

**SB**

**132**

HB 202

SENATE BILL NO. 132  
"AN ACT RELATING TO COMPLAINTS FILED WITH, AND  
INVESTIGATIONS, HEARINGS, AND ORDERS OF, AND  
THE INTEREST RATE ON AWARDS OF THE  
STATE COMMISSION FOR HUMAN RIGHTS"

SECTIONAL ANALYSIS  
OFFICE OF THE ATTORNEY GENERAL

Section 1: Amends AS 18.80.100 to ensure that a complainant may withdraw a complaint of unlawful discrimination during the investigative and conciliation phases of the procedures and before the executive director issues an accusation, which begins formal procedures.

Section 2: Adds new subsections to 18.90.100. The power of the executive director to file a complaint is moved from subsection (a) to proposed subsection (b).

Proposed subsection (c) adds to 18.80.100 the limitation period for filing a complaint set out in 6 AAC 30.230. The limitation period established allows the filing of a complaint for 180 days after the discriminatory act or practice ends.

Section 3: Amends 18.80.110 to require a written and signed agreement if a complaint is resolved in the conciliation phase, to make that agreement the equivalent of a commission order for purposes of enforcement, and to authorize the compromise of a damages claim in the agreement.

Section 4: Adds a new section establishing the procedure to be followed if a complaint lacks substantial supporting evidence and expanding the discretion of the executive director to dismiss a complaint that is supported by substantial evidence in appropriate circumstances. A purpose of the section is to reverse the Alaska Supreme Court's decision in *Department of Fish and*

*Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), that a hearing is mandatory if a complaint is supported by substantial evidence. The Court concluded that the law did not give the commission staff discretion to discontinue action on a complaint after an investigator found substantial evidence of unlawful discrimination. *Id.*, at 1373. The effect of this decision was to require the commission to commit its resources to any complaint supported by substantial evidence without regard to such factors as the weakness of the evidence, the strength of an employer's affirmative defenses, or the significance of the alleged violation.

Subsection (a) establishes the procedure that follows a conclusion after investigation that substantial evidence does not support a complaint of unlawful discrimination. The executive director dismisses the complaint without prejudice. The commission is provided with the discretion to consider an appeal from the director's dismissal.

Subsection (b) expands the discretion of the executive director to pursue complaints based on such factors as, for example, the strength of the evidence, the severity of the alleged violation, an employer's history before the commission, the complainant's cooperation, or the complaint's value in establishing precedent guiding future conduct.

Subsection (c) ensures that the executive director's administrative dismissal is not a dismissal on the merits and that a complainant may file an action with a court or another agency or even file a new complaint with the commission if the reason for the administrative dismissal can be resolved.

**Section 5:** Repeals and reenacts 18.80.120, which sets out the requirements for a hearing on a complaint of discrimination.

Subsection (a) implements the expanded discretion of the executive director to choose the complaints that commission staff pursue to hearing and provides that the commission may not review the executive director's exercise of that discretion. It also provides that, if the executive director refers a complaint for hearing, the executive director must issue an accusation based on the investigator's determination of substantial evidence.

Subsection (b) adds a requirement that the chief administrative law judge appoint the hearing officer who will conduct the hearing, that various statutes applying to the Office of Administrative Hearings (including those addressing disqualification of a hearing officer and administrative hearing records but excluding the section addressing hearing procedures) apply to the hearing, and a requirement that the hearing follow the procedures in the Administrative Procedure Act, AS 44.62.330 - 44.62.630, except where the statutes applying to the commission provide otherwise.

Subsection (c) allows reasonable and fair amendments to an accusation, but it provides that substantial evidence must support an amendment naming a different discriminatory practice and that the parties must have an opportunity to resolve the different discriminatory practice in conciliation before the hearing may proceed.

Subsection (d) establishes the burden of proof at a hearing by requiring that the elements of an accusation or defense be proven by a preponderance of the evidence.

Subsection (e) authorizes the commission to issue a summary decision without a hearing

in the same manner that a court may issue a summary judgment -- when the facts are not in dispute and the party petitioning for a summary decision is entitled to an order as a matter of law.

**Section 6:** Amends the remedial provisions in 18.80.130(a) to authorize the commission to order a remedy after a hearing or after considering a petition for a summary decision. It clarifies the remedial authority of the commission by providing that the commission may order action to correct the discriminatory practice but may not order awards of noneconomic or punitive damages.

Paragraph (1), addressing employment, is amended to set out the specific remedies that the commission can award to remedy a discriminatory employment practice. To the remedies of hiring, reinstatement or upgrading an employee with or without back pay, it adds the authority to order training regarding discriminatory practices, accommodation of a disability, changes to personnel records, posting signs, restoration of seniority, and the payment of front pay for a period of one year in special circumstances: if hiring, reinstatement or upgrading of an employee cannot be accomplished because the employer does not have an appropriate vacancy; if the employer's discriminatory conduct made the employee incapable of returning to work; or if the relationship between the employer and employee has so deteriorated that they cannot work together. The paragraph adds a duty to mitigate. An order for either front pay or back pay must be reduced by the amount that the employee could have earned if the employee made a reasonably diligent effort to obtain comparable employment.

**Section 7:** Makes conforming amendments to 18.80.130(c).

- Section 8:** Adds a provision tying the rate of interest when the commission awards interest to the legal rate in AS 09.30.070.
- Section 9:** Makes conforming amendments to 18.80.135(b).
- Section 10:** Makes conforming amendments to 18.80.140.
- Section 11:** Makes conforming amendments to 18.80.270.
- Section 12:** Adds definitions of "complainant" and "pay" to the definition section in 18.80.300.
- Section 13:** Adds a paragraph to the Administrative Procedure Act adding the commission to the list of agencies that the Act's hearing provisions cover.
- Section 14:** Authorizes the commission to begin adopting regulations to implement the changes before the effective date of the act and provides that the regulations may not take effect before the act's effective date.
- Section 15:** Applies the law prospectively, to complaints filed after it is enacted.
- Section 16:** Provides an immediate effective date for section 14, which authorizes the commission to begin procedures to adopt regulations.
- Section 17:** Provides an effective date of July 2, 2005.

SB132

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STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

March 3, 2005

The Honorable Ben Stevens  
President of the Senate  
Alaska State Legislature  
State Capitol, Room 111  
Juneau, AK 99801-1182

Dear President Stevens:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would amend the investigation and procedure laws of the State Commission for Human Rights (commission). The bill would amend the investigation and hearing procedures to enhance fairness and efficiency and to give the commission more enforcement discretion to increase its effectiveness in combating unlawful discrimination.

The bill would add a new statutory provision, AS 18.80.112, to provide the staff of the commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The purpose of the amendment is to reverse the Alaska Supreme Court's decision in *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), that a hearing is mandatory if a complaint is supported by substantial evidence. The court concluded that the state human rights laws did not give the commission staff discretion to discontinue action on a complaint after an investigator found substantial evidence of unlawful discrimination. *Id.*, at 1373. The effect of this decision was to require the commission to commit its resources to any complaint supported by substantial evidence without regard to such factors as the weakness of the evidence, the strength of an employer's affirmative defenses, or the significance of the alleged violation. Providing the commission with genuine prosecutorial discretion would allow the commission to commit its resources to complaints it determines merit pursuit, based on such factors as, for example, the strength of the evidence, the severity of the alleged violation, an employer's history before the commission, or the complaint's value in establishing precedent guiding future conduct.

COMMITTEE COPY

The Honorable Ben Stevens

March 3, 2005

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The discretion of the staff of the commission would also be expanded to allow it to compromise a claim for damages in the conciliation (or prehearing) phase of the procedures. The bill would avoid conflicts between staff's exercise of its expanded discretion to compromise, dismiss, or pursue a complaint and the concerns of the victims of unlawful discrimination by allowing a complainant to opt out of commission procedures. A complainant may withdraw the complaint at any time before the executive director of the commission makes the decision to go to hearing and, after withdrawal, pursue the claim independently of the commission in another forum.

The bill would expand on a procedural change made in 2004 when the power to appoint the individuals who conduct commission hearings was moved from the commission to the chief administrative law judge in the Department of Administration. The bill would apply all of the statutes regarding hearings of the office of administrative hearings to the commission (including statutes addressing the qualifications of the persons who would conduct the commission's hearings) except for the statutes establishing hearing procedures. The commission's hearing procedures would be any specific procedures set out in AS 18.80 and the uniform procedures in the Administrative Procedure Act, AS 44.62.330 - 44.62.630. The bill would eliminate from AS 18.80 some duplicative procedural requirements that are addressed in the Administrative Procedure Act, such as the admissibility of evidence and the requirement that testimony be under oath. Another change would be the addition of a provision similar to a motion for summary judgment in the civil rules of court to allow a summary decision on the law if the facts are not disputed. The reason for allowing a summary decision is that it is a faster procedure than a hearing, and it would provide a sufficient opportunity to be heard on the legal issues when the facts are not in dispute. The bill would add a provision tying the rate of interest on commission economic awards to the rate of interest on judgments in AS 09.30.070, to conform the commission's rate to the rate awarded by other administrative agencies and the courts. It would continue to allow the commission to amend an accusation after a case is referred for hearing, but it would require that each new claim be supported by substantial evidence and that the commission provide a respondent with the opportunity to address new claims informally before being required to defend them in a formal hearing. The bill would move the statute of limitations for bringing a claim from regulation (6 AAC 30.230) to statute.

The bill would identify the specific relief available to remedy discrimination, to make the process more open and predictable and, thus, fairer. The bill would incorporate into statute the Alaska Supreme Court's conclusion that the commission lacks the authority to award punitive or

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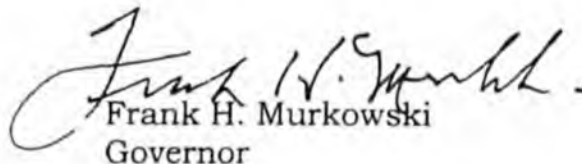
noneconomic damages. The bill would amend AS 18.30.130 to establish restoration of the benefit that was deprived -- hiring, promotion, or reinstatement to a position with back pay -- as the customary remedy for unlawful employment discrimination. The bill would define "pay" broadly to mean all compensation for service, including the cost of employee benefits. In the unusual case of an employee who is unable to return to work, the bill would allow an award of up to one year of future compensation. For any pay that the commission awards, the bill would require the commission to offset the amount an employee should have been able to earn after making a reasonable effort to find similar work.

Very importantly, under the bill the commission would retain the authority to order affirmative action to correct unlawful discrimination and to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination.

By increasing the commission's discretion in handling complaints, the bill would enable the commission to allocate its diminishing resources to cases in which the commission could be the most effective in addressing and eliminating unlawful discrimination. By streamlining commission procedures, the bill would help contain costs and ensure that the procedures are equitable to both complainants and the persons, businesses, labor organizations, and employment agencies charged before the commission with unlawful discrimination.

I urge your prompt and favorable action on this bill.

Sincerely yours,

  
Frank H. Murkowski  
Governor

Enclosure

*as amended*

SENATE BILL NO. 132(cfd fld)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Amended: 4/20/05  
Introduced: 3/4/05

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to complaints filed with, investigations, hearings, and orders of, and  
2 the interest rate on awards of the State Commission for Human Rights; and making  
3 conforming amendments."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 \* Section 1. AS 18.80.100 is amended to read:

6           Sec. 18.80.100. Complaint; time limitations. A person who is aggrieved by  
7           a [ANY] discriminatory practice [CONDUCT] prohibited by this chapter may sign  
8           and file with the commission a written, verified complaint stating the name and  
9           address of the person alleged to have engaged in the discriminatory practice  
10           [CONDUCT], and the particulars of the discrimination. A complainant may  
11           withdraw the complaint at any time before the service of an accusation under  
12           A<sup>c</sup> 18.80.120. A withdrawal must be signed by the complainant and be in  
13           writing. A withdrawal does not limit the discretion of the executive director  
14           provided in (b) of this section [THE EXECUTIVE DIRECTOR MAY FILE A

1 COMPLAINT IN LIKE MANNER WHEN AN ALLEGED DISCRIMINATION  
2 COMES TO THE ATTENTION OF THE DIRECTOR].

3 \* Sec. 2. AS 18.80.100 is amended by adding new subsections to read:

4 (b) The executive director may file a complaint in the manner provided in (a)  
5 of this section when a discriminatory practice comes to the attention of the executive  
6 director.

7 (c) A complaint may be filed not later than 180 days after the alleged  
8 discriminatory practice occurred or, for a continuing discriminatory practice, not later  
9 than 180 days after the alleged discriminatory practice stopped.

10 \* Sec. 3. AS 18.80.110 is amended to read:

11 **Sec. 18.80.110. Investigation and conciliation.** The executive director or a  
12 member of the commission's staff designated by the executive director shall  
13 informally investigate the matters set out in a filed complaint, promptly and  
14 impartially. If the investigator determines that there is [THE ALLEGATIONS ARE  
15 SUPPORTED BY] substantial evidence of an unlawful discriminatory practice  
16 under this chapter, the investigator shall immediately try to eliminate or remedy the  
17 discriminatory practice through an agreement reached [DISCRIMINATION  
18 COMPLAINED OF,] by conference, conciliation, and persuasion. If an agreement is  
19 reached, it must be reduced to writing and signed by the complainant, executive  
20 director, and respondent. The agreement is binding and enforceable under this  
21 chapter as an order of the commission. An agreement reached under this section  
22 may include the compromise of damages authorized under this chapter.

23 \* Sec. 4. AS 18.80 is amended by adding a new section to read:

24 **Sec. 18.80.112. Dismissal of complaint without prejudice.** (a) If an  
25 investigation of a complaint under AS 18.80.110 fails to discover substantial evidence  
26 of an unlawful discriminatory practice under this chapter, the executive director shall  
27 issue an order dismissing the complaint without prejudice. The commission, in its  
28 discretion, may <sup>and is not required to,</sup> review the executive director's order of dismissal and may affirm the  
29 order, remand the complaint for further investigation, or refer the complaint for  
30 conference, conciliation, and persuasion as provided in AS 18.80.110 if it concludes  
31 that substantial evidence supports the complaint of an unlawful discriminatory

1 practice.

2 (b) At any time before the issuance of an accusation under AS 18.80.120, the  
3 executive director may dismiss without prejudice a complaint if the executive director  
4 determines, in the executive director's discretion, that

5 (1) the complainant's objection to a proposed agreement under  
6 AS 18.80.110 is unreasonable;

7 (2) the complainant is unavailable or unwilling to participate in a  
8 hearing;

9 (3) relief is precluded by the absence of the person alleged to have  
10 engaged in the discriminatory practice;

11 (4) the person aggrieved by the discriminatory practice has initiated or  
12 wants to initiate an action or proceeding in another forum based on the same facts;

13 (5) a hearing will not represent the best use of commission resources;

14 (6) a hearing will not advance the purposes stated in AS 18.80.200; or

15 (7) the probability of success of the complaint on the merits is low.

16 (c) Dismissal under this section does not prevent a complainant from

17 (1) initiating an action or proceeding in another forum; or

18 (2) filing a new complaint under AS 18.80.100 that resolves the  
19 grounds for the dismissal under this section.

20 \* Sec. 5. AS 18.80.120 is repealed and reenacted to read:

21 **Sec. 18.80.120. Hearing.** (a) If no agreement is reached under AS 18.80.110  
22 and the executive director determines, in the executive director's discretion, to refer  
23 the complaint for hearing, the executive director shall issue an accusation based on the  
24 investigator's determination of substantial evidence and serve the person charged in  
25 the accusation and the complainant with notice of the referral and a copy of the  
26 accusation. The executive director's decision to refer the complaint to hearing is not  
27 reviewable by the commission under this chapter. The location of the hearing is the  
28 commission office unless the commission designates another location. The executive  
29 director, or the executive director's designee, shall present the case in support of the  
30 accusation before the commission. The person charged in the accusation may file a  
31 written answer and may appear at the hearing, with or without counsel, and submit

1 evidence.

2 (b) The commission shall request the chief administrative law judge to appoint  
3 under AS 44.64.020 an administrative law judge employed or retained by the office of  
4 administrative hearings to preside over a hearing conducted under this section.  
5 AS 44.64.040, 44.64.050, 44.64.055, 44.64.070, 44.64.080, 44.64.090, 44.64.095, and  
6 44.64.200, and the procedures in AS 44.62.330 - 44.62.630 (Administrative Procedure  
7 Act), apply to the hearing except as otherwise provided in this chapter.

8 (c) An accusation may be reasonably and fairly amended by the commission.  
9 An amendment to name a different discriminatory practice must be supported by  
10 substantial evidence, and the discriminatory practice must be referred for conference,  
11 conciliation, and persuasion as provided in AS 18.80.110, before a hearing may  
12 proceed.

13 (d) In a hearing on an accusation, each element of an accusation or defense  
14 must be proven by a preponderance of the evidence.

15 (e) At any time after the issuance of an accusation, the executive director or  
16 the person charged in the accusation may petition for a summary decision on the  
17 accusation. The commission shall grant a petition if the record shows that there is no  
18 genuine issue of material fact and the petitioner is entitled to an order under  
19 AS 18.80.130 as a matter of law.

20 \* Sec. 6. AS 18.80.130(a) is amended to read:

21 (a) At the completion of the hearing or after consideration of a petition for  
22 summary decision under AS 18.80.120(e), if the commission finds that a person  
23 charged in an accusation [AGAINST WHOM A COMPLAINT WAS FILED] has  
24 engaged in the discriminatory practice [CONDUCT] alleged in the accusation  
25 [COMPLAINT], it shall order the person to refrain from engaging in the  
26 discriminatory practice [CONDUCT]. The order must include findings of fact [,] and  
27 may order the person to take affirmative action to correct the discriminatory  
28 practice [PRESCRIBE CONDITIONS ON THE ACCUSED'S FUTURE CONDUCT  
29 RELEVANT TO THE TYPE OF DISCRIMINATION]. The commission may not  
30 order an award of noneconomic or punitive damages in any case. In a case  
31 involving a discriminatory practice [DISCRIMINATION] in

1 (1) employment, the commission may order any appropriate relief,  
 2 including [BUT NOT LIMITED TO,] one or more of the following: training of an  
 3 employer, labor organization, or employment agency, and its employees  
 4 concerning discriminatory practices; an accommodation for a person with a  
 5 disability; removal of or changes to a personnel record; posting of signs;  
 6 backpay; the hiring, reinstatement, or upgrading of an employee with or without back  
 7 pay; the payment of front pay for a period of not more than one year if hiring,  
 8 reinstatement, or upgrading of an employee is inappropriate because no vacancy  
 9 exists, the employer's discriminatory practice rendered the employee incapable of  
 10 returning to work, or the relationship between the employer and employee has so  
 11 deteriorated as to make working conditions intolerable; [,] restoration to  
 12 membership in a labor organization; [, or] admission to or participation in an  
 13 apprenticeship training program, on-the-job training program, or other retraining  
 14 program; or restoration of seniority; however, an order for back pay or front pay  
 15 must be reduced by the amount the employee could have earned or could earn by  
 16 making reasonably diligent efforts to obtain similar employment;

17 (2) housing, the commission may order the sale, lease, or rental of the  
 18 housing accommodation to the aggrieved person if it is still available, or the sale,  
 19 lease, or rental of a like accommodation owned by the person charged in the  
 20 accusation [AGAINST WHOM THE COMPLAINT WAS FILED] if one is still  
 21 available, or the sale, lease, or rental of the next vacancy in a like accommodation,  
 22 owned by the person charged in the accusation [AGAINST WHOM THE  
 23 COMPLAINT WAS FILED]; the commission may award actual damages, which shall  
 24 include [, BUT NOT BE LIMITED TO,] the expenses incurred by the complainant for  
 25 obtaining alternative housing or space; for storage of goods and effects; for moving,  
 26 and for other costs actually incurred as a result of the unlawful practice or violation.

27 \* Sec. 7. AS 18.80.130(c) is amended to read:

28 (c) If the commission finds that a person charged in an accusation  
 29 [AGAINST WHOM A COMPLAINT WAS FILED] has not engaged in the  
 30 discriminatory practice [CONDUCT] alleged in the accusation [COMPLAINT], it  
 31 shall issue and cause to be served on the complainant an order dismissing the

1 complaint.

2 \* Sec. 8. AS 18.80.130 is amended by adding a new subsection to read:

3 (f) The interest rate for an award under this section is determined in the  
4 manner provided in AS 09.30.070.

5 \* Sec. 9. AS 18.80.135(b) is amended to read:

6 (b) commission may obtain a court order for the enforcement of any of its  
7 orders by filing a complaint with the superior court in the judicial district in which the  
8 unlawful practice [CONDUCT] is alleged to have occurred.

9 \* Sec. 10. AS 18.80.140 is amended to read:

10 **Sec. 18.80.140. Effect of compliance with order.** Immediate and continuing  
11 compliance with all the terms of a commission order is a bar to criminal prosecution  
12 for the particular instances of discriminatory practice [CONDUCT] described in the  
13 accusation **issued under AS 18.80.120** [FILED BEFORE THE COMMISSION].

14 \* Sec. 11. AS 18.80.270 is amended to read:

15 **Sec. 18.80.270. Penalty.** A person, employer, labor organization, or  
16 employment agency, who or that wilfully engages in an unlawful discriminatory  
17 practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents,  
18 impedes, or interferes with the commission or any of its authorized representatives in  
19 the performance of duty under this chapter, or who or that wilfully violates an order of  
20 the commission, is guilty of a misdemeanor and, upon conviction by a court of  
21 competent jurisdiction, is punishable by a fine of not more than \$500, or by  
22 imprisonment in a jail for not more than 30 days, or by both.

23 \* Sec. 12. AS 18.80.300 is amended by adding new paragraphs to read:

24 (17) "complainant" means a person who is aggrieved by a  
25 discriminatory practice prohibited by this chapter and who has filed a complaint as  
26 provided in AS 18.80.100;

27 (18) "pay" means wages; salaries; commissions; amounts an employer  
28 contributes to retirement, health, or other fringe benefit plans; and other forms of  
29 remuneration paid to an employee for personal services.

30 \* Sec. 13. AS 44.62.330(a) is amended by adding a new paragraph to read:

31 (45) State Commission for Human Rights, where procedures are not

1 otherwise expressly provided in AS 18.80.

2 \* Sec. 14. The uncodified law of the State of Alaska is amended by adding a new section to  
3 read:

4 TRANSITION: REGULATIONS. The State Commission for Human Rights may  
5 proceed to adopt regulations necessary to implement the changes made by this Act. The  
6 regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the  
7 effective date of the statutory change.

8 \* Sec. 15. The uncodified law of the State of Alaska is amended by adding a new section to  
9 read:

10 APPLICABILITY. This Act applies to all complaints filed on or after the effective  
11 date of secs. 1 - 13 of this Act.

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 132  
 (S) Publish Date: 3/4/05

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: OOG  
 Title "An Act relating to complaints filed  
with investigations...of the State Human Rights Comm..." RDU Commissions/Special Offices  
 Sponsor Rules Component Human Rights Commission  
 Requester Governor Component No. 1

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2005) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Prepared by: Kevin Jardell, Legislative Liaison Phone 465-4021  
 Division: Office of the Governor Date/Time 3/3/05 3:25 PM  
 Approved by: Kevin Jardell, Legislative Liaison Date 3/3/2005  
 Agency: Office of the Governor

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
 Bill Version: SB 132  
 (S) Publish Date: 3/4/05

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
 Title: "An Act relating to complaints filed with,  
investigations...the State Commission for Human Rights..." RDU: CIVIL  
 Component: Labor & State Affairs  
 Sponsor: \_\_\_\_\_  
 Requester: Governor Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2005) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)  
 This bill amends AS 18.80.112 to provide the staff of the Human Rights Commission with greater authority to evaluate complaints of discrimination and to choose the complaints that it pursues to hearing before the commission. The bill also sets out the appropriate remedy for employment discrimination but preserves the commission's discretion to award "any appropriate relief" if it needs to innovate in order to remedy an unusual case of discrimination. The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn Daughhete, Director Phone 465-3673  
 Division: Administrative Services Division Date/Time 1/28/05 2:48 PM  
 Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General Date 1/28/2005  
 Agency: Department of Law

## Conceptual Motion

Motion that the NSTA Comm request  
the Administration ~~to~~ to provide  
a written response to the following questions  
Concerning all boards and commissions, compensated  
and non-compensated:

1. Should any <sup>of</sup> non-compensated boards  
and commissions be compensated?
  2. Should the compensation rate(s) be  
adjusted or standardized and, if so, at what  
rate(s)?
  3. Should the following language be added  
to those statutes that provide compensation  
at a daily rate "or part of a day"?
- If legislation is warranted, the

committee would welcome proposed legislation.

## **COMPARISON OF CSSB 354(STA) with SB 132 (ASCHR)**

SB 132 is very similar to last year's bill, SB 354. Some changes were made, however, in response to concerns raised in committee. Because the House State Affairs Committee did consider SB 354 last year, to assist the committee, this memorandum compares SB 132 with the committee's substitute for SB 354.

- Section 4 of SB 132 adds subsection (a). This subsection answers the question what happens to a complaint if, after investigation, the executive director concludes that substantial evidence did not support the complaint. AS 18.80 is silent on this question. Proposed AS 18.80.112(a) would answer the question by providing for the executive director to dismiss the complaint and by allowing, but not requiring, the commission to review the dismissal. The commission previously did review a dismissal for failure of substantial evidence upon the request of the complainant (under former 6 AAC 30.370) (repealed). Providing the commission with the discretion to review such dismissals would allow (but not require) the commission to adopt a similar procedure in the future.
- Because a new subsection is added to section 4, the section also renumbers the previous subsections (b) and (c). Paragraph (1) of subsection (b) adds "under AS 18.80.110" for the sake of clarification. No change is intended.
- Section 5 in AS 18.80.120(a) (addressing hearings) substitutes "If no agreement is reached under AS 18.80.110" for "if informal efforts under as 18.80.110 to eliminate or remedy the alleged discriminatory practice are unsuccessful" for clarity. No change in the meaning is intended.
- Section 5, which addressed conforming commission procedures to the procedures of other administrative agencies by bringing the commission into the Administrative Procedure Act, coordinates the bill's changes with sec. 36, ch. 163, SLA 2004. In 2004 the legislature adopted a bill creating the Office of Administrative Hearings (OAH) and section 36 of that bill assigned to the chief

administrative law judge the authority to appoint a hearing officer (now called an administrative law judge) to preside over commission hearings. This bill incorporates additional provisions from the OAH: (1) the qualifications of administrative law judges, (2) hearing officer conduct, (3) reimbursement to OAH for the cost of its services, (4) when an administrative law judge can be disqualified, (5) agency cooperation, (6) hearing records, (7) applicability of federal provisions and (8) definitions. This bill, however, retains from previous versions the requirement to follow the Administrative Procedure Act rather than OAH's procedural requirements in AS 44.64.060.

- Section 6, once again, makes changes to the remedial powers of the commission. CSSB 354(STA) amended the bill to remove these changes. Although SB 132 addresses this subject, an effort was made to address the concerns raised in the House State Affairs Committee. Although AS 18.80.130(a) would prohibit the commission from ordering noneconomic or punitive damages (incorporating into statute the Alaska Supreme Court's ruling in *Johnson v. Alaska State Department of Fish & Game*, 836 P.2d 896, 914 (Alaska 1991) (limiting commission's power to award money to damages for "direct, calculable, pecuniary loss")), it retains language providing the commission with the authority to order "any appropriate relief" to remedy unlawful employment discrimination. The bill continues to list the types of remedies that can be awarded in an employment discrimination case, but because of a concern that the list and the repeal of the phrase "any appropriate relief" too narrowly limited the powers of the commission, SB 32 retains the phrase. Thus, the list illustrates, rather than limits, the commission's powers. The bill provides that the usual remedy is to make the employee whole through reinstatement and the award of back pay, although the commission can speculate and award one year's compensation for future lost wages under the circumstances listed instead of returning the employee to work.

- Section 6 also incorporates into statute the judicial rule that an employee seeking to recover wages for lost employment must mitigate the employee's losses by making a reasonably diligent effort to obtain similar employment. *E.g., City of Fairbanks v. Rice*, 20 P.3d 1097, 1111 (Alaska 2000) (applying mitigation requirement to an employee whistleblower suing for constructive wrongful discharge).
- Section 11 adds a definition of "pay" to address the concern that the commission's power to award pay cover all of the compensation paid to an employee.
- The bill adds sections 15 and 16, addressing the effective date of the changes. In section 15, the bill provides that the effective date is July 2, 2005. The reason for a July 2 date is to make the changes effective one day following the amendments to AS 18.80.120(b) in sec. 36, ch.163, SLA 2004. If both effective dates were July 1, 2005, there might be confusion about the final version of the statute. The immediate effective date in section 16 for section 13 is intended to give the commission an opportunity to adopt regulations in advance so that the regulations are effective on the same date as the statutory changes.

"An Act relating to complaints filed with, and investigations, hearings, and orders of, and the interest rate on awards of the State Commission for Human Rights; making conforming amendments; and providing for an effective date."

\* Section 1. AS 18.80.100 is amended to read:

**Sec. 18.80.100. Complaint; time limitations.** A person who is aggrieved by a [ANY] discriminatory practice [CONDUCT] prohibited by this chapter may sign and file with the commission a written, verified complaint stating the name and address of the person alleged to have engaged in the discriminatory practice [CONDUCT], and the particulars of the discrimination. A complainant may withdraw the complaint at any time before the service of an accusation under AS 18.80.120. A withdrawal must be signed by the complainant and be in writing. A withdrawal does not limit the discretion of the executive director provided in (b) of this section [THE EXECUTIVE DIRECTOR MAY FILE A COMPLAINT IN LIKE MANNER WHEN AN ALLEGED DISCRIMINATION COMES TO THE ATTENTION OF THE DIRECTOR].

\* Sec. 2. AS 18.80.100 is amended by adding new subsections to read:

(b) The executive director may file a complaint in the manner provided in (a) of this section when a discriminatory practice comes to the attention of the executive director.

(c) A complaint may be filed not later than 180 days after the alleged discriminatory practice or, for a continuing discriminatory practice, not later than 180 days after the alleged discriminatory practice stopped.

\* Sec. 3. AS 18.80.110 is amended to read:

**Sec. 18.80.110. Investigation and conciliation.** The executive director or a member of the commission's staff designated by the executive director shall informally investigate the matters set out in a filed complaint, promptly and impartially. If the investigator determines that there is [THE ALLEGATIONS ARE SUPPORTED BY] substantial evidence of a discriminatory practice under this chapter, the investigator shall immediately try to eliminate or remedy the discriminatory practice through an agreement reached [DISCRIMINATION COMPLAINED OF,] by conference, conciliation, and persuasion. If an agreement is reached, it must be reduced to writing and signed by the complainant, executive director, and respondent. The agreement is binding and enforceable under this chapter as an order of the commission. Any agreement reached under this section may include the compromise of damages authorized under this chapter.

\* Sec. 4. AS 18.80 is amended by adding a new section to read:

**Sec. 18.80.112. Dismissal of complaint without prejudice.** (a) If an investigation of a complaint under AS 18.80110 fails to discover substantial evidence of an unlawful discriminatory practice under this chapter, the executive director shall issue an order dismissing the complaint without prejudice. The

commission, in its discretion, may review the executive director's order of dismissal and may affirm the order, remand the complaint for further investigation, or refer the complaint for conference, conciliation, and persuasion as provided in AS 18.80.110 if it concludes that substantial evidence supports the complaint of an unlawful discriminatory practice.

(b) At any time before the issuance of an accusation under AS 18.80.120, the executive director may dismiss without prejudice a complaint if the executive director determines, in the executive director's discretion, that

(1) the complainant's objection to a proposed conciliation agreement under AS 18.80.110 is unreasonable;

(2) the complainant is unavailable or unwilling to participate in a hearing;

(3) relief is precluded by the absence of the person alleged to have engaged in the discriminatory practice;

(4) the person aggrieved by the discriminatory practice has initiated or wants to initiate an action or proceeding in another forum based on the same facts;

(5) a hearing will not represent the best use of commission resources;

(6) a hearing will not advance the purposes stated in AS 18.80.200;

or

(7) the probability of success of the complaint on the merits is low.

(c) Dismissal under this section does not prevent a complainant from

(1) initiating an action or proceeding in another forum; or

(2) filing a new complaint under AS 18.80.100 that resolves the grounds for the dismissal under (a) of this section.

\* Sec. 5. AS 18.80.120 is repealed and reenacted to read:

**Sec. 18.80.120. Hearing.** (a) If no agreement is reached under AS 18.80.110 [SUBSTITUTED FOR " IF INFORMAL EFFORTS UNDER AS 18.80.110 TO ELIMINATE OR REMEDY THE ALLEGED DISCRIMINATORY PRACTICE ARE UNSUCCESSFUL] and the executive director determines, in the executive director's discretion, to refer the complaint for hearing, the executive director shall issue an accusation based on the investigator's determination of substantial evidence and serve the person charged in the accusation and the complainant with notice of the referral and a copy of the accusation. The executive director's decision to refer the complaint to hearing is not reviewable by the commission under this chapter. The location of the hearing is the commission office unless the commission designates another location. The executive director, or the executive director's designee, presents the case in support of the accusation before the commission. The person charged in the accusation may file a written answer and may appear at the hearing, with or without counsel, and submit evidence.

(b) The commission shall request the chief administrative law judge (AS 44.64.020) to appoint an administrative law judge employed or retained by

the office of administrative hearings to preside over a hearing conducted under this section. AS 44.64.040, 44.64.050, 44.64.055, 44.64.070, 44.64.080, 44.64.090, 44.64.095, and 44.64.200 and [FOLLOW] the procedures in AS 44.62.330 - 44.62.630 (Administrative Procedure Act) [APPLY] to the hearing except as otherwise provided in this chapter.

(c) An accusation may be reasonably and fairly amended by the commission. An amendment to name a different discriminatory practice must be supported by substantial evidence, and the discriminatory practice must be referred for conciliation as provided in AS 18.80.110, before a hearing may proceed.

(d) In a hearing on an accusation, each element of an accusation or defense must be proven by a preponderance of the evidence.

(e) At any time after the issuance of an accusation, the executive director or the person charged in the accusation may petition for a summary decision on the accusation. The commission shall grant a petition if the record shows that there is no genuine issue of material fact and the petitioner is entitled to an order under AS 18.80.130 as a matter of law.

\* Sec. 6. AS 18.80.130(a) is amended to read:

(a) At the completion of the hearing or after consideration of a petition for summary decision under AS 18.80.120(e), if the commission finds that a person charged in an accusation [AGAINST WHOM A COMPLAINT WAS FILED] has engaged in the discriminatory practice [CONDUCT] alleged in the

accusation [COMPLAINT], it shall order the person to refrain from engaging in the discriminatory practice [CONDUCT]. The order must include findings of fact [,] and may order the person to take affirmative action to correct the discriminatory practice [PRESCRIBE CONDITIONS ON THE ACCUSED'S FUTURE CONDUCT RELEVANT TO THE TYPE OF DISCRIMINATION]. The commission may not order an award of noneconomic or punitive damages in any case. In a case involving a discriminatory practice [DISCRIMINATION] in

(1) employment, the commission may order any appropriate relief, including [BUT NOT LIMITED TO,] one or more of the following: training of an employer, labor organization, or employment agency, and its employees concerning discriminatory practices; an accommodation for a person with a disability; removal of or changes to a personnel record; posting of signs; backpay; the hiring, reinstatement, or upgrading of an employee with or without back pay; the payment of front pay for a period of not more than one year if hiring, reinstatement, or upgrading of an employee is inappropriate because no vacancy exists, the employer's discriminatory practice rendered the employee incapable of returning to work, or the relationship between the employer and employee has so deteriorated as to make working conditions intolerable; [,] restoration to membership in a labor organization; [, or] admission to or participation in an apprenticeship training program, on-the-job training program, or other retraining program; or restoration of seniority; however, an

order for back pay or front pay must be reduced by the amount the employee could have earned or could earn by making reasonably diligent efforts to obtain similar employment:

(2) housing, the commission may order the sale, lease, or rental of the housing accommodation to the aggrieved person if it is still available, or the sale, lease, or rental of a like accommodation owned by the person charged in the accusation [AGAINST WHOM THE COMPLAINT WAS FILED] if one is still available, or the sale, lease, or rental of the next vacancy in a like accommodation, owned by the person charged in the accusation [AGAINST WHOM THE COMPLAINT WAS FILED]; the commission may award actual damages, which shall include [, BUT NOT BE LIMITED TO,] the expenses incurred by the complainant for obtaining alternative housing or space; for storage of goods and effects; for moving; and for other costs actually incurred as a result of the unlawful practice or violation.

\* Sec. 7. [Sec. 6 in HSTA bill] AS 18.80.130(c) is amended to read:

(c) If the commission finds that a person charged in an accusation [AGAINST WHOM A COMPLAINT WAS FILED] has not engaged in the discriminatory practice [CONDUCT] alleged in the accusation [COMPLAINT], it shall issue and cause to be served on the complainant an order dismissing the complaint.

\* Sec. 8. AS 18.80.130 is amended by adding a new subsection to read:

(f) The interest rate for an award under this section is determined in the manner provided in AS 09.30.070.

\* **Sec. 9.** AS 18.80.140 is amended to read:

**Sec. 18.80.140. Effect of compliance with order.** Immediate and continuing compliance with all the terms of a commission order is a bar to criminal prosecution for the particular instances of discriminatory practice [CONDUCT] described in the accusation issued under AS 18.80.120 [FILED BEFORE THE COMMISSION].

\* **Sec. 10.** AS 18.80.270 is amended to read:

**Sec. 18.80.270. Penalty.** A person, employer, labor organization, or employment agency, who or that wilfully engages in an unlawful discriminatory practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents, impedes, or interferes with the commission or any of its authorized representatives in the performance of duty under this chapter, or who or that wilfully violates an order of the commission, is guilty of a misdemeanor and, upon conviction by a court of competent jurisdiction, is punishable by a fine of not more than \$500, or by imprisonment in a jail for not more than 30 days, or by both.

\* **Sec. 11.** AS 18.80.300 is amended by adding new paragraphs to read:

(17) "complainant" means a person who is aggrieved by a discriminatory practice prohibited by this chapter and who has filed a complaint as provided in AS 18.80.100;

(18) "pay" means wages, salaries, commissions, amounts an employer contributes to retirement, health, or other fringe benefit plans, and other forms of remuneration paid to employees for personal services.

\* **Sec. 12.** AS 44.62.330(a) is amended by adding a new paragraph to read:

(61) State Commission for Human Rights, where procedures are not otherwise expressly provided in AS 18.80.

\* **Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: REGULATIONS. The State Commission for Human Rights may proceed to adopt regulations necessary to implement the changes made by this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date of the statutory change.

\* **Sec. 14.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to all complaints filed on or after the effective date of secs. 1 - 12 of this Act.

\* **Sec. 15.** Sections 1 - 12 of this Act take effect July 2, 2005.

\* **Sec. 16.** Except as provided in section 15, this Act takes effect immediately.

HOUSE CS FOR CS FOR SENATE BILL NO. 354(STA)  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered: 5/9/04  
Referred: Judiciary

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to complaints filed with, and investigations, hearings, and orders of,  
2 the State Commission for Human Rights; and making conforming amendments."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 \* Section 1. AS 18.80.100 is amended to read:

5           Sec. 18.80.100. Complaint; time limitations. A person who is aggrieved by  
6           a [ANY] discriminatory practice [CONDUCT] prohibited by this chapter may sign  
7           and file with the commission a written, verified complaint stating the name and  
8           address of the person alleged to have engaged in the discriminatory practice  
9           [CONDUCT], and the particulars of the discrimination. A complainant may  
10           withdraw the complaint at any time before the service of an accusation under  
11           AS 18.80.120. A withdrawal must be signed by the complainant and be in  
12           writing. A withdrawal does not limit the discretion of the executive director  
13           provided in (b) of this section [THE EXECUTIVE DIRECTOR MAY FILE A  
14           COMPLAINT IN LIKE MANNER WHEN AN ALLEGED DISCRIMINATION

1 COMES TO THE ATTENTION OF THE DIRECTOR].

2 \* Sec. 2. AS 18.80.100 is amended by adding new subsections to read:

3 (b) The executive director may file a complaint in the manner provided in (a)  
4 of this section when a discriminatory practice comes to the attention of the executive  
5 director.

6 (c) A complaint may be filed not later than 180 days after the alleged  
7 discriminatory practice or, for a continuing discriminatory practice, not later than 180  
8 days after the alleged discriminatory practice stopped.

9 \* Sec. 3. AS 18.80.110 is amended to read:

10 **Sec. 18.80.110. Investigation and conciliation.** The executive director or a  
11 member of the commission's staff designated by the executive director shall  
12 informally investigate the matters set out in a filed complaint, promptly and  
13 impartially. If the investigator determines that there is [THE ALLEGATIONS ARE  
14 SUPPORTED BY] substantial evidence of a discriminatory practice under this  
15 chapter, the investigator shall immediately try to eliminate or remedy the  
16 discriminatory practice through an agreement reached [DISCRIMINATION  
17 COMPLAINED OF,] by conference, conciliation, and persuasion. If an agreement is  
18 reached, it must be reduced to writing and signed by the complainant, executive  
19 director, and respondent. The agreement is binding and enforceable under this  
20 chapter as an order of the commission. Any agreement reached under this  
21 section may include the compromise of damages authorized under this chapter.

22 \* Sec. 4. AS 18.80 is amended by adding a new section to read:

23 **Sec. 18.80.112. Dismissal of complaint without prejudice.** (a) At any time  
24 before the issuance of an accusation under AS 18.80.120, the executive director may  
25 dismiss without prejudice a complaint if the executive director determines, and the  
26 commission concurs, that

27 (1) the complainant's objection to a proposed conciliation agreement is  
28 unreasonable;

29 (2) the complainant is unavailable or unwilling to participate in a  
30 hearing;

31 (3) relief is precluded by the absence of the person alleged to have

1 engaged in the discriminatory practice;

2 (4) the person aggrieved by the discriminatory practice has initiated or  
3 wants to initiate an action or proceeding in another forum based on the same facts;

4 (5) a hearing will not represent the best use of commission resources;

5 (6) a hearing will not advance the purposes stated in AS 18.80.200; or

6 (7) the probability of success of the complaint on the merits is low.

7 (b) Dismissal under this section does not prevent a complainant from

8 (1) initiating an action or proceeding in another forum; or

9 (2) filing a new complaint under AS 18.80.100 that resolves the  
10 grounds for the dismissal under (a) of this section.

11 \* **Sec. 5.** AS 18.80.120 is repealed and reenacted to read:

12 **Sec. 18.80.120. Hearing.** (a) If informal efforts under AS 18.80.110 to  
13 eliminate or remedy the alleged discriminatory practice are unsuccessful and the  
14 executive director determines, in the executive director's discretion, to refer the  
15 complaint for hearing, the executive director shall issue an accusation based on the  
16 investigator's determination of substantial evidence and serve the person charged in  
17 the accusation and the complainant with notice of the referral and a copy of the  
18 accusation. The executive director's decision to refer the complaint to hearing is not  
19 reviewable by the commission under this chapter. The location of the hearing is the  
20 commission office unless the commission designates another location. The executive  
21 director, or the executive director's designee, presents the case in support of the  
22 accusation before the commission. The complainant may be represented by counsel,  
23 at the complainant's discretion. The person charged in the accusation may file a  
24 written answer and may appear at the hearing, with or without counsel, and submit  
25 evidence.

26 (b) The commission shall follow the procedures in AS 44.62.330 - 44.62.630  
27 (Administrative Procedure Act) except as otherwise provided in this chapter.

28 (c) An accusation may be reasonably and fairly amended by the commission.  
29 An amendment to name a different discriminatory practice must be supported by  
30 substantial evidence, and the discriminatory practice must be referred for conciliation  
31 as provided in AS 18.80.110, before a hearing may proceed.

1 (d) In a hearing on an accusation, each element of an accusation or defense  
2 must be proven by a preponderance of the evidence.

3 (e) At any time after the issuance of an accusation, the executive director or  
4 the person charged in the accusation may petition for a summary decision on the  
5 accusation. The commission shall grant a petition if the record shows that there is no  
6 genuine issue of material fact and the petitioner is entitled to an order under  
7 AS 18.80.130 as a matter of law.

8 \* Sec. 6. AS 18.80.130(c) is amended to read:

9 (c) If the commission finds that a person charged in an accusation  
10 [AGAINST WHOM A COMPLAINT WAS FILED] has not engaged in the  
11 discriminatory practice [CONDUCT] alleged in the accusation [COMPLAINT], it  
12 shall issue and cause to be served on the complainant an order dismissing the  
13 complaint.

14 \* Sec. 7. AS 18.80.130 is amended by adding a new subsection to read:

15 (f) The interest rate for an award under this section is determined in the  
16 manner provided in AS 09.30.070.

17 \* Sec. 8. AS 18.80.140 is amended to read:

18 **Sec. 18.80.140. Effect of compliance with order.** Immediate and continuing  
19 compliance with all the terms of a commission order is a bar to criminal prosecution  
20 for the particular instances of discriminatory practice [CONDUCT] described in the  
21 accusation issued under AS 18.80.120 [FILED BEFORE THE COMMISSION].

22 \* Sec. 9. AS 18.80.270 is amended to read:

23 **Sec. 18.80.270. Penalty.** A person, employer, labor organization, or  
24 employment agency, who or that wilfully engages in an unlawful discriminatory  
25 practice [CONDUCT] prohibited by this chapter, or wilfully resists, prevents,  
26 impedes, or interferes with the commission or any of its authorized representatives in  
27 the performance of duty under this chapter, or who or that wilfully violates an order of  
28 the commission, is guilty of a misdemeanor and, upon conviction by a court of  
29 competent jurisdiction, is punishable by a fine of not more than \$500, or by  
30 imprisonment in a jail for not more than 30 days, or by both.

31 \* Sec. 10. AS 18.80.300 is amended by adding a new paragraph to read:

1                   (17) "complainant" means a person who is aggrieved by a  
2           discriminatory practice prohibited by this chapter and who has filed a complaint as  
3           provided in AS 18.80.100.

4   \* **Sec. 11.** AS 44.62.330(a) is amended by adding a new paragraph to read:

5                   (61) State Commission for Human Rights, where procedures are not  
6           otherwise expressly provided in AS 18.80.

7   \* **Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to  
8   read:

9           **APPLICABILITY.** This Act applies to all complaints filed on or after the effective  
10   date of secs. 1 - 11 of this Act.

11   \* **Sec. 13.** The uncodified law of the State of Alaska is amended by adding a new section to  
12   read:

13           **TRANSITION: REGULATIONS.** The State Commission for Human Rights may  
14   proceed to adopt regulations necessary to implement the changes made by this Act. The  
15   regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the  
16   effective date of the statutory change.



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## Westlaw.

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(Cite as: 906 P.2d 1365)

## C

Supreme Court of Alaska.  
 STATE of Alaska, DEPARTMENT OF FISH AND  
 GAME, SPORT FISH DIVISION, Petitioner,  
 v.  
 Andrea MEYER and Alaska State Commission on  
 Human Rights, Respondents.  
 No. S-6036.

Nov. 17, 1995.

State employee who had claimed discrimination sought review of a decision of the State Commission for Human Rights closing her case. The Superior Court, Third Judicial District, Anchorage, Joan M. Woodward, J., determined that the order was appealable and that the Commission abused its discretion in ruling that employee did not produce substantial evidence of pretext discrimination. Employer petitioned for review. The Supreme Court, Eastaugh, J., held that: (1) closing order was final agency action subject to judicial review, and (2) it was an error of law for Commission staff or executive director to resolve at investigative stage legitimacy of employee's nondiscriminatory reasons for its actions and employee's success in rebutting those reasons.

Affirmed and remanded.

## West Headnotes

## [1] Appeal and Error ⇨893(1)

30k893(1) Most Cited Cases

The Supreme Court reviews issues of law de novo.

## [2] Administrative Law and Procedure ⇨796

15Ak796 Most Cited Cases

On appeal from a decision of administrative agency, the Supreme Court reviews questions of law where no agency expertise is involved under the substitution of judgment test.

## [3] Administrative Law and Procedure ⇨683

15Ak683 Most Cited Cases

Supreme Court gives no deference to superior court's decision reviewing an administrative agency decision because that court was acting as an intermediate appellate court.

## [4] Administrative Law and Procedure ⇨651

15Ak651 Most Cited Cases

All final administrative actions are presumed to be reviewable, and this presumption controls unless it is rebutted by an affirmative indication of legislative intent that there be no reviewability.

## [5] Administrative Law and Procedure ⇨651

15Ak651 Most Cited Cases

## [5] Administrative Law and Procedure ⇨704

15Ak704 Most Cited Cases

Under statute providing that a complainant or a person against whom a complaint is filed or other person aggrieved by an order of an agency, may obtain judicial review of the order, agency decisions are presumed reviewable if they have requisite finality. AS 18.80.135(a).

## [6] Administrative Law and Procedure ⇨704

15Ak704 Most Cited Cases

Administrative agency's decision's reviewability does not turn on whether it is labeled an "order"; rather, determinative question in deciding whether decision is reviewable is whether it ended case at agency level and this constituted final agency action. AS 18.80.135(a), 4 AS 2.560(e).

## [7] Administrative Law and Procedure ⇨704

15Ak704 Most Cited Cases

Court question in determining when an agency action is final and reviewable is whether agency has completed its decisionmaking process, and whether result of that process is one that will directly affect the parties.

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**[8] Administrative Law and Procedure** ⇨704

15Ak704 Most Cited Cases

An agency determination need not be one which ends litigation on the merits and leaves nothing for court to do but execute the judgment in order to be ripe for judicial review.

**[9] Administrative Law and Procedure** ⇨704

15Ak704 Most Cited Cases

**[9] Civil Rights** ⇨1712

78k1712 Most Cited Cases

(Formerly 78k447)

A decision of Commission on Human Rights staff or executive director closing employment discrimination claimant's case was ripe for judicial review; the case-closing order was final action taken by the agency, and legislature intended to allow courts to determine whether an agency's withholding of action was unreasonable or unlawful. AS 18.80.135(a), 44.62.560(e).

**[10] Administrative Law and Procedure** ⇨701

15Ak701 Most Cited Cases

**[10] Civil Rights** ⇨1712

78k1712 Most Cited Cases

(Formerly 78k447)

Fact that determination of Commission on Human Rights that an employment discrimination case was not supported by substantial evidence was an exercise of prosecutorial discretion did not render agency's determination unreviewable; if Commission wanted its staff to have discretionary prosecutorial authority, it had to be obtained from the legislature, not the judiciary, and opportunity for judicial review was necessary because federal Equal Employment Opportunity Commission (EEOC) might, and in some circumstances had to, accord substantial weight to findings by state authorities, and the anti-discrimination statutory scheme was a mandate to seek out and eradicate discrimination in employment and did not simply create a complaint-taking agency. Civil Rights Act of 1964, § 706(a), as amended, 42 U.S.C.A. § 2000e-5(b).

**[11] Civil Rights** ⇨1710

78k1710 Most Cited Cases

(Formerly 78k445)

Employee claiming discrimination must introduce evidence raising an inference of employer's discriminatory intent, and once employee has established this prima facie case of disparate treatment, burden rests with employer to articulate a legitimate, nondiscriminatory reason, supported by evidence, for the treatment.

**[12] Civil Rights** ⇨1744

78k1744 Most Cited Cases

(Formerly 78k453)

If employer establishes a legitimate reason for its actions, burden shifts back to employee claiming discrimination to persuade court that discriminatory reasons more likely motivated the employer, and employee usually satisfies this burden by showing that employer's explanation is pretextual.

**[13] Administrative Law and Procedure** ⇨470

15Ak470 Most Cited Cases

**[13] Civil Rights** ⇨1709

78k1709 Most Cited Cases

(Formerly 78k442.1)

**[13] Civil Rights** ⇨1711

78k1711 Most Cited Cases

(Formerly 78k446)

It was an error of law for staff or executive director of Commission on Human Rights to resolve at investigative stage legitimacy of employer's nondiscriminatory reasons for its alleged discriminatory action and employee's success in rebutting those reasons; by offering objective evidence of facts which established a prima facie case of discrimination and which raised a genuine dispute about employer's explanation of its decisions, employee established substantial evidence of discrimination sufficient to warrant a hearing. AS 18.80.110, 18.80.120.

**[14] Administrative Law and Procedure** ⇨470

15Ak470 Most Cited Cases

**[14] Civil Rights** ⇨1711

78k1711 Most Cited Cases

(Formerly 78k446)

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Burden required to compel a hearing for the Commission on Human Rights on an employment discrimination complaint is less than burden required to prevail on the merits at hearing's conclusion. AS 18.80.110, 18.80.120.

[15] **Administrative Law and Procedure** ⇨796  
15Ak796 Most Cited Cases

[15] **Civil Rights** ⇨1712  
78k1712 Most Cited Cases  
(Formerly 78k447)

Commission on Human Rights' failure to conduct a hearing mandated by statute in employment discrimination case once employee established a prima facie case of discrimination included a question of law to which the Supreme Court applied independent judgment. AS 18.80.110, 18.80.120.

\*1366 Marie Sansone, David M. Weingartner, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Petitioner.

Randall G. Simpson, Jermain, Dunnagan & Owens, P.C., Anchorage, for Respondent Andrea Meyer.

Mark Ertischek, Anchorage, for Respondent Alaska State Commission for Human Rights.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

**\*1367 OPINION**

EASTAUGH, Justice.

**I INTRODUCTION**

Andrea Meyer filed a discrimination complaint with the Alaska State Commission for Human Rights (Commission) against her employer, the Alaska Department of Fish and Game (ADF & G). We hold that the Commission's order closing Andrea Meyer's case is judicially reviewable. We further hold that Meyer's claim of discrimination is supported by substantial evidence.

**II. FACTS AND PROCEEDINGS**

Andrea Meyer began working for ADF & G in 1977 as a seasonal field researcher for the Russian River Sockeye Salmon Fishery. Her job title was Fisheries Biologist I (FBI). Meyer had substantial previous experience as a biologist as well as a B.A. in biology. During her employment with ADF & G, Meyer's primary duty was the creel census. She also computed fisheries data, operated the weir at Lower Russian Lake, assisted in the production of area surveys, conducted salmon spawning escapement counts, enforced Fish and Game regulations, and conducted group tours in which she explained the fishery and the wildlife of the area.

In March 1987 Meyer filed a discrimination complaint against ADF & G with the Alaska State Commission for Human Rights. [FN1] The complaint alleged four specific instances which caused Meyer to believe her employer had discriminated against her on the basis of gender and also asserted that no women employed in the Sport Fish Division for Region II held the position of Fish Biologist II (FBII) or higher.

FN1. AS 18.80.100 authorizes any person aggrieved by discriminatory conduct prohibited by statute to file a complaint with the Commission.

Under AS 18.80.110 the executive director or a member of the Commission's staff shall informally investigate the matters set out in a file complaint, promptly and impartially. If the investigator determines that the allegations are supported by substantial evidence, the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion. If these informal efforts are unsuccessful, the executive director is required to hold a hearing before the Commission. AS 18.80.120.

In March 1989 the Commission's executive director issued a closing order, finding that Meyer's allegations were not supported by substantial evidence and dismissing the case. Meyer requested reconsideration of the closing order. The

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Commission's chairperson, Katie Hurley, ordered the case reopened for further investigation because she believed that the investigation was insufficient to conclude that ADF & G had provided legitimate nondiscriminatory reasons for denying Meyer employment extensions or job assignments. In March 1991, after further investigation and review by the Commission staff, the executive director again closed the file on Meyer's complaint, summarizing the additional investigation as follows:

[T]he additional investigation conducted by Commission staff determined that respondent's defense to complainant's prima facie case is legitimate and nondiscriminatory and that complainant has failed to rebut respondent's legitimate nondiscriminatory reason. Therefore, I find that complainant's allegations are not supported by substantial evidence.

Meyer again asked for reconsideration; Commissioner Esther A. Wunnicke denied her request in an order which contained an entry which read as follows:

A person dissatisfied with a Commission Order dismissing the complaint may obtain judicial review by Superior Court in accordance with AS 44.62.560-44.62.570. An aggrieved person must file an appeal with the Superior Court within 30 days of the issuance of the Order of the Commission.

Meyer appealed the closing order to superior court. ADF & G argued that judicial review of a case-closing order is not available and that even if available, the Commission did not abuse its discretion by finding that Meyer's complaint was not supported by substantial evidence. The superior court determined that such orders are appealable to the superior court and that the Commission abused its discretion in ruling that Meyer did not produce substantial evidence of "pretext/discrimination." It consequently reversed the Commission's decision and remanded "for \*1368 further proceedings under AS 18.80.110 and, if appropriate, 18.80.120." We granted ADF & G's petition for review under Alaska Rule of Appellate Procedure 402. [FN2]

FN2. Although the Alaska State Human Rights Commission is listed as a

co-respondent with Andrea Meyer, the Commission was granted permission to submit a brief in support of ADF & G's position. Meyer was permitted to submit a reply to the Commission's brief.

### III. DISCUSSION

The Alaska Civil Rights Act permits a person aggrieved by discriminatory conduct to file a complaint with the Alaska State Commission for Human Rights. AS 18.80.100. The executive director or a staff member must then informally investigate the complaint to determine whether the allegations of the complaint are supported by substantial evidence. AS 18.80.110. If the investigator determines that the allegations are supported by substantial evidence, "the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion." *Id.* By implication, if the investigator determines that the allegations of the complaint are not supported by substantial evidence, the complaint is dismissed. If the investigator determines that substantial evidence does exist and informal efforts to eliminate the discrimination do not succeed, a hearing before the Commission is required. AS 18.80.120. At the conclusion of the hearing, the Commission is required to enter an order. AS 18.80.130. The order is reviewable in court in accordance with Alaska's Administrative Procedure Act. AS 18.80.135(a). [FN3]

FN3. The following are the relevant sections of the Civil Rights Act.

#### Sec. 18.80.100. Complaint.

A person who is aggrieved by any discriminatory conduct prohibited by this chapter may sign and file with the commission a written, verified complaint stating the name and address of the person alleged to have engaged in discriminatory conduct, and the particulars of the discrimination. The executive director may file a complaint in like manner when an alleged discrimination comes to the attention of the director.

#### Sec. 18.80.110. Investigation and

conciliation. The executive director or a member of the commission's staff designated by the executive director shall informally investigate the matters set out in a filed complaint, promptly and impartially. If the investigator determines that the allegations are supported by substantial evidence, the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion.

**Sec. 18.80.120. Hearing.**

If the informal efforts to eliminate the alleged discrimination are unsuccessful, the executive director shall inform the commission of the failure, and the commission shall provide the respondent and the complainant with notice of the failure and shall serve written notice together with a copy of the complaint, requiring the person, employer, labor organization, or employment agency charged in the complaint to answer the allegations of the complaint at a hearing before the commission. The hearing shall be held by the commission at the place where the unlawful conduct is alleged to have occurred unless the person, employer, labor organization, or employment agency requests a change of venue for good cause shown. The case in support of the complaint shall be presented before the commission by the executive director or a designee who shall be a bona fide resident of the state. The person charged in the complaint may file a written answer to the complaint and may appear at the hearing in person or otherwise, with or without counsel, and submit testimony. The executive director has the power reasonably and fairly to amend the complaint, and the person charged has the power reasonably and fairly to amend the answer. The commission is not bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and shall be transcribed at the request of

any party to the hearing.

**Sec. 18.80.130. Order.**

(a) At the completion of the hearing, if the commission finds that a person against whom a complaint was filed has engaged in the discriminatory conduct alleged in the complaint, it shall order the person to refrain from engaging in the discriminatory conduct. The order must include findings of fact, and may prescribe conditions on the accused's future conduct relevant to the type of discrimination. In a case involving discrimination in

(1) employment, the commission may order any appropriate relief, including but not limited to, the hiring, reinstatement or upgrading of an employee with or without back pay, restoration to membership in a labor organization, or admission to or participation in an apprenticeship training program, on-the-job training program, or other retraining program;

(2) housing, the commission may order the sale, lease, or rental of the housing accommodation to the aggrieved person if it is still available, or the sale, lease, or rental of a like accommodation owned by the person against whom the complaint was filed if one is still available, or the sale, lease, or rental of the next vacancy in a like accommodation, owned by the person against whom the complaint was filed; the commission may award actual damages which shall include, but not be limited to, the expenses incurred by the complainant for obtaining alternative housing or space; for storage of goods and effects; for moving and for other costs actually incurred as a result of the unlawful practice or violation.

(b) The order may require a report on the manner of compliance.

(c) If the commission finds that a person against whom a complaint was filed has not engaged in the discriminatory conduct alleged in the complaint, it shall issue and cause to be served on the complainant an order dismissing the complaint.

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(d) A copy of the order shall be filed in all cases with the attorney general of this state.

(e) The commission may order payment of reasonable expenses, including reasonable attorney fees to any private party before the commission when the commission, in its discretion, determines the allowance is appropriate.

Sec. 18.80.135. Judicial review and enforcement.

(a) A complainant, or person against whom a complaint is filed or other person aggrieved by an order of the commission, may obtain judicial review of the order in accordance with AS 44.62.560-44.62.570.

\*1369 [1][2][3] ADF & G and the Commission argue that the superior court's decision should be reversed because (1) the decision to close Meyer's case for lack of substantial evidence is not reviewable, and (2) if the decision is reviewable, it should be reviewed under the abuse of discretion standard and should be affirmed because there was no abuse of discretion. Meyer argues that the superior court's opinion should be affirmed in all respects. [FN4]

FN4. We review issues of law *de novo*. *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979). Thus, in deciding whether judicial review is available and which standard of review to apply, we will adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Id.* We review questions of law where no agency expertise is involved under the substitution of judgment test. *Fandley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992). If the agency has not proceeded in the manner required by law, the agency has abused its discretion. AS 44.62.570(b)(3). No deference is given to the superior court's decision because that court was acting as an intermediate court of appeal. See *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

A. *Reviewability of Case-Closing Decisions by Commission Staff or Executive Director*

ADF & G and the Commission argue that decision of the Commission staff or executive director is not reviewable because the decision (1) is not an "order" under AS 18.80.135, (2) does not constitute final agency action, and (3) is an enforcement decision committed to the Commission's discretion and thus presumptively unreviewable. Each of these arguments fails.

1. *The decision as an "order" under AS 18.80.135*

The State and Commission first argue that a decision issued before a public hearing is not an "order" under AS 18.80.135 [FN5] and is thus not subject to judicial review. The State and Commission cite *Hotel & Restaurant Union Local 878 v. Alaska State Comm'n for Human Rights*, 595 P.2d 653 (Alaska 1979), in support.

FN5. We have interpreted the first sentence of AS 44.62.560(e) as allowing a superior court to assert jurisdiction and grant preliminary injunctive relief in cases in which an agency has taken an action which directly and immediately affects the complainant. See *Alaska Pub. Util. Co. v. Greater Anchorage Area Borough* 534 P.2d 549, 556-58 (Alaska 1975); *A.J. Industries v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 539 (Alaska 1970). Although we have never interpreted the second sentence of AS 44.62.560(e), in *Schnabel v. State*, 663 P.2d 960 (Alaska App.1983), the Alaska Court of Appeals stated that the remedy provided by this sentence "is independent of and in addition to Schnabel's right to judicial review of an adverse administrative adjudication." *Id.* at 966 (dictum) (citing *United States v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 508 (Alaska 1978)).

Alaska Statute 18.80.135(a) expressly permits judicial review of "an order of the commission...." Given the structure of the chapter, and the sequence

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apparently contemplated by AS 18.80.120, .130, and .135, it seems likely that § 135 deals only with review of orders issued by the Commission itself at the conclusion of hearings conducted by the Commission pursuant to § 130. Accordingly, § 135 is not concerned with review of some action by the executive director which is not an "order" as that term is used in Chapter 80. In \*1370Hotel and Restaurant Union Local 878, 595 P.2d at 654-55, we discussed the sequence of events contemplated by §§ 120 and 130. That discussion supports a conclusion that § 135 does not authorize review of a decision of the sort that closed Meyer's case.

[4][5] Assuming § 135 deals only with review of post-hearing Commission orders, it does not follow that § 135 affirmatively bars judicial review of the order closing Meyer's case. Moreover, all final administrative actions are presumed to be reviewable. This presumption controls unless it is rebutted by an affirmative indication of legislative intent that there be no reviewability. *Johns v. CFEC*, 699 P.2d 334, 339 (Alaska 1985); *Sisters of Providence v. Department of Health & Soc. Servs.*, 648 P.2d 970, 976 (Alaska 1982); *Alyeska Ski Corp. v. Holdsworth*, 426 P.2d 1006, 1011 n. 16 (Alaska 1967). Section 135(a) does not express an affirmative legislative intention that file-closing decisions of the executive director or her staff be judicially unreviewable. We consequently apply the presumption of reviewability, and hold that such decisions are reviewable if they have the requisite finality.

[6] We also reject any suggestion that a decision's reviewability turns on whether it is labeled an "order." As AS 44.62.560(e) confirms, the legislature imposed no such prerequisite for judicial review if agency action is "unlawfully withheld or unreasonably withheld." [FN6] Rather, as discussed *infra*, the determinative question in deciding whether the decision is reviewable is whether it ended the case at the agency level and thus constituted final agency action.

FN6. AS 44.62.560(e) provides:

The superior court may enjoin agency action in excess of constitutional or

statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action.

We also note that when Meyer last sought reconsideration of the executive director's file-closing order, the order of the Commissioner denying reconsideration informed Meyer that "[a] person dissatisfied with a Commission Order dismissing the complaint may obtain judicial review by Superior Court in accordance with AS 44.62.560-44.62.570." It appears the Commissioner then considered that Meyer's order would be judicially reviewable.

## 2. The case-closing order as final agency action

[7] In deciding whether a superior court order possessed the finality essential for appellate review, this court observed that, "[t]he term finality is subject to several definitions." *Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408, 411 (Alaska 1973). [FN7] The test in Alaska for determining whether a judgment is final is "essentially a practical one." *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 184 (Alaska 1980). As the United States Supreme Court recently noted, "[t]he core question [in determining when an agency action is final] is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S.Ct. 2767, 2773, 120 L.Ed.2d 636 (1992).

FN7. We noted in *Mukluk* that the United States Supreme Court had stated that, "'final' in the context of appealability [is] an 'abstruse and infinitely uncertain term.'" *Mukluk*, 516 P.2d at 411, n. 11 (quoting *Will v. United States*, 389 U.S. 90, 108, 88 S.Ct. 269, 280, 19 L.Ed.2d 305 (1967) (Black, J., concurring)).

[8] Contrary to ADF & G's assertions *Ostman v. State Commercial Fisheries Entry Comm'n*, 678

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P.2d 1323 (Alaska 1984), does not stand for the proposition that Meyer's ability to file a separate superior court discrimination claim renders the case-closing decision unreviewable. [FN8] ADF & G notes that we stated in *Ostman* that a final agency determination "must be one which disposes of the entire case ... [or] one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." 678 P.2d at 1327 (quoting \*1371 *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1030-31 (Alaska 1972)). However, our quoted statement discusses the finality of a trial court decision. 504 P.2d at 1030-31. See also *Mukluk Freight Lines*, 516 P.2d at 411. An agency determination need not be "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" in order to be ripe for judicial review. Thus, we held in *Ostman* that agency rejection of a fishing permit application constitutes a final order which is reviewable in superior court where there is no more time to submit evidence or alter the decision through administrative means. 678 P.2d at 1326-28. Our holding in *Ostman* is contrary to ADF & G's argument.

FN8. AS 22.10.020(i) authorizes individuals to bring civil rights actions against the State in superior court. See *Johnson v. Alaska Dept. of Fish and Game*, 836 P.2d 896, 905 (Alaska 1991).

Case law from other jurisdictions is conflicting. New York, New Jersey and Iowa have held that Human/Civil Rights Commission dismissals based on no probable cause are judicially reviewable. See *State Div. of Human Rights v. Blanchette*, 73 A.D.2d 820, 423 N.Y.S.2d 745 (1979) (reviewing a Division finding of no probable cause under substantial evidence test); *Sprague v. Glassboro State College*, 161 N.J.Super. 218, 391 A.2d 558, 561 (App.Div.1978) (holding that the Division on Civil Rights did not abuse its discretion in finding no probable cause of discrimination and that the Fourteenth Amendment does not require a hearing before finding "no probable cause"); *Oliver v. Teleprompter Corporation*, 299 N.W.2d 683, 686-87 (Iowa 1980) (holding that a finding of no

probable cause is a "final decision" and that the complainant was not limited to a thirty-day period in which to file a petition for judicial review of no probable cause finding). [FN9]

FN9. The Commission argues that *Sprague* and a previous Iowa case, *Estabrook v. Iowa Civil Rights Comm'n*, 283 N.W.2d 306 (Iowa 1979), support its assertion that there is no judicial review of no probable cause determinations in these jurisdictions.

However, these cases held only that an administrative complainant is not constitutionally entitled to an evidentiary hearing before a human rights commission makes a determination of no probable cause. See *Sprague*, 391 A.2d at 561-62; *Estabrook*, 283 N.W.2d at 309-10. As noted above, *Sprague* itself held that a determination of no probable cause is judicially reviewable. 391 A.2d at 561. The court in *Estabrook* noted that the complainant had only challenged the merits of the commission's finding as not supported by substantial evidence, a standard reserved for "contested cases" (post-hearing cases) under Iowa law. 283 N.W.2d at 311. As *Oliver* indicates, probable cause determinations are judicially reviewable under Iowa law. 299 N.W.2d at 686. Furthermore, Iowa statutory law currently allows explicitly for judicial review of "no-probable-cause decisions and other final agency actions." Iowa Code Ann. § 216.17(1) (West 1994).

In *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392 (D.C.1991), the court held that a determination by the Office of Human Rights that there was no probable cause to believe that the Human Rights Act had been violated was a final agency action subject to judicial review. *Id.* at 397-99. As ADF & G points out, the District of Columbia court appeared to base its decision in part on the fact that the applicable statute did not authorize a human rights complainant to bring suit on her own behalf if the agency declines or fails to do so for lack of probable cause. 597 A.2d at 398.

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However, the District of Columbia has since indicated that this distinction is not pertinent. In *Timus v. District of Columbia Dep't of Human Rights*, 633 A.2d 751 (D.C.1993), the court held that an administrative convenience dismissal (which occurs under District of Columbia law after a finding of probable cause but before a hearing) was subject to judicial review even though the complainant had the right to a trial *de novo* in superior court. *Id.* at 761. Thus, although the court in *Simpson* had indicated that reviewability of an administrative convenience dismissal might depend on whether the complainant had the right to a *de novo* trial, 597 A.2d at 398, *Timus* indicates that judicial review is available in both instances. 633 A.2d at 769 (Ferren, J., concurring).

In *Demetry v. Colorado Civil Rights Comm'n*, 752 P.2d 1070 (Colo.App.1988), the court held that a decision of the Colorado Civil Rights Commission upholding the dismissal of a claim, based on a finding that no probable cause existed to sustain a claim of discrimination on basis of handicap, did not constitute final agency action and was therefore not subject to judicial review. *Id.* at 1072. The court cited federal cases involving claims brought before the Equal Employment Opportunity Commission (EEOC). *Id.* at 1071. The court found the reasoning of \*1372 those cases--that an EEOC investigation is merely preparatory to further proceedings--persuasive because the complainant can bring a private cause of action in federal court if the EEOC finds no probable cause. *Id.* at 1072.

ADF & G also cites EEOC cases for the proposition that the proper response to an agency's determination of no probable cause at the agency level is filing a *de novo* claim in district court rather than seeking review of the agency's adverse determination. The EEOC cases note that Title VII provides no express or implied cause of action against the EEOC to challenge its investigation and processing of a charge, *McCottrill v. EEOC*, 726 F.2d 350, 351 (7th Cir.1984), and that the federal Administrative Procedure Act (APA) provides no right to judicial review of an adverse EEOC determination, *Stewart v. EEOC*, 611 F.2d 679, 683-84 (7th Cir.1979).

Alaska law is similar to federal law in giving the complainant the right to file an original action in superior court. See *supra*, note 4. However, Alaska's statutory anti-discrimination scheme materially differs from the federal scheme. First, Alaska's anti-discrimination statute gives the Commission a more aggressive mandate than that held by the EEOC. "Clearly the legislature intended the Commission to be more than a simple complaint-taking bureau; the statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in employment...." *Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976). Therefore, the limited role of the federal EEOC is of dubious assistance in ascertaining the scope of powers conferred by the Alaska legislature on the Alaska Commission for Human Rights:

A cursory comparison reveals that the anti-discrimination legislation enacted in Alaska is not substantially similar to comparable federal laws.... Congress limited the adjudicatory and coercive enforcement of the EEOC powers in favor of reliance on private citizen action....

*Id.* at 945.

Second, under Alaska law a hearing is mandatory when the Commission's executive director or designated investigator determines that substantial evidence supports a complainant's allegations and informal efforts to eliminate discrimination fail. AS 18.80.120. In comparison, under federal law the EEOC is only required to use informal methods such as private conference, conciliation and persuasion, and "may" bring a civil action if these efforts fail. 42 U.S.C. § 2000e-5(b), (f).

[9] Finally, Alaska's APA potentially provides for more expansive judicial review than the federal APA. AS 44.62.560(e). See note 5, *supra*. Because the case-closing order was the final action taken by the agency and because the Alaska legislature intended to allow the courts to determine whether an agency's withholding of action is unreasonable or unlawful, the decision of the Commission staff or executive director in this case is ripe for judicial review. AS 44.62.560(e).

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3. *The determination as an enforcement decision committed to agency discretion*

[10] Citing *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), and *Vick v. Board of Electrical Examiners*, 626 P.2d 90 (Alaska 1981), ADF & G and the Commission argue that the agency's determination that Meyer's case is not supported by substantial evidence is presumptively unreviewable because that determination is an exercise of prosecutorial discretion. This presumption was first articulated by the Supreme Court in *Heckler*, where the Court reasoned that even where the legislature has expressed no intent to preclude review, review is not available under the federal APA if the statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 831, 105 S.Ct. at 1655. According to the Court, this presumption helps avoid the problem of how to apply an "abuse of discretion" standard when there are "no judicially manageable standards available for judging how and when an agency should exercise its discretion." *Id.* We reject the argument of ADF & G and the Commission \*1373 that the presumption of unreviewability applies here.

In *Vick* the question was whether a board decision not to process an accusation against a licensee was subject to judicial review. We stated concerning this issue: "Questions of law and fact, of policy, of practicality, and of the allocation of an agency's resources all come into play in making such a decision. The weighing of these elements is the very essence of what is meant when one speaks of an agency exercising its discretion." 626 P.2d at 93. We further stated that "[w]hen a matter falls within an area traditionally recognized as within an agency's discretionary power, courts are less inclined to intrude than when the agency has acted in a novel or questionable fashion." *Id.* Unlike *Vick* or *Heckler*, Meyer's case does not involve the exercise of prosecutorial discretion at all. The statute here provides that if the executive director or designated staff member conducting the investigation finds substantial evidence of discrimination, the investigator "shall ... try to

eliminate the discrimination complained of by conference, conciliation, and persuasion." AS 18.80.110. If the problem is not eliminated informally, the Commission "shall" conduct a hearing and issue an order at the completion of the hearing. AS 18.80.120, .130(a). Thus, the statute grants no discretion to discontinue the process once the investigator finds substantial evidence of discrimination, unlike the statutes at issue in *Vick* and *Heckler*. [FN10]

FN10. In *Vick*, the complainant conceded that the Board had discretion whether to revoke a license even after it found a regulatory violation. 626 P.2d at 92. Likewise, in *Heckler*, the statute did not require the Food and Drug Administration (FDA) to investigate the unapproved use of an approved drug even when that use became widespread or endangered public health. 470 U.S. at 835-36, 105 S.Ct. at 1657-58 (holding statute granted FDA unreviewable discretion to refrain from enforcement despite policy statement stating FDA was obligated to investigate such uses which were widespread or endangered public health).

This case is instead closely akin to *Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975), which the Supreme Court reaffirmed in *Heckler*. The statute at issue in *Dunlop* provided:

The Secretary [of Labor] shall investigate such complaint [by a union member] and, if he finds probable cause to believe that a violation ... has occurred, ... he shall ... bring a civil action.... 421 U.S. at 563 n. 2, 95 S.Ct. at 1855 n. 2. After investigating the complainant's claims, the Secretary of Labor declined to file suit and the complainant sought judicial review under the APA. The Supreme Court held that review was available and that the Secretary's decision not to file suit was *not* "an unreviewable exercise of prosecutorial discretion." *Id.* at 567 n. 7, 95 S.Ct. at 1858 n. 7. The *Heckler* Court stated that in *Dunlop*, "[t]he statute being administered quite clearly withdrew discretion from the agency and provided guidelines

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for exercise of its enforcement power." 470 U.S. at 834, 105 S.Ct. at 1657. The *Heckler* Court thus found *Dunlop* "consistent with a general presumption of unreviewability of decisions not to enforce." *Id.*

In *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392 (D.C.1991), the court held that prosecutorial discretion was not an obstacle to review:

In the present case, however, OHR was not purporting to exercise "prosecutorial discretion," nor did it reject Ms. Simpson's complaint on the ground that it lacked resources for enforcement. Rather, OHR found that there was no probable cause to believe that the Human Rights Act had been violated. Whether right or wrong, that determination was not one of the kind to which the doctrine embraced by the District can reasonably be applied. We conclude the OHR's determination is subject to judicial review.

*Id.* at 398-99. As Meyer correctly argues, the statute now before us provides no reason to dismiss a case other than a lack of substantial evidence.

ADF & G and the Commission argue that the Commission staff and executive director have wide discretion to determine whether an allegation of discrimination is supported by substantial evidence. ADF & G makes the following argument:

\*1374 Whether a violation has occurred, whether the Commission's resources are best spent on one violation or another, whether the Commission is likely to succeed if it acts, whether the particular enforcement action requested best fits the Commission's overall policies, and whether the Commission has enough resources to undertake the action at all are issues that the Commission, and not the courts, should decide.

The Commission also argues that these "discretionary issues" are "policy reasons" why this court should find the decision of the Commission staff or executive director to be unreviewable:

The Commission must have discretion to decide whether to prosecute. The Commission has an important policy interest in the results of each of its investigations because of its role in developing the body of civil rights law in Alaska and because

of its statutory obligation to enforce Alaska's civil rights laws. The Commission must employ its limited resources in the most effective manner possible in order to meet these obligations.

The Commission further argues that it will become nothing more than a "complaint taking agency" if it cannot exercise prosecutorial discretion in deciding whether a claim is supported by substantial evidence.

These arguments strongly support judicial review of staff or executive director determinations that there is no substantial evidence. These passages indicate, as the Commission confirmed during oral argument, that the staff or executive director, contrary to statutory mandate, is closing cases not for lack of evidence of discrimination but to control budget and docket. We are sympathetic to the Commission's claim of lack of resources. We recognize that it might be highly desirable for the Commission staff to have the power to administratively dismiss cases which have individual merit but no widespread impact. However, if the Commission wants its staff to have this discretionary authority, it must be obtained from the legislature, not the judiciary. We cannot import these social, political, and economic concerns into the clear scheme of the existing statute.

An opportunity for judicial review is also necessary because the federal EEOC may, and in some circumstances must, accord substantial weight to findings made by state authorities. 42 U.S.C. § 2000e-5(b); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 470 n. 8, 474-75, 102 S.Ct. 1883, 1892 n. 8, 1893-94, 72 L.Ed.2d 262 (1982); *Cottrell v. Newspaper Agency Corp.* 590 F.2d 836, 838 (10th Cir.1979). [FN1!] Furthermore, such findings may affect workers' perceptions of potential employers and vice versa. [FN12] Finally, as noted above, Alaska's anti-discrimination statutory scheme is a mandate to seek out and eradicate discrimination in employment, and did not simply create a complaint-taking agency. *Hotel, Motel, Restaurant, Constr. Camp Employees & Bartenders Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976). A human rights

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complainant in Alaska has the statutory right to expect that his or her claim will be decided on the merits, not pre-determined by budgetary constraints.

FN11. The EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination has been given at least sixty days to resolve the matter. 42 U.S.C. § 2000e-5(c).

FN12. Thus, if the complaint was valid, a finding of no substantial evidence may give a "false negative" signal to persons seeking positions with that employer. It may also place the unsuccessful complainant in a bad light when he or she seeks employment elsewhere.

#### B. The Finding of No Substantial Evidence

[11][12] Under Alaska and federal law, a court generally applies a three-part test in determining whether discriminatory treatment has occurred. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981); *Thomas v. Anchorage Telephone Utility*, 741 P.2d 618, 622 (Alaska 1987). In the first stage, the employee claiming discrimination must introduce evidence raising an inference of employer discriminatory intent. [FN13] Once the employee has established a prima facie case of disparate treatment, the burden rests with the employer to articulate a legitimate, non-discriminatory reason, supported by evidence, for the treatment. *Burdine*, 450 U.S. at 254-55, 101 S.Ct. at 1094; *Thomas*, 741 P.2d at 623-24. If the employer establishes a legitimate reason for its actions, the burden shifts back to the employee to persuade the court that discriminatory reasons more likely motivated the employer. Usually the employee satisfies this burden by showing that the employer's explanation is pretextual. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095; *Thomas*, 741 P.2d at 622.

FN13. This inference is usually accomplished by establishing a prima facie case using the four-part test articulated in

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (prima facie case established by showing: (1) complainant belongs to a racial minority; (2) complainant applied for and was qualified for a job for which employer was seeking applicants; (3) despite qualifications, complainant was rejected; and (4) after rejection, the position remained open and employer continued to seek applications from similarly qualified persons). However, the *McDonnell Douglas* test is not the only means by which a claimant may raise an inference of discrimination. *Haroldson v. Omni Enterprises, Inc.*, 901 P.2d 426 (Alaska 1995). *Strand v. Petersburg Pub. Schools*, 659 P.2d 1218, 1222 n. 7 (Alaska 1983) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13).

In determining that there was no substantial evidence at the investigative stage, the Commission staff and executive director applied the three-part *Burdine/Thomas* test, concluding that ADF & G had rebutted Meyer's prima facie case of discrimination and that Meyer had failed to show that ADF & G's proffered reasons were pretextual. In the first case-closing decision, the Commission's investigator stated:

According to the principles of discrimination law, complainant must first establish a *prima facie* case, that is, a set of facts which raises an inference of sex discrimination, before respondent can be required to justify its actions....

Evidence showed that complainant has established a *prima facie* case.... Once complainant has established a prima facie case, the burden shifts to respondent to provide a legitimate non-discriminatory reason for denying complainant the employment extensions.

The investigator concluded:

I therefore determine that ... respondent's defenses to complainant's *prima facie* case are legitimate and nondiscriminatory and that complainant has failed to rebut respondent's legitimate nondiscriminatory reasons.

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The decision upon reconsideration affirmed this determination.

[13] It was an error of law for the staff or executive director to resolve at the investigative stage the legitimacy of ADF & G's non-discriminatory reasons and Meyer's success in rebutting those reasons. By offering objective evidence of facts which established a prima facie case of discrimination and which raised a genuine dispute about ADF & G's explanation of its decisions, Meyer established substantial evidence of discrimination under AS 18.80.110 sufficient to warrant a hearing under AS 18.80.120. [FN14] Although \*1376 ADF & G asserted non-discriminatory reasons for offering job extensions and increased responsibility to male employees rather than Meyer, the ADF & G evidence discussed by the Commission staff was insufficient to demonstrate that Meyer's claims were completely lacking in merit, or that a fact finder would be compelled to find for ADF & G. [FN15] Consequently, the staff and executive director could not determine whether discrimination had occurred without resolving the factual disputes between the two parties. These disputes could not be resolved without a hearing.

FN14. The determination that Meyer established a prima facie case was clearly correct. As stated by the Commission's investigator:

Evidence showed that complainant is a member of a protected class; that respondent denied her extensions/job assignments in her employment as [FBI] on four separate occasions during 1985 and 1986; and that respondent awarded the extensions/assignments to male FBI's.... Investigation showed that complainant was qualified for these extended assignments.

Further, Meyer raised a genuine dispute regarding ADF & G's employment decisions. ADF & G argued that the male employees it chose for work extensions were the most qualified for the positions they were given. Meyer offered evidence

that at least some of the male employees chosen were not more qualified, that her writing skills were superior to the male applicants chosen to complete written projects, and that if male fish biologists had greater job capabilities, it was a result of a supervisor's consistent efforts to enhance the qualifications of male biologists while making no corresponding effort to enhance the job skills of female biologists.

Meyer alleged that recipients of "unstructured positions" were always male and always more likely to be promoted or receive extensions. There was evidence that Supervisor Dave Nelson decided who assumed the duty of census creel clerk and who would be put in the "unstructured position." Shortly after the Commission closed Meyer's case the second time, a male FBI who had previously been in the unstructured position was promoted to FBII.

Nelson denied that there was a pattern of "grooming" male fish biologists for promotion.

FN15. Further, even without the benefit of discovery, Meyer offered evidence that could support findings that ADF & G's explanations were pretextual. For example, as of 1987, there were four women in the Division, all of whom were FBI's, and sixty-two males, holding positions of FBI through FBIV; in comparison, there had been a significantly higher percentage of women in the applicant pool of ADF & G registers for FBI and FBII positions than was reflected by the number of women holding those positions. This court has held that once a prima facie case of discrimination is established, statistical evidence of a discriminatory pattern "is to be viewed as evidence that the non-discriminatory justification given by the defendant is in fact a pretext." *Brown v. Wood*, 575 P.2d 760, 770 (Alaska 1978).

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Moreover, the skills which Nelson stated the male FBI's exhibit, such as using tools, were not listed in the job description for fish biologists. Rather, these skills were listed in the job description for fish technicians, a different and less advanced position.

[14] The burden required to compel a hearing is less than the burden required to prevail on the merits at the hearing's conclusion. This distinction is appropriate because of the structural differences between the unilateral investigation conducted by Commission investigators and formal adversarial proceedings before the full Commission. Unlike an adversarial proceeding in which a party has the opportunity to rebut the other's proffered evidence, an investigation by an administrative agency "represents a unilateral inquiry into the facts which are in the possession of the employee and the employer." 10 Marlin M. Volz et al., *West's Federal Practice Manual* § 15,919, at 488 (2d ed. 1970). Thus, at the investigative stage, neither party may conduct discovery. 6 Alaska Administrative Code 30.320(c) (1995). Without access to discovery, in many cases it would be difficult or impossible for a complainant to prove that an employer's proffered reasons are pretextual. Consequently, a staff or executive director finding of no substantial evidence cannot be based on the fact that a complainant "failed" to meet the three-part *Burdine/Thomas* test at the investigative stage. Nor should the staff or executive director attempt to determine at the investigative stage whether the non-discriminatory reasons proffered by the employer are legitimate. The Commission cannot adequately resolve factual disputes if the parties have not been given the opportunity to conduct discovery or cross-examine opposing witnesses.

Other courts have generally not examined what showing must be made to warrant a hearing under similar anti-discrimination statutory programs. However, another jurisdiction which has considered this issue has reached a similar conclusion. New Jersey has defined probable cause (the functional equivalent of "substantial evidence" as that phrase

is used in AS 18.60.110) as a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious [person] in the belief that the law is being violated." *Sprague v. Glassboro State College*, 161 N.J.Super. 218, 391 A.2d 558, 561 (1978) (quoting *People v. Marshall*, 13 N.Y.2d 28, 241 N.Y.S.2d 417, 420, 191 N.E.2d 798, 801 (1963)). In expounding on this definition, another court subsequently stated:

Much the same way as in the administration of criminal justice and probable cause for Fourth Amendment purposes, a proceeding to determine the existence of probable cause [in the discrimination context] is not an adjudication on the merits. Rather, it is an initial threshold procedure to determine whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits. The quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits... *When deciding probable cause, the Director was not permitted "to resolve disputed facts. The Director was not concerned with whether the information collected during the investigation was true or false-only whether it was reasonable to accept it as true and if so whether it justified consideration on the merits. A common sense, practical and nontechnical standard is required for the probable cause determination.*

*Frank v. Ivy Club*, 228 N.J.Super. 40, 548 A.2d 1142, 1150 (App.Div.1988) (citations omitted) (emphasis added), *rev'd on other grounds*, 120 N.J. 73, 576 A.2d 241 (1990), *cert denied*, 498 U.S. 1073, 111 S.Ct. 799, 112 L.Ed.2d 860 (1991). See also *New York State Div. for Youth v. State Human Rights Appeal Bd.*, 83 A.D.2d 972, 442 N.Y.S.2d 813, 814 (1981) (where there is no full investigation with opportunity for confrontation, the complaint must lack merit as a matter of law in order for division to dismiss complaint).

[15] As noted above, the Commission staff determined that Meyer established a prima facie case of discrimination. This determination was correct. ADF & G does not claim that it was error to determine that Meyer established a prima facie

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case of discrimination. Instead ADF & G argues that substantial evidence under AS 44.62.579 supported the decision to close Meyer's case and that the superior court erred in reweighing the evidence considered by the staff and director. The deferential standard of review on which ADF & G relies has no bearing in this case, because the staff and executive director incorrectly applied the *Burdine/Thomas* test at the investigative stage and the Commission never conducted the hearing mandated by statute. This error was one of law, to which we apply our independent judgment. See *supra*, note 3. [FN16]

FN16. The parties dispute the proper standard of review to be applied to a staff or executive director factual determination of no substantial evidence under AS 18.30.110. Because we hold the error was one of law, it is unnecessary to resolve this issue in this case.

#### IV. CONCLUSION

The decision to close Meyer's case is judicially reviewable. We AFFIRM the superior court's decision and REMAND to the superior court for the purpose of remanding this case to the Commission with directions to proceed with Meyer's complaint in accordance with AS 18.30.110-.120.

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END OF DOCUMENT

## ANALYSIS OF SB 132 (ASCHR BILL)

**Enhances effectiveness of the Alaska State Commission for Human Rights by allowing the commission to evaluate complaints of unlawful discrimination and to allocate its resources to prosecuting those complaints that will best serve the commission's goal of eliminating unlawful discrimination; improves commission procedures; enhances the fairness of commission proceedings; and clarifies the remedies that the commission may award in employment cases.**

- Authorizes executive director to choose the complaints of unlawful discrimination that merit pursuit, based on factors such as strength of evidence, severity of alleged violation, employer's history before the commission, or complaint's value in establishing precedent. (Sec. 4)
- Has the effect of reversing *Department of Fish and Game v. Meyer*, 906 P.2d 1365 (Alaska 1995), which required the director to take to hearing any complaint supported by substantial evidence of unlawful discrimination without regard to such factors as the weakness of the evidence, or the strength of an employer's affirmative defenses. (Sec. 4)
- Allows complainant to withdraw complaint before accusation is served, but preserves executive director's right to file complaint on her own. (Secs. 1, 2)
- Avoids conflicts between (1) staff's exercise of expanded discretion to compromise, dismiss, or pursue complaint and (2) victims' interests, by allowing complainant to opt out of commission procedures, and after withdrawal, to pursue claim independently of commission in another forum. (Sec. 1)

### **Improves commission procedures**

- Permits agreements during the prehearing (conciliation) phase to compromise damage claims. (Sec. 3)
- Requires that agreements be reduced to writing, and provides that agreements are enforceable as commission orders. (Sec. 3)

- Establishes procedure to be followed if a complaint is found after investigation to lack sufficient supporting evidence. (Sec. 4)
- Requires commission to follow procedures in Administrative Procedure Act, unless AS 18.80 provides different procedure. (Secs. 5, 12)
- Allows the commission to issue a summary decision, which is similar to a motion for summary judgment: if facts are not disputed, the commission can make a ruling without providing a full hearing. (Sec. 5)

#### **Enhances fairness of commission's procedures**

- Requires the charges in the accusation that the executive director issues after deciding to pursue a complaint to hearing to be based on the investigator's determination of substantial evidence. (Sec. 5)
- Requires that substantial evidence support any new charges of unlawful discrimination that are added when the accusation is amended. (Sec. 5)
- Requires that respondent have an opportunity to address all charges informally (even charges added by amendment) before being required to defend them in a formal hearing. (Sec. 5)

#### **Clarifies the remedies that the commission may award to remedy unlawful discrimination**

- Sets out examples of appropriate action to correct unlawful employment discrimination, including ordering the accommodation of a disability or changes to personnel records, while retaining the commission's general authority to order corrective action. (Sec. 6)
- Prohibits noneconomic or punitive damages. (Sec. 6)
- Defines "pay" (as used in the remedies of back pay and front pay) to include retirement, health, and other fringe benefits, in addition to wages, salary, and commissions. (Sec. 12)

- Limits remedies for employment discrimination (normally) to restoration of actual benefits lost – *i.e.*, for employers this would mean payment of back pay and hiring, promoting, or reinstating an employee to a position. (Sec. 6)
- But allows the award of front pay for a period of up to one year if a return to work is impossible because no vacancy exists, the employer's unlawful discrimination made the employee incapable of work, or the working environment deteriorated intolerably. (Sec. 6)
- Requires any order to pay wages (front pay or back pay) to be reduced by the amount the employee should be able to earn with a "reasonably diligent" effort. (Sec. 6)

#### **Makes housekeeping changes**

- Incorporates current regulation's (6 AAC 30.230) 180-day limitation period for filing complaint. (Sec. 2)
- Incorporates the rate of interest that the commission may award that is now set in regulation (6 AAC 30.480) and which is the statutory interest rate provided in AS 09.30.070. (Sec. 8)
- Adds a definition of "complainant." (Sec. 11)

Amendments  
~~consider in its discussion~~

1. "may, but is not required to,"  
p. 2 line  
28

Cruenberg

- passed 44 IN

2. p. 2 line 26 change word "shall"  
to "may" - withdrawn

ATTN: DON BULLOCK

PLEASE INCORPORATE THE FOLLOWING AMENDMENT TO SB 132 (efd fld):

Page 2, line 28

After "discretion, may"

Insert ", but is not required to"

This bill will be read across the floor today and sent to Judiciary as changed.

Thanks.

Louie Flora  
House State Affairs Committee Aide,  
Rep. Paul Seaton  
Room 102

# LEGAL SERVICES

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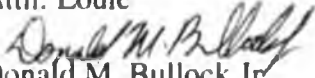
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Juneau, Alaska 99801-1182  
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## MEMORANDUM

May 5, 2005

**SUBJECT:** Statutory citation on page 2, line 4 of HCS SB 132(STA)

**TO:** Representative Paul Seaton  
Attn: Louie

**FROM:**   
Donald M. Bullock Jr.  
Legislative Counsel

Enclosed is HCS SB 132(STA). Please look at page 4, line 2 and the reference to AS 44.64.020. Should this reference actually be to AS 44.64.030(b) instead of AS 44.64.020? AS 44.64.030(b) reads as follows:

(b) An agency may request the office to conduct an administrative hearing or other proceeding of that agency or to conduct several administrative hearings or other proceedings under statutes not listed in (a) of this section. The office may provide the service after entering into a written agreement with the agency describing the services to be provided and providing for reimbursement by the agency to the office of the costs incurred by the office in providing the services.

If this citation should be changed, please advise the chair of the next committee of referral.

DMB:med  
05-350.med

Enclosure