit against the respondent named in your charge within 90 days from the date you receive this notice. You should keep a record of this date because once this 90-day period is over, your right to sue is lost. If you intend to consult an attorney, you should do so as soon as possible.

Your lawsuit may be filed in state court or the United States District Court. Filing the notice is not sufficient. A court complaint must contain a short statement of the facts of your case that shows that you are entitled to relief. Generally, suits are brought in the state where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office.

You may contact EEOC if you have any questions about your rights, including advice on which court can hear your case, or if you need to inspect and copy information contained in the case file. Additionally, many EEOC offices can provide you with names of private attorneys who have agreed to consider referrals for private litigation.

**Do I need to file my complaint with both the Equal Employment Opportunities Commission and Alaska State Commission For Human Rights?**

No. A complaint filed with one agency is considered filed with the other due to a work-sharing agreement.

**How can I find an attorney for my employment discrimination claim?**

Employment law and employment discrimination law are specialized areas of practice. You may call the Alaska Bar Association Lawyer Referral Service at 1-800-770-9999 for the numbers of attorneys who practice in this area. You may want to ask how much experience the attorney has with these types of cases. Try to find an attorney who is recommended for his or her work in this area.

**What are the state agencies/commissions?**

*See the Resource Directory at the end of this handbook for contact information for these agencies.*

- The Alaska State Commission for Human Rights (ASCHR) is the state agency that enforces the Alaska Human Rights Law. The Commission maintains an investigative unit in Anchorage. The Commission has statewide powers and accepts complaints from all regions of the state. At the present time, if an individual has a discrimination action in the Commission, the individual can only recover actual wage and benefit damages. There can be no recovery for emotional distress or punitive damages in the Commission. (However, emotional distress and punitive damages are available before the federal EEOC and in a state court civil suit under AS 18.80.220.) An Alaska Supreme Court ruling explains the requirements to get a hearing with the Commission. [*State Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995).]
- The Office of Equal Employment Opportunity (OEEO) is an administrative unit located in the Office of the Governor that is responsible for ensuring fair employment practices in state government. It monitors the state affirmative action plan for the employment retention and advancement of women, minorities, the handicapped, and other disadvantaged workers. OEEO only monitors state government; it does not have authority outside of state employees. Even if you file a discrimination claim with the OEEO, you may also want to file a complaint with the ASCHR or EEOC since you are still required to file timely with the Commissions.
- The Department of Labor enforces state law regarding certain fair labor practices. This division is responsible for assisting employees who have worked in the private sector and have not been paid wages due to the employees for overtime, minimum wage, or other wage complaints. The State Department of Labor Wage & Hour Administration also enforces the state law regarding family leave.

**What are the local agencies?**

*See the Resource Directory at the end of this handbook for contact information for these agencies.*

- The Anchorage Equal Rights Commission (AERC) is the agency that handles complaints regarding discrimination that occurs within the municipal boundaries of Anchorage.
- The Disability Law Center of Alaska is the statewide protection and advocacy agency mandated under federal law to promote and protect the legal and human rights of individuals with disabilities. The Center provides education, systems advocacy, and direct representation in areas such as special education, social security and other entitlements, and enforcement of the Americans with Disabilities Act and other disability laws. The Center has authority to conduct investigations of incidents of abuse or neglect of individuals with disabilities.

**What are the federal agencies?**

*See the Resource Directory at the end of this handbook for contact information for these agencies.*

- The U.S. Equal Employment Opportunities Commission (EEOC) is the federal agency charged with enforcing federal laws outlawing employment discrimination. As a practical matter, EEOC, ASCHR, and AERC have a work-sharing agreement. If you file with one agency, your complaint will be simultaneously filed with the other agencies, although only one agency will investigate.
- The U.S. Department of Labor is charged with enforcing federal wage and hour laws, such as overtime and minimum wage; it also enforces the federal Family and Medical Leave Act and federal whistleblower laws.
- The Office of Federal Contract Compliance Programs is a federal agency charged with monitoring federal contractors for equal employment opportunity and affirmative action practices. This agency has an office in Anchorage.

There are other federal agencies which may be able to assist you in pursuing a claim of discrimination.