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HB

385

Alaska State Legislature

Legislative Research Agency

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Phone: (907) 465-3991
Fax: (907) 463-3351

October 4, 1991

MEMORANDUM

TO: Representative Fran Ulmer

FROM: Linda J. Snow
Legislative Analyst

RE: **Repetitive Strain Injury Associated with Use of Video Display Terminals**
Research Request 92.043

You asked for information about adverse health effects associated with the use of video display terminals (VDTs). You specifically asked about the incidence and seriousness of repetitive strain injuries (RSI), and what Alaska state government positions are most at risk for this type of injury.

In this report, we present a summary of a recent report by the National Institute for Occupational Safety and Health (NIOSH), entitled *Occupational Health Aspects of Work with Video Display Terminals.*[1] Next we discuss the types of occupations that are most likely to be affected by RSI and other injuries associated with VDT usage.[2] We then identify which positions held by state employees are most at risk to develop the foregoing types of injuries.

SUMMARY OF RECENT NATIONAL INSTITUTE OF OCCUPATIONAL SAFETY AND HEALTH REPORT

Today, about half the jobs in the U.S. involve work with VDTs. Many studies have examined the possible health effects of VDT use. A recent unpublished report by the NIOSH (February 1991) entitled *Occupational Health Aspects of Work with Video Display Terminals* reviews and summarizes the existing reports on the subject. The report discusses four areas of health concern for VDT users. These areas are visual system dysfunction (eye strain), musculoskeletal disorders, stress and adverse pregnancy outcomes.

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[1]This study was completed by NIOSH in February 1991. It has not yet been published.

[2]Repetitive strain injury results from repeating the same motion over and over. It can lead to inflammation of joints and pain and numbness of extremities.

Eye Strain

Eye strain (including sore eyes, blurred vision and headaches) is the most common health complaint of VDT users. At least 50 percent of VDT users have reported occasional symptoms of eye strain, although eye strain is not unique to VDT work. There is little evidence of enduring functional problems resulting from VDT-related eyestrain. Recent studies suggest no link between the use of VDTs and increased risk of cataract development.

Some suggestions to lessen the adverse impact of VDT work on vision are: 1) to test and correct the vision of the affected workers; 2) to modify VDT display characteristics such as contrast, sharpness, type design, image stability and color to reduce discomfort; and 3) to provide adequate and appropriate workplace lighting.

Musculoskeletal Disorders

Early NIOSH studies have shown that 75 percent of VDT workers experience occasional back and neck discomfort on the job. More recent NIOSH studies show that 20 to 25 percent of VDT workers experience almost daily upper torso discomfort.

Musculoskeletal disorders include repetitive strain injuries (RSI). About 40 percent of 834 newspaper employees studied reported symptoms of cumulative trauma disorder during a one-year period. Neck and shoulder pain were prevalent complaints of the subjects. However, recent studies have shown that the hand and wrist are also susceptible to musculoskeletal disorders in VDT work. Although there is no conclusive evidence of RSI from use of VDTs, the World Health Organization stated in a recent report that injury from repeated stress is possible. Recent studies seem conclusive that chronic pain and disability are influenced by cultural, social and psychological forces. However, physical causes of chronic pain and disability cannot be ruled out.

Evidence exists that ergonomic changes in the work environment can reduce musculoskeletal discomfort associated with VDT use. It appears that the stationary and sedentary characteristics of VDT work are the primary risk factor. Tasks can be redesigned to allow for job rotation and more frequent rest breaks. Improved work station design may lessen musculoskeletal discomfort.

Stress

A third health effect examined in the NIOSH study is stress. In the U.S., increased VDT usage has caused a change in the content and organization of work tasks. Following is a list of factors that contribute to stress in VDT workers:

- increased work pressure;
- reduced autonomy;
- increased management control over the work process;
- concerns about computer breakdowns and delays;
- physical immobility;
- excessive repetition;
- reduced skill and experience levels;
- reduced task variety; and
- more uncertainty over job security and promotion opportunities.

Although stress is apparent in all VDT-related jobs, it is most pronounced in lower-level clerical jobs. Stress may result in mental disorders, cardiovascular diseases and psychological disorders. In California, 70 percent of workers compensation claims from stress came from white collar workers, and 40 percent came from the sales and clerical level. Stress can be relieved by making jobs challenging and varied; making sure that tasks have some kind of closure, or an end product; and by improving the social environment of the workplace.

Adverse Pregnancy Outcomes

It has long been claimed that VDT usage causes adverse pregnancy outcomes; however, no conclusive evidence of any relationship between VDT use and adverse pregnancy outcomes is available. A recent NIOSH report on the subject found no relationship between the two.

AT-RISK OCCUPATIONS

According to Betsy Jordon with the Bureau of Labor Statistics in Washington, D.C., disorders associated with repetitive motion (RSI) now make up 52 percent of reported job-related illnesses. Reports of carpal tunnel syndrome have increased more rapidly in recent years than reports of any other job-related illness.[3]

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[3]Carpal tunnel syndrome is the swelling of the tendons where they pass through the front of the wrist. The resulting pressure can cause pain, numbness and weakness of the hands.

Barbara Webster, with the Liberty Mutual Insurance Company, stated that 1.5 percent of that company's insurance claims, and 2.5 percent of their costs in 1990, were for RSI. The average award per case in 1990 was $6,168. Ms. Webster said that no one in the insurance industry keeps statistics on the occupations of those making claims for RSI, but managers in the insurance industry generally believe keyboard operators are one of the highest at-risk groups for that type of injury. The industries most affected by RSI are:

- meat and poultry cutting and packing industry;
- electronic manufacturing industry;
- telephone operators; and
- data entry/secretarial agencies.

The fourth category, secretarial and data processing agencies, file 1 percent of all workers' compensation claims in the U.S. A large number of claims for RSI are filed by reporters, automotive workers, and upholsterers.

In Alaska, 289 of 11,998 workers compensation claims made in 1990 were for inflammation of the joints. According to Jim Wilson, labor economist with the Alaska Department of Labor, this category of injury is caused almost exclusively by repetitive motion. Carpal tunnel syndrome is not included in the foregoing category of injury and is difficult to separate from its primary category of nervous system disorders.

STATE EMPLOYEES IN AT-RISK OCCUPATIONS

Table A (attached) presents a list of the most obvious job classes at risk to develop RSI and other VDT-associated health disorders in Alaska state government. It is difficult to tell what the exact duties of a particular position may entail, however, those listed in Table A are likely to require many hours of typing or data entry using VDTs. Just as some of these positions may not use VDTs for a significant portion of their duties, many other job classes not listed here (the state has over 1,300 job classes) may use VDTs for a major portion of their work day. The 2,056 positions represented by these job classes account for nearly 10 percent of the total positions in state government.[4]

I hope this information is helpful to you. If you have further questions, please feel free to call this office.

Attachment

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[4]The state FY 92 budget (after vetoes) funds 21,018 positions.

TABLE A

State of Alaska Positions at Risk for Repetitive Strain Injury (as of September 1991)

CLASS CODE	CLASS TITLE	NUMBER OF POSITIONS
1122	Clerk Typist II	93
1123	Clerk Typist III	786
1145	Legal Secretary I	99
1146	Legal Secretary II	30
1151	Secretary I	106
1152	Secretary II	24
1182	Correspondence Secretary I	4
1183	Correspondence Secretary II	4
1184	Correspondence Secretary III	12
1185	Administrative Support Technician I	3
1186	Administrative Support Technician II	0
1187	Administrative Support Technician III	9
1188	Administrative Support Technician IV	4
1191	Data Processing Clerk I	38
1192	Data Processing Clerk II	60
1193	Data Processing Clerk III	16
1201	Accounting Clerk I	4
1202	Accounting Clerk II	98
1203	Accounting Clerk III	144
1204	Accountant I	4
1205	Accountant II	26
1210	Accounting Technician I	100
1211	Accounting Technician II	66
1212	Accounting Technician III	32
1217	Permanent Fund Dividend Specialist I	11
1218	Permanent Fund Dividend Specialist II	2
1219	Permanent Fund Dividend Specialist III	2
1610	Data Processing Assistant	2
1611	Data Processing Technician I	14
1612	Data Processing Technician II	27
1613	Data Processing Technician III	12
1621	Analyst Programmer I	10
1622	Analyst Programmer II	26
1623	Analyst Programmer III	64
1624	Analyst Programmer IV	92
1625	Analyst Programmer V	32
	Total	2,056

Note: This table presents the number of existing state positions. These positions may or may not be filled at any given time.

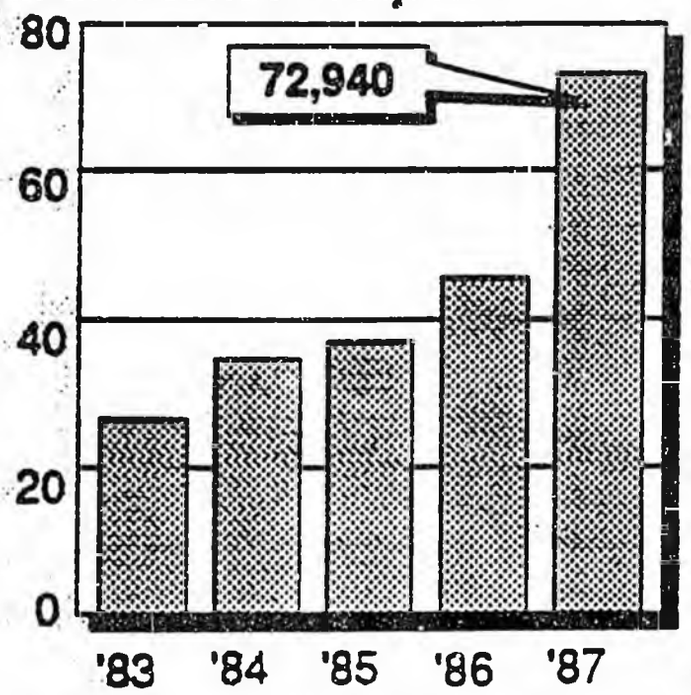
Source: Alaska Department of Administration, Division of Personnel.

Prepared by the Legislative Research Agency, October 1991 (92.043A).

Strain in the hand

The growth of personal computer use has coincided with an increase in repetitive strain hand injuries in the United States.

In thousands of injuries



SOURCE: Occupational Safety and Health Administration

Knight-Ridder Newspapers

The computer work station

What are the hazards and how can they be prevented?

Repetitive strain injuries may occur as a result of a combination of repetitive motions with fast forceful movements, awkward positions, lack of sufficient rest time over periods of weeks, months or years. They occur in many different work situations.

Hazards

Tenosynovitis: Pain in hands and arms caused by swelling of the tendon and the sheath that covers it.

White finger: Numbness, tingling, paleness and burning sensations caused by damaged blood vessels.

Cervical disk syndrome: Pain, numbness and muscular spasm caused by pinching of the cervical nerves by compressed discs.

Rotator cuff injury: Pain and limited motion in the shoulder caused when one or more of the four rotator cuff tendons is inflamed.

Carpal tunnel syndrome: Numbness, pain, tingling and aching sensations in the wrist caused by too much pressure on the median nerve of the wrist.

Epicondylitis *(tennis elbow)*: Pain, swelling and weakness in the elbow caused by inflammation of tendons.

Tendinitis Swelling, tenderness and weakness in the hand, elbow or shoulder due to inflammation of tendons.

Prevention

The ideal computer work area

1. Eyes should be from 18" to 28" from the screen.
2. Good lighting and one of several methods to reduce glare.
3. A video display terminal with an adjustable tilt from 0° to 20°.
4. An inclined footrest to relieve strain from legs and back.
5. A chair with an adjustable seat height and back rest. Elbows should not bend more than 90° to reach the keyboard.

Source: Krames Communications

AP/Wm. J. Castello

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB385

Offered: 2/21/92
Title: An Act relating to video display terminals
Sponsor: Reps Ulmer, B. Davis, Bruckman
Requestor:

Department Affected: UNIVERSITY OF ALASKA
BRU: ALL
Component: ALL
Component Serial No: ALL

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY93	FY94	FY95	FY96	FY97	FY98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE FD SOURCE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUNDS						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: -0-

ANALYSIS (Attach additional pages as necessary)
The responsibilities that would be imposed by this bill can be accommodated by the reallocation of existing Risk Management resources already dedicated to workplace safety training. It should also be noted that CSHB385's requirements could be incorporated within the workplace safety requirements proposed by CSSB320, "Act relating to occupational safety and Health."

Prepared by: Marsha Hubbard, Director
Division: Statewide Budget Office
Phone: 474-7593
Date: 2/27/92

Approved by: Brian Rogers, Vice President for Finance
Agency: University of Alaska
Date: 2/27/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies)

Rev 10/90

STATE OF ALASKA

1992 LEGISLATIVE SESSION

No. 7

Bill Version: CSHB 385(RLC)AM

(S) Publish Date: 3-27-92

Revision Date: March 20, 1992

Title: Relating to video display terminals

Department Affected: Revenue

BRU: Administration & Support

Component: Administrative Services

Sponsor: Ulmer

Requestor: Senate State Affairs Committee

Component Serial No.

0	1	2	5

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	5.0	1.0	1.0	1.0	1.0	1.0
SUPPLIES	1.0					
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	6.0	1.0	1.0	1.0	1.0	1.0
CAPITAL						
REVENUE FUND SOURCE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	6.0	1.0	1.0	1.0	1.0	1.0
FEDERAL FUNDS						
OTHER FUND SOURCE						
TOTAL	6.0	1.0	1.0	1.0	1.0	1.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact:

ANALYSIS: The Department of Revenue would require 9 designated worksite representatives. This fiscal includes training, printing and notice distribution expenses. It does not include any equipment repairs, upgrades or replacement.

Prepared by: Tracy L. McGill Phone: 465-2315

Division: Administrative Services Date: 3/20/92

Approved by Commissioner: Darrel J. Rexwinkel

Agency: Revenue

Distribution (by preparer): Legislative [redacted] Agency(ies).

Rev 10/7/91 — FISCAL NOTE Rev. 6.0 — Page 1 of 1

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill Version: CSHB 385(L&C)AM

(S) Publish Date: 3-27-92

Revision Date: _____ Department Affected: Department of Corrections

Title: "An Act relating to video display terminals." BRU: Statewide Operations

Component: Various

Sponsor: Rep. Ulmer

Requestor: Senate State Affairs COMPONENT SERIAL NO. [ ][ ][ ][ ]

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL	6.7	6.7	6.7	6.7	6.7	6.7
CONTRACTUAL	.8	.2	.2	.2	.2	.2
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	7.5	6.9	6.9	6.9	6.9	6.9
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	7.5	6.9	6.9	6.9	6.9	6.9
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	7.5	6.9	6.9	6.9	6.9	6.9

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)

Please see attached fiscal analysis.

Prepared By: Diane Schenker, Legislative Liaison Phone: 465-3376

Division: Office of the Commissioner Date: 03/24/92

Approved by Commissioner: Lloyd Hames, Commissioner

Agency: Department of Corrections Date: 03/24/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

FISCAL NOTE Corrections 7.5

CONTINUATION OF FISCAL ANALYSIS

BILL: CSHB 385 (L&C) " An Act relating to video display terminals."

The bill would require each state agency to appoint a person responsible for providing information on the risks and proper use of video display terminals (VDTs) at each "qualified work site." A qualified work site means a cluster of at least four VDTs. The Department of Administration would be required to train the appointees in the proper use of VDTs to avoid or lessen risks involved with improper use. The Department of Administration has submitted a fiscal note based on the assumption that this training would be paid for by the state agencies receiving training.

NOTE: The Department will request that training be provided in writing or on videotape in order to reduce travel costs to zero; however, based on assumptions in the Department of Administration's fiscal note, the following costs are estimated for training:

Travel Costs: The Department would send the following numbers of appointees to yearly training in either Anchorage, Fairbanks, or Juneau. It is assumed that current airfares will remain constant, and that each training session will require one overnight and full day of per diem.

Location	# of worksites	transportation	per diem	Total
Anchorage	6	0.00	0.00	0.00
Palmer	3	0.00	108.00	108.00
Kenai	3	282.60	108.00	390.60
Seward	1	76.20	36.00	112.20
Kodiak	1	276.00	95.00	371.00
Dillingham	1	446.00	95.00	541.00
Fairbanks	2	0.00	0.00	0.00
Nome	2	1228.00	190.00	1418.00
Bethel	2	1388.00	190.00	1578.00
Kotzebue	1	614.00	95.00	709.00
Barrow	1	470.00	95.00	565.00
Juneau	3	0.00	0.00	0.00
Ketchikan	2	496.00	190.00	686.00
Sitka	1	174.00	95.00	269.00
TOTAL COSTS				$ 6,747.80

Contractual Costs: The Department of Administration's fiscal note assumes that contractual costs for preparing and presenting the training will be paid by the receiving agencies. It is assumed that the contractual costs identified each year in that fiscal note will be divided among the agencies receiving training, or approximately 25 agencies, to estimate the cost to this Department.

STATE OF ALASKA

1992 LEGISLATIVE SESSION

Bill Version: CSHB 385(STA)
(H) Publish Date: 2/18/92

Revision Date:
Title: "An Act relating to video display terminals."
Sponsor: Representatives Ulmer, B. Davis
Requestor: House State Affairs

Department Affected: Labor
BRU: Workers' Compensation & Admin. Svcs.
Component: Workers' Compensation & Labor Market Information
COMPONENT SERIAL NO. 344 & 336

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)
This bill requires a report to be prepared by the Department of Labor concerning video display terminal injuries. The department can report to the legislature on injuries identified on the Initial Report of Occupational Injury Form completed by both the employee and employer and collected by the Workers' Compensation Division. There would be no additional fiscal impact to the department.

Prepared by: Arbe Williams, Special Assistant — Phone: 465-2700
Division: Commissioner's Office — Date: 1/28/92

Approved by Commissioner: John Abshire, Acting Commissioner
Agency: Department of Labor — Date: 1/28/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/7/91

FISCAL NOTE Labor Ø

Bill Version: CSHB 385(STA)
(H) Publish Date: 2/18/92

Revision Date:
Department Affected: Administration
Title: Relating to video display terminals.
BRU: Personnel/OEEO
Component: Personnel/OEEO
Sponsor: Ulmer
Requestor: House State Affairs
COMPONENT SERIAL NO. 5 7

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL	8.0	1.7	1.7	1.7	1.7	1.7
CONTRACTUAL	20.5	4.3	4.3	4.3	4.3	4.3
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	28.5	6.0	6.0	6.0	6.0	6.0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE: I/A Rec't	28.5	6.0	6.0	6.0	6.0	6.0
TOTAL	28.5	6.0	6.0	6.0	6.0	6.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)

See Attached.

Prepared by: R. H. King, Director
Phone: 465-4430
Division: Personnel/OEEO
Date: January 28, 1992

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 1/28/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
24LEG92/2815A.xpn

FISCAL NOTE Admin. 28.5

ANALYSIS: (continued)

This bill requires the Department of Administration to train employees designated by all agencies on the hazards of video display terminals and the measures that may be taken to avoid or lessen those hazards. We estimate that 500 employees will need to be trained initially. For this initial training, it is cost effective to take the training to the various locations. First year costs are for the development of the training, preparation and printing of required notices, course negotiation and contracted instructor costs. Travel for delivering the training throughout the state is provided.

For the second and subsequent years, we anticipate offering the training twice annually, but only in Juneau, Anchorage and Fairbanks. Agencies will be expected to send their new designated employees to one of these courses.

Interagency receipts are shown as the funding source on the assumption that agencies will pay the costs. If that assumption is incorrect, the funding source will be general funds.

Alaska State Legislature

HOUSE OF REPRESENTATIVES

REPRESENTATIVE FRAN ULMER

MEMORANDUM March 30, 1992

TO: Senator Drue Pearce, Chair
Labor & Commerce Committee

FROM: Rep. Fran Ulmer

RE: CSHB 385 (L&C) am - Video Display Terminals

I am requesting a hearing on this legislation at your earliest convenience.

HB 385 was created in response to a growing health problem among state workers who spend long hours in front of their Video Display Terminals (VDTs). VDT workplace injuries include eye strain, stress and musculoskeletal disorders (wrist, back and neck injuries) including host of ailments dubbed "repetitive strain injuries" or RSI.

According to the Federal Bureau of Labor Statistics, disorders associated with repetitive strain injuries now rank among the highest reported workplace injuries in the U.S. (more than 52%). For instance, in recent years the cases of carpal tunnel syndrome (swelling of tendons in the wrist) have increased more rapidly then any other job related illness. Insurance industry sources believe that keyboard operators are one of the highest at-risk groups.

In many cases, the remedy for these conditions already exists in the workplace. Educating workers on the proper positioning of VDT monitors, keyboards and chairs can go a long way to alleviating this problem. However, phasing out or remodeling "unhealthy" work station configurations and furniture is also essential.

CSHB 385 (L&C) seeks to remedy this situation for state workers by:

* Requiring the training of supervisory staff about the causes, remedies and prevention of VDT related injuries.

* Requiring the posting of notices in the workplace to advise state employees about the safe use of Video Display Terminals.

State Capitol
Juneau, AK 99801-1182
(907) 465-4947
Fax 465-2108

* Requiring that future purchases of office furniture and equipment meet engineering standards that reduce the health risks associated with VDTs.

* Requiring the Department of Administration to report to the legislature on the implementation of the requirements after the first and second years following passage of the bill.

CSHB 385 (L&C) has a fiscal note of 28.5 for the first year of implementation to be generated through interagency receipts shared among all state agencies.

Think of HB 385 as a dose of preventative medicine. By moving now to answer the health concerns of state workers, we wi'l also be saving the state money by eliminating the causes of a growing number of health insurance claims.

ALASKA STATE LEGISLATURE
HOUSE BILL NO. 385

HISTORY IN THE HOUSE

19

92 Read first time and referred to: STA, L&C, Finance

1/13

STA RPT CS(STA) New Title
2/18 5 DP Ø DNP Ø NR Ø AM
1 FN 1 0FN Previous FN

L&C RPT CS(LC) New Title
2/21 4 DP Ø DNP Ø NR AM
FN 0FN 2 Previous FN

FIN RPT CS(L&C) New Title
3/4 16 DP Ø DNP 4 NR Ø AM
FN 0FN 1 Previous FN
1 Rev. Ø FN

3/6 Read second time
CS(L&C) Adopted

3/6 Amended
am #1
am #2

3/6 Advanced

3/6 Read third time

3/6 Return to second for specific amendment
3/6 Held on 3rd to 3/9

3/9

PASSED	EFD Same __ or
Yeas 21	Yeas
Nays 18	Nays
Excused Ø	Excused
Absent 1	Absent

__ Intent adopted

3/9 Reconsideration by Taylor
3/11 Reconsideration not taken up

PASSED ON RECON.	EFD Same __ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

__ Intent adopted

3/11 Reported correctly engrossed
Signed by Speaker, to the Senate

Rosalie Gray
Chief Clerk of the House

HISTORY IN THE SENATE

1992

Read first time and referred to: STA, L&C, FIN

3/27 STA RPT(__) CS 2 DP 1 NR __ DNP __ AM
__ New Title __ Same Title (2) ✓ Previous FN
2 FN __ 0FN To L&C

__ RPT(__) CS __ DP __ NR __ DNP __ AM
__ New Title __ Same Title __ Previous FN
__ FN __ 0FN To __

__ RPT(__) CS __ DP __ NR __ DNP __ AM
__ New Title __ Same Title __ Previous FN
__ FN __ 0FN To __

__ Rules Calendar(__) CS __ AM __ Other
__ New Title __ Same Title __ Previous FN
__ FN __ 0FN

Read second time

__ CS Adopted (__) __ New Title
__ Amended __ Advanced

Read third time

__ Letter of Intent adopted
__ Return to second for specific amendment

PASSED	EFD Same __ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reconsideration
Reconsideration not taken up

PASSED	EFD Same __ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reported correctly engrossed
Signed by President, to the House

Secretary of the Senate

7-LS1567\P.2
Cramer
04/29/92

AMENDMENT

OFFERED IN THE SENATE

TO: CSHB 385 (L&C) am

Page 2, line 12, after ".":

Insert "The Department of Administration shall collect information on the effective use of video display terminals and related workstation furniture from federal agencies and other sources, including the American National Standards Institute, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health, and shall make the information available to state agencies."

Page 2, lines 25 - 29:

Delete all material and insert:

"(d) With respect to office equipment related to video display terminal workstations at which video display equipment will be used by an employee for repetitive keyboard activity, including data entry, data inquiry, or text processing, for more than four hours per day, a state agency shall, before purchasing, leasing, or installing the equipment, review and consider whether the equipment is capable of being used in an ergonomically proper manner, using as a guideline the American National Standard for Human Factors for Engineering of Visual Display Terminal Workstations, ANSI/HFS Standard No. 100-1988, or a subsequent revision of that standard."

HB

389

Alaska State Legislature

HOUSE OF REPRESENTATIVES

REPRESENTATIVE FRAN ULMER

MEMORANDUM April 5, 1992

TO: Senator Drue Pearce, Chair
Labor & Commerce Committee

FROM: Rep. Fran Ulmer

RE: CSHB 389 "An Act relating to recycling of lead acid batteries."

I am requesting a hearing on this bill at your earliest convenience. I expect the bill to move out of the Community and Regional Affairs Committee today.

HB 389 is designed to help remove a highly toxic chemical (lead) from the environment. Every year thousands of lead acid batteries are disposed of improperly in Alaska, posing a significant health risk. HB 389 seeks to alleviate this problem by offering incentives to both the consumer and the distributor to recycle lead acid batteries.

The Senate CS for CSHB 389 (C&RA) includes several changes as a result of input from environmental, legal and industry interests concerned about the legislation. I believe the Senate CS makes this legislation more adaptable to the unique conditions regarding commerce and recycling of lead acid batteries in Alaska.

If enacted, HB 389 would:

* require retailers and wholesalers to accept a used battery in exchange for a new one.

* require that used batteries be in reasonably sound and clean condition when delivered for a refund.

* allow for the assessment of a minimum $5.00 "core charge" redeemable when a used battery is returned to the retailer or community recycling center.

State Capitol
Juneau, AK 99801-1182
(907) 465-4947
Fax 465-2108

* allow the retailer to keep the "core charge" if a used battery is not returned within 30 days.

* require that notices be posted at the place of business informing consumers of the requirements, including the fees and the right to a refund.

* provide for penalties under the state's Unfair Trade articles for noncompliance with the law.

* provide an exemption from the statute if the sale occurs, or the battery is delivered to, an area where there are no transporters possessing an EPA Identification number under federal RCRA statutes.

Thank you for your prompt attention to this matter.

SUPPORT FOR CSHB 389

ALASKA MUNICIPAL LEAGUE
ALASKA BATTERY
ALASKA HEALTH PROJECT
KODIAK ISLAND BOROUGH
E & L AUTO, JUNEAU
AK ENVIRONMENTAL LOBBY
ALEUTIAN WEST CRSA
SW AK MUNICIPAL CONFERENCE
ALPAC/PEPSI OF ALASKA
BROMAR ALASKA
JUNEAU RECYCLING COMMITTEE
ALASKA CENTER FOR THE ENVIRONMENT
NAPA AUTO PARTS - KETCHIKAN AND JUNEAU
CHANNEL SANITATION
DEPT. INDUSTRIAL DEVELOPMENT - N. SLOPE BOROUGH
FRIENDS OF RECYCLING - JUNEAU
ENVIRONMENTAL PROTECTION AGENCY (EPA)
DEPT. OF ENVIRONMENTAL CONSERVATION
TOTEM OCEAN TRAILER EXPRESS, INC.
REVILLA RECYCLING OF KETCHIKAN

FISCAL NOTE

No. 1
Bill Version HB 389
(H) Publish Date: 2/7/92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Environmental Conservation

Title: Recycling of automobile batteries BRU: Environmental Quality

Component: Solid & Hazardous Waste Management

Sponsor: Rep. Ulmer

Requestor: (H) Resources COMPONENT SERIAL NO. 1 4 2 7

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Changes in SCS CS HB 389 (CRA) have no fiscal impact. This fiscal note is appropriate.

5-5-92
date

Comte Aide (initial)

Prepared By: Janice Adair Phone: 465-5050

Division: Commissioner's Office Date: January 26, 1992

Approved by Commissioner: Dan A. Sosier

Agency: Environmental Conservation Date: 1/27/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor OMB/OSR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

COMMITTEE COPY

Page ___ of ___

ALASKA STATE LEGISLATURE
HOUSE BILL NO. 389

HISTORY IN THE HOUSE

19

92 Read first time and referred to:
Resources, L&C.

1/13

RES RPT CS(RES) ___New Title
4 DP 2 DNP 1 NR 0 AM
___FN 1 0FN ___Previous FN

2/7

L&C RPT CS(L&C) ✓ New Title
4 DP 0 DNP 2 NR 0 AM
___FN ___0FN 1 Previous FN 0

2/26

___ RPT CS( ) ___New Title
___DP ___DNP ___NR ___AM
___FN ___0FN ___Previous FN

3/4 Read second time
CS(L+C) Adopted

3/4 Amended
Am 3, Am 4

3/4 Advanced

3/4 Read third time

3/4 Return to second for specific amendments (#1,2,3,4)

3/4

PASSED	EFD Same ___ or
Yeas 25	Yeas
Nays 13	Nays
Excused 2	Excused
Absent 0	Absent

___Intent adopted

3/9 Reconsideration by Zawacki.
3/16 Reconsideration ~~was~~ taken up

3/16

PASSED ON RECON.	EFD Same ___ or
Yeas 24	Yeas
Nays 9	Nays
Excused 3	Excused
Absent 4	Absent

___Intent adopted

3/16 Reported correctly engrossed
Signed by Speaker, to the Senate

Kristin Gray
Chief Clerk of the House

HISTORY IN THE SENATE

1992

3/9 Read first time and referred to:
C.R.A., L+C.

5/5

CRA RPT(✓) CS 3 DP 2 NR ___DNP ___AM
___New Title ✓ Same Title ~~#~~ Previous FN
___FN ___0FN Just letter, To L+C

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ Rules Calendar(___) CS ___AM ___Other
___New Title ___Same Title ___Previous FN
___FN ___0FN

Read second time

___ CS Adopted (___) ___New Title
___Amended ___Advanced

Read third time

___ Letter of Intent adopted
___ Return to second for specific amendment

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reconsideration
Reconsideration not taken up

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reported correctly engrossed
Signed by President, to the House

Secretary of the Senate

HB

APR 6 1992

CRAIG TAYLOR EQUIPMENT COMPANY
733 E. WHITNEY ROAD
ANCHORAGE, ALASKA 99501-1694
(907) 276-5050
FAX (907) 276-0889

April 3, 1992

Senator Steve Frank
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Ref: HB-389

Dear Senator Frank,

Thanks for sending me a copy of The House Bill 389. As a businessman of over 35 years in Alaska and with Four store locations in the State (Anchorage, Fairbanks, Wasilla, and Soldotna). I see no need whatsoever for this legislation.

First: The Bill is unenforceable to <u>All Alaskans</u>, as stated in Sec 3. "The act does not apply to the sale of a lead acid battery, if the sale occurs in a Municipality or unincorporated community that has a population less than 1,000, that is not on the State Road or Marine Highway System, and does not have regular Jet Service." This means this Law would apply to many Alaskan citizens but not all of them. If its unenforceable in "Bush Alaska" why should the rest be subjected to it.

Second: The Municipalities where our businesses are located have taken care of the problem. We wouldn't dare put an old battery in the trash. Every store location we have collects old, used and broken batteries and deliver them to the proper recycler. We have for years received batteries and stored them in covered containers until they are delivered. We have no problems with old batteries. If there might be a problem its in "Bush Alaska" and this legislation exempts most or all of the Bush.

Third: Why make laws for laws sake. There is no need for this legislation in 10% of Alaska where 90% of the population lives. Its all ready being taken care of by the Local Municipalities. We are careful, we recycle and we are good citizens in our state. I urge you to vote against this HB-389 because its not needed except maybe in the area the Bill exempts, and it doubtful that it will ever be enforceable there.

Yours Very Truly,

CRAIG TAYLOR EQUIPMENT COMPANY

Jack H. Richardson
Jack Richardson
President

cc: Senator Drue Pearce

HB

394

State of Alaska

House Majority Leader
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET AFFAIRS
LEGISLATIVE COUNCIL

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

P.O. BOX V
JUNEAU, AK 99811
(907) 465-3718
465-4968/4986
(SESSION)

3111 C STREET, SUITE 440
ANCHORAGE, AK 99503
(907) 561-7621

MEMORANDUM

TO: Senator Drue Pearce
Chair, Senate Labor and Commerce Committee

FROM: Representative Max Gruenberg

DATE: April 16,1992

RE: Scheduling of HB 394

I would appreciate it if you would schedule HB 394," An Act Relating to Notaries; and providing for an effective date."as soon as possible.

HB 394 deals with several important notary issues: (1) it would require all notaries to use a rubber stamp instead of the embossed seal; (2) it would require notaries to keep a journal; (3) it would require the notary's expiration date to be included with the information already required on the seal. (4) it sets out, disqualifications of a notary, and requirements under AS 44.50.(5) it requires a notary to return papers to the Lieutenant Governor if a the notary dies, resigns, is disqualified, removed from office, or permanently moves from the state.

If you have any questions, please call me or Stan Robbins, my Chief of staff, at ext.4968.

Thank you for your consideration.

FISCAL NOTE

No. 1
Bill Version: CSHB 394(L&C)
(H) Publish Date: 2/14/92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Office of the Governor
Title: "An Act relating to notaries public:..." BRU: Executive Operations
Component: Office of the Lt. Governor
Sponsor: _____
Requestor: Governor COMPONENT SERIAL NO. 0 0 1 1

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	n/a	n/a	n/a	n/a	n/a	n/a
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact

Prepared By: Michael Nizich, Director Phone: 465-3616
Division: Division of Administrative Services Date: 12-26-91
Approved by Commissioner: D. Max Hodel, Chief of Staff
Agency: Office of the Governor Date:

COMMITTEE COPY

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

COMMITTEE

ALASKA STATE LEGISLATURE
HOUSE BILL NO. 394

HISTORY IN THE HOUSE

1992

1-14 Read first time and referred to: L & C, Jud

2/14 L&C RPT CS(L&C) New Title
3 DP 0 DNP 1 NR 0 AM
FN 1 0FN Previous FN

4/6 JUD RPT CS(L&C) New Title
5 DP 0 DNP 0 NR 0 AM
FN 1 0FN Previous FN

RPT CS( ) New Title
DP DNP NR AM
FN 0FN Previous FN

4/14 Read second time
CS(L&C) Adopted

Amended

4/14 Advanced

4/14 Read third time

Return to second for specific amendment

4/14

PASSED	EFD Same ✓
Yeas 38	Yeas
Nays 0	Nays
Excused 0	Excused
Absent 2	Absent

Intent adopted

Reconsideration
Reconsideration not taken up

PASSED ON RECON.	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Intent adopted

4/14 Reported correctly engrossed
Signed by Speaker, to the Senate

Kristin Evans
Chief Clerk of the House

HISTORY IN THE SENATE

1992

4/15 Read first time and referred to: L&C, Jud

RPT( ) CS DP NR DNP AM
New Title Same Title Previous FN
FN 0FN To

RPT( ) CS DP NR DNP AM
New Title Same Title Previous FN
FN 0FN To

RPT( ) CS DP NR DNP AM
New Title Same Title Previous FN
FN 0FN To

Rules Calendar( ) CS AM Other
New Title Same Title Previous FN
FN 0FN

Read second time

CS Adopted ( ) New Title
Amended Advanced

Read third time

Letter of Intent adopted
Return to second for specific amendment

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reconsideration
Reconsideration not taken up

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reported correctly engrossed
Signed by President, to the House

Secretary of the Senate

HB

(5) L+C
bill file

received
4/27/92

Huycke General Agency

2904 Boniface Parkway
Anchorage, Alaska 99504

AAMGA

FAX 907-338-7234

907-338-0491

April 22, 1992

Honorable Senator Rick Halford
P.O. Box V
Juneau, Alaska 99811

Re: CS 394 (L&C)

Dear Senator Halford:

I wish to register my violent opposition to this bill. The original proposal was bad enough, but the newest revision is terrible.

I have been a notary public since 1976, solely to notarize the paper work required by the Alaska Division of Insurance. We are a small mom and pop organization with my husband holding the required licenses. Before I applied and received my notary in 1976, it was determined that I could notarize my husband's signature on the required papers for the Division of Insurance. The new bill would effectively deny my right to notarize his signature.

The journal requirements along with the new requirements in Section I will be more than time-consuming. To date in 1992 I have notarized approximately 200 signatures. Knowing they are all for the State of Alaska, have not kept a journal, feeling that if necessary to prove, the Division of Insurance has all the originals, plus copies. Can you imagine the paper work and time involved in handling close to 1,000 notaries per year.

Please do whatever you can to kill this bill.

Very truly yours,

Jane S. Huycke

Jane S. Huycke

NATIONAL NOTARY ASSOCIATION®
8236 Remmet Ave., P.O. Box 7184, Canoga Park, CA 91304-7184
Telephone: (818) 713-4000, FAX: (818) 713-0842

A Nonprofit
Educational Organization

April 23, 1992

Honorable Drue Pearce
Chairman, Labor and Commerce Committee
Alaska State Senate
State Capitol
Juneau, AK 99811

RE: Committee Substitute for House Bill 394

Dear Senator Pearce:

On behalf of the National Notary Association, a nonprofit educational organization serving the nation's 4.2 million Notaries Public, I applaud the recent introduction of Committee Substitute for House Bill 394, a proposal requiring each Notary to keep a journal of his or her notarial acts.

Keeping a journal record of one's official acts is not only a prudent, businesslike practice, but protects the public by providing valuable documentary evidence of a notarization should memory fail or should an original document become altered or misplaced.

A journal may also preclude a baseless lawsuit by showing that the Notary did use reasonable care or that a transaction did occur as recorded.

The bill additionally requires Notaries to use only seals that are black-inking stamps -- a provision favored by document recorders to simplify the microfilming process.

As the nation's clearinghouse for information on Notary laws, customs and practices, we welcome your questions. Please let us know if we can be of service.

Sincerely,

Charles N. Faerber

Charles N. Faerber
Vice President, Legislation

CNF:ecs

cc: Honorable John B. Coghill
Lieutenant Governor

HB

395

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN
SEAT A

3111 "C" STREET, SUITE 450
ANCHORAGE, ALASKA 99503
(907) 561-7629 (FAX) 562-4376

ALASKA LANDINGS • BENTZEN • BIRCHWOOD • CHESTER CREEK • HEATHER MEADOWS • LINCOLN PARK • MIDTOWN • NORTHSTAR
NORTHWOOD • ROMIG • ROOSEVELT PARK • SPENARD • THOMPSON • TURNAGAIN • WINDEMERE • WOODLAND PARK

CHAIRMAN
JUDICIARY COMMITTEE
VICE CHAIRMAN
REGULATION REVIEW COMMITTEE
MEMBER
RULES COMMITTEE
LABOR AND COMMERCE COMMITTEE

M E M O R A N D U M

TO: Senator Drue Pearce, Labor and Commerce Chair

FROM: Representative Dave Donley DD

DATE: April 21, 1992

RE: Request to Schedule HB 395

I respectfully request that a Labor and Commerce hearing be scheduled for HB 395 at the earliest possible opportunity. HB 395 gives public employees the right to be indemnified for injuries occurring within the scope of employment, and clarifies the circumstances under which indemnification will be granted.

HB 395 codifies the current state policy for defense and indemnification of state employees, and as a result, will not have a fiscal impact on the state. A copy of this policy is attached, along with a memorandum from the Attorney General's Office explaining the policy reasons why indemnification of state employees is a good idea. As the Department of Law points out, there is a "widely felt" belief "that where an employee acting in good faith injures a person within the performance and scope of employment, the employer should indemnify the employee."

As public employers, both the Administration and the Municipality of Anchorage support indemnifying public employees. And, at the request of these two entities, a number of procedural provisions were added to the CS to clarify the circumstances under which indemnification would be provided. For example, provisions were added to require employees to cooperate in their defense, to prohibit employees from settling claims after an employer has undertaken defense of the employee, and to set out the specific and exclusive remedies available to an employee if an employer does not provide defense or indemnification as required by law.

In addition to support from the Department of Law and the Municipality of Anchorage, HB 395 is strongly supported by the Alaska Association of Chiefs of Police and the Alaska Peace Officers Association.

Thank you for considering this request to schedule HB 395.

DD:lc

JUNEAU OFFICE
(During Legislative Session January through May)
P.O. BOX V, JUNEAU, ALASKA 99811 • (907) 465-3892 (FAX) 465-5661

SPONSOR PACKET

MEMORANDUM

State of Alaska
Department of Law

TO: Brad Thompson
Division of Risk Management
Department of Administration

DATE: June 17, 1988

FILE NO:

TEL NO: 465-3603

SUBJECT: State provided defense of employees

FROM: Bill Mellow
Assistant Attorney General
Special Litigation-Juneau

You have requested a concise (10 lines or less) statement of the state's policy for defense and indemnification of state employees. A copy of that policy is attached but please note that this is only policy and is not legally binding except where the state has otherwise contractually bound itself.

Following is an explanation of the basis for evolution of a general belief that the state should defend and indemnify employees; There is no statutory law in Alaska requiring state defense and indemnification of employees, however, most public employees are protected by bargaining agreements which obligate the state to defend and indemnify for ordinary negligence. Additionally, common law rules developed by the courts have saddled employers with liability for negligence of employees. The common law rules are referred to as the doctrine of respondeat superior (the master answers for the servant) and require the employer to pay a third party for injuries caused by employees. The doctrine also grants common law indemnity in favor of the employer against the employee but, because many employees are judgment-proof, employers often simply absorb the expense without looking to the employee for reimbursement. Additionally, for the tactical reason that the employer needs the support of the employee in defense against the third party, there is a tactical justification for agreeing to indemnify. Finally, and strongest of all as a policy justification, it is widely felt that where an employee acting in good faith injures a person within the performance and scope of employment, the employer should indemnify the employee.

WGM:jal
Attachment

cc: Ronald W. Lorensen (w/enc.)

STATE POLICY FOR DEFENSE OF EMPLOYEES

Where the rights and obligations of employees and the state are not otherwise covered by bargaining agreements, it is the policy of the State of Alaska to provide legal defense and pay judgments against state employees sued for injuries occurring during the performance and within the scope of duty. Except where the Department of Law has specifically in writing obligated the state otherwise, the state will not defend or indemnify for acts of intentional and willful misconduct nor pay an award of punitive damages.

Alaska Association Chiefs of Police

Representative Dave Donley
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

February 13, 1992

Dear Representative Donley,

I would like to thank you for introducing House Bill 395, which would ensure Indemnification for public employees. You have our full support on this important piece of legislation.

In conjunction with the Alaska Peace Officers Association we have identified House Bill 395 as a top legislative priority. We believe that government employees should be defended and protected by their employer when lawsuits are filed against employees who were merely performing required work.

Government employees should be held responsible and accountable for their actions. We would never advocate that bad employees be protected, however, when employees take good faith actions at the behest of their employer, we feel that as a matter of law, employees should be indemnified. When employees are doing the work of government, within the scope of their authority and without malice, they should not be held personally liable when they are named as parties to lawsuits.

We have long been concerned about the chilling effect lawsuits have upon employees. Hopefully, House Bill 395 will become law and good employees will no longer have to be concerned that their personal assets are unfairly in jeopardy.

We would be happy to work with you in the passage of this bill. If you have any questions about our position, I can be reached at 786-8552.

Sincerely,

Duane S. Udland

Duane S. Udland, President
Alaska Association of Chiefs of Police
4501 South Bragaw
Anchorage, Alaska 99507

Alaska Association of Chiefs of Police

Alaska Peace Officers Association, Inc.

Federal Bureau of Investigation National Academy Associates

Position Statement
from The Law Enforcement Coalition
Concerning Legislative Proposals
before the
Eighteenth Alaska Legislature
February 1992

HOUSE BILL 395:
INDEMNIFICATION OF GOVERNMENT EMPLOYEES

Indemnification for public employees is our number one priority.

We believe that government must be held responsible for its actions. When someone is wrongly harmed through the actions of government, injured parties should be able to make claims as appropriate. However, we believe very strongly that government employees should be defended and protected when their actions are made in good faith.

Generally when a lawsuit is filed, employees are listed as parties to the action. In the past, employees have not been held personally liable for actions taken at the behest of their employer, unless they were clearly working outside the scope of their authority. This seems to be changing. Recent court rulings imposing personal punitive damages are placing the livelihoods of our public employees in jeopardy.

The trend where public employees are being held personally liable places employees in a position where their own personal assets are at risk. All government employees are in danger, from the highest level policy maker to the lowest level of workers where those policies are carried out. The social worker, the road maintenance supervisor, the police officer, the medic, the fire fighter, the department manager, and elected officials are all vulnerable.

We in law enforcement believe this is an undue burden upon the State's public employees. It carries great potential for the workings of government to become bogged down because employees fear that decisions they make in good faith may result in the loss of their assets.

When employees are doing the work of the government, within the scope of their authority, and without malice, they should not be held personally liable when they are named as parties to law suits.

Legislation should be passed that indemnifies public employees and frees them from the burden of working under the constant threat that the good faith judgments they make can result in the loss of their homes, their cars, or their savings.

Municipality of Anchorage

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4545

TOM FINK,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

March 3, 1992

Representative Dave Donley
Chair House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Re: HB 395 Regarding Indemnification of Public Employees

Dear Mr. Donley:

On behalf of the Municipal Attorney's Office in Anchorage and the Municipality of Anchorage, I strongly endorse HB 395.

Treatment of indemnification of municipal officers and employees, particularly indemnification for punitive damages, is an issue we face in a number of cases handled by our office. Passage of HB 395 would provide clear authorization allowing municipalities to establish and enforce consistent procedures for addressing claims where employee indemnification is at issue.

I appreciate your efforts in drafting HB, 395 and urge your continued diligence as it moves through the process. Thank you for your attention to this issue.

Sincerely,

Richard L. McVeigh,
Municipal Attorney

cc: Speaker of the House
Governor's Office

m:\ltr\donnelly\indem.sbo/rh

Municipality of Anchorage

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4545

TOM FINK,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

April 6, 1992

Representative Dave Donely
Chair, House Judiciary Committee
3311 C Street
Suite 450
Anchorage, Alaska 99503

Subject: CSHB 395 Relating to Defense and Indemnification of Public Employees

Dear Representative Donely:

After reviewing the committee substitute for HB 395 dated April 5, 1992, and identified as draft no. 7-LS1682/J, the Municipality of Anchorage supports this draft committee substitute. From discussions with the Municipal Risk Management Department, Police Department and Legal Department, this committee substitute appears to be a workable compromise between the initial draft and a prior committee substitute.

This version of the bill would allow the Municipality of Anchorage flexibility to defend and indemnify its employees in appropriate circumstances, including punitive damage situations. Additionally, the substitute allows an employee a defined time period in which to assert and protect the employee's rights to defense or indemnity. The committee substitute appropriately limits the defense of those rights to declaratory actions, for enforcing the rights to defense; cross claims for enforcing rights to indemnity where the employer is named as a party, and an action brought within one year for enforcing indemnification where the employer is not named as a party. With these elements, the Municipality of Anchorage supports the bill.

Sincerely,

Scott A. Brandt-Erichsen
Assistant Municipal Attorney

cc: Anne Williams, Executive Assistant, Municipal Manager's Office
Duane Udland, Deputy Chief of Police
Harry Sjoberg, Risk Manager

m:\ltr\donley\index.sbe\rh

FISCAL NOTE

No. 3

Bill Version: CSHB 395(JUD)

(H) Publish Date: 4-8-92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Department of Law

Title: "...requiring public employers to indemnify public employees..." BRU: Legal Services

Component: Operations

Sponsor: Representative Donley

Requestor: Representative Donley COMPONENT SERIAL NO. 9 3

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues

Prepared By: Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: February 18, 1992

Richard I. Pegues / for

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law Date: February 18, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

COMMITTEE COPY

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 395

This bill amends AS 29.20 and AS 39.90 to provide that public employers shall indemnify public employees who are sued individually for injuring others while acting within the performance and the scope of their duties, unless an injury is the result of an intentional act or willful misconduct. The bill attempts to codify existing practice; however, we believe it is unclear in certain respects and could cause confusion.

For instance, the bill does not define "scope of duties," nor does it require an employee to give prompt notice to the employer when a claim is filed. Furthermore, the bill does not address conflicts of interest or which party would ultimately be responsible for directing a defense, the employer or the employee. The bill would not prohibit an employee from agreeing to a settlement or payment of a claim without the knowledge or agreement of the employer.

The bill also does not include gross negligence as an exemption to indemnification. The state currently does not indemnify acts of gross negligence for any of its employees, and this proviso is included in all of the state's collective bargaining agreements. The bill would therefore have the effect of indemnifying acts of gross negligence for employees not covered by collective bargaining agreements, primarily appointed officials, but it would not do so for employees covered by collective bargaining agreements. These apparent inconsistencies with existing practice could have an impact if they are not clarified.

However, we have not shown a fiscal impact because we cannot determine whether there will be any, and because the department's costs to defend personal injury claims are paid from the state's Risk Management accounts.

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FISCAL NOTE No. 2

Bill Version: CSHB 395(JUD)

(H) Publish Date: 4-8-92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Administration

Title: An act requiring public employers to indemnify public employees BRU: Division of Risk Management

Component: _____

Sponsor: Donley

Requestor: House Community & Reg'l Affairs COMPONENT SERIAL NO. 0 0 7 1

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.) State policy presently provides protection to State employees acting within the course and scope of their duties -- with the exclusion of intentional and willful or wanton acts of misconduct. Therefore there is no effect on Risk Management budget.

Prepared By: Donald J. Hitchcock Phone: 465-2180

Division: Risk Management Date: 2/27/92

Approved by Commissioner: Nancy Bear Usera

Agency: Department of Administration Date: 2/27/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov.(a. Ofc., & Impacted Agency(ies).

Rev. 10/7/91

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Page 1 of _

FISCAL NOTE

No. 1
Bill Version: HB 395
(H) Publish Date: 3-6-92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date:
Title: Indemnification of Public Employees
Sponsor: Representative Donley
Requestor: (H) CRA

Department Affected: Community and Regional Affairs
BRU:
Component:
COMPONENT SERIAL NO. 0 0 0 0

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	*0	*0	*0	*0	*0	*0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	*0	*0	*0	*0	*0	*0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	*0	*0	*0	*0	*0	*0

POSITIONS:

FULL-TIME	*0	*0	*0	*0	*0	*0
PART-TIME						
TEMPORARY						

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)
Section 1 of the bill applies only to municipalities and, therefore, does not have a fiscal impact on the department.

* Section 2 of the bill applies to state departments generally but it is impossible to determine the possible impact. To date, no DCRA employees have been sued "for injuries occurring during the performance and within the scope of the employee's duty."

Prepared By:
Phone: 465-4708
Division: Administrative Services Division
Date:

Approved by Commissioner: Ed. Bethel
Agency: Department of Community and Regional Affairs
Date: 3-3-92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).
Rev 10/7/91

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ALASKA STATE LEGISLATURE
HOUSE BILL NO. 395

HISTORY IN THE HOUSE

1992

1-14 Read first time and referred to: CRA, L+C, Jud

3/6 CRA RPT CS( ) New Title
2 DP 0 DNP 4 NR 0 AM
FN 1 0FN Previous FN
3/6 LOC waiver

4/8 JUD RPT CS(JUD) ✓ New Title
4 DP 0 DNP 2 NR 0 AM
FN 2 0FN 1 Previous FN

RPT CS( ) New Title
DP DNP NR AM
FN 0FN Previous FN

Read second time
4/21 CS(JUD) Adopted

Amended

4/21 Advanced

4/21 Read third time

Return to second for specific amendment

4/21

PASSED	EFD Same ___ or
Yeas 35	Yeas
Nays 0	Nays
Excused 0	Excused
Absent 5	Absent

___ Intent adopted

Reconsideration
Reconsideration not taken up

PASSED ON RECON.	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

___ Intent adopted

4/21 Reported correctly engrossed
Signed by Speaker, to the Senate

Kristin Gray
Chief Clerk of the House

HISTORY IN THE SENATE

19

Read first time and referred to:

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ Rules Calendar(___) CS ___AM ___Other
___New Title ___Same Title ___Previous FN
___FN ___0FN

Read second time

___ CS Adopted (___) ___New Title
___Amended ___Advanced

Read third time

___ Letter of Intent adopted
___ Return to second for specific amendment

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reconsideration
Reconsideration not taken up

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reported correctly engrossed
Signed by President, to the House

Secretary of the Senate

HB

HB

418

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO : CSSSHB 418 (FIN) am

Revision Date:
Title: "An Act requiring employers to provide ... minors with a break from work."
Sponsor: MacLean, Koponen & Moyer
Requestor: Senate Labor & Commerce

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Wage & Hour
COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Randy Carr, Acting Director
Division: Labor Standards & Safety
Phone : 269-4913
Date : 3/26/92

Approved by Commissioner: C. W. Mahlen
Agency: Department of Labor 3/26/92
Date: 3/26/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/7/91

HB 418

ALASKA STATE LEGISLATURE

Representative Eileen Panigeo MacLean
Co-Chair House Finance Committee
P.O. Box 830
Barrow, Alaska 99723

WHILE IN JUNEAU
Box V
Juneau, Alaska 99811
465-4525
465-4833

HOUSE OF REPRESENTATIVES

MEMORANDUM

District 22

North Slope Borough

Anaktuvuk Pass
Atqasuk
Barrow
Kaktovik
Nuiqsut
Point Hope
Point Lay
Wainwright

Northwest Arctic Borough

Ambler
Buckland
Deering
Kiana
Kivalina
Kobuk
Kotzebue
Noatak
Noorvik
Selawik
Shungnak

DATE: March 10, 1992

TO: Senator Drue Pearce, Chairman
Senate Labor and Commerce Committee

FROM: Representative Eileen P. MacLean EPM

SUBJ: Scheduling HB 418 for a Committee Hearing

House Bill 418 passed the House on March 6 and has been referred to the Senate Labor and Commerce Committee. This is to request a hearing for HB 418. The purpose of the bill is to require lunch breaks for people under the age of 18.

Federal and state law currently have no requirements for lunch breaks or lengths of shifts for children. Although most businesses probably do provide some kind of break for their employees there are some businesses in the state which do not.

Specifically, HB 418 requires that people under the age of 18 who are scheduled to work for six hours or more are entitled to a break of at least 30 minutes during the course of the work shift. The bill requires that the break must occur after the first hour and a half of work and before the beginning of the last hour of work.

HB 418 also addresses the situation where an individual may end up working more hours than originally planned and specifies that a person under the age of 18 who works for five consecutive hours without a break is entitled to a break of at least 30 minutes before continuing to work.

The Department of Labor would have the authority to monitor employers through their usual wage and hour audit procedures. If there was a violation of this section, then the department could impose a penalty which would result in the employee receiving compensation for the lunch break at twice the minimum wage rate, or $9.50 per hour. For a 30 minute lunch break this totals $4.75.

The House Finance Committee Substitute incorporated HB 461, by Representative Parnell. This would allow minors under the age of 14 years old to be employed as a performer in the entertainment industry.

HB 418 was amended on the House Floor on page 2, section 2, line 8 to add the words, or by mutual agreement between the employer and the employee. And also on page 2, section 2, lines 14-21, which limit the the application of work breaks for minors under section (c).

HB 418 passed the House with unanimous support. I would appreciate your consideration of scheduling this bill for a hearing in the Senate Labor and Commerce Committee. If you have any questions, or need any additional information, please contact Rena Bukovich of my staff at 465-4525.

HB 418

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSSSHB 418 (FIN) am

Revision Date: _____
Title: Requiring work breaks for employees under age 18.
Sponsor: MacLean
Requestor: _____

Department Affected: Administration
BRU: Personnel/OEEO
Component: Personnel/OEEO
COMPONENT SERIAL NO. 5 6

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)
This bill will have no fiscal impact on State employment.

Prepared by: R. H. King, Director — Phone: 465-4430
Division: Personnel/OEEO — Date: 3/13/92

Approved by Commissioner: Nancy Bear Usera — Date: 3/17/92
Agency: Administration

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Official Business

Room 128

State Capitol
Juneau, AK 99801-1182

465-2647

MAR 17 1992
HB 418

TO: Senator Drue Pearce, Chair
Senate Labor & Commerce Committee

FROM: Rep. Kevin "Pat" Parnell

DATE: March 17, 1992

RE: Scheduling for CSSSHB418

I would greatly appreciate your scheduling CSSSHB418, "An Act permitting the employment of certain minors in the entertainment industry; requiring employers to provide certain employees who are minors with a break from work," for a hearing before the Senate Labor & Commerce Committee. It passed from the House unanimously.

I have amended HB461 onto this bill, and therefore have a desire to have this bill succeed, thus my request to you.

Thank you for your consideration of my request.

SENATE LABOR AND COMMERCE COMMITTEE
SPONSOR STATEMENT
CSSSHB 418 (FINANCE) am
REPRESENTATIVE EILEEN P. MACLEAN

The purpose of HB 418 is to require employers to provide employees who are minors with a break after 6 or more hours of work. Our research indicates that there is no federal or state law that addresses this problem.

Although most businesses probably do provide some kind of break for their employee's, either through a collective bargaining agreement or through their own personnel policy, there are some businesses in the state which do not.

HB 418 would require that people under the age of 18 who are scheduled to work for six hours or more are entitled to a break of at least 30 minutes during the course of the work shift. The bill requires that the break must occur after the first hour and a half of work and before the beginning of the last hour of work.

HB 418 also addresses the situation where an individual may end up working more hours than originally planned and specifies that a person under the age of 18 who works for five consecutive hours without a break is entitled to a break of at least 30 minutes before continuing to work.

The Sponsor Substitute was introduced to add section 2. paragraph (d). This section entitles the employee to receive compensation if they do not get a lunch break and also gives the Dept. of Labor the authority to monitor employer's through their usual wage and hour audit procedures to insure that employer's are complying with the law.

The House Finance Committee incorporated HB 461, by Representative Parnell. This amendment would allow minors under 14 years old to be employed as performers in the entertainment industry.

HB 418 was amended on the House Floor on page 2, section 2, line 8, to add the works, <u>or by mutual agreement betweer the employer and the employee.</u> This would allow the employer and

employee to negotiate the terms of the required break. For example, instead of a 30 minute break, they may agree on two 15 minute breaks. HB 418 was also amended on page 2, section 2, lines 14-21, which lists exempt activities from the required break section.

HB 418 passed the House with unanimous support.

ALASKA STATE LEGISLATURE

Representative Eileen Panigeo MacLean
Co-Chair House Finance Committee
P.O. Box 830
Barrow, Alaska 99723

WHILE IN JUNEAU
Box V
Juneau, Alaska 99811
465-4525
465-4833

HOUSE OF REPRESENTATIVES

MEMORANDUM

District 22

North Slope Borough

Anaktuvuk Pass
Atqasuk
Barrow
Kaktovik
Nuiqsut
Point Hope
Point Lay
Wainwright

Northwest Arctic Borough

Ambler
Buckland
Deering
Kiana
Kivalina
Kobuk
Kotzebue
Noatak
Noorvik
Selawik
Shungnak

DATE: March 10, 1992

TO: Senator Drue Pearce, Chairman
Senate Labor and Commerce Committee

FROM: Representative Eileen P. MacLean EPM

SUBJ: Scheduling HB 418 for a Committee Hearing

House Bill 418 passed the House on March 6 and has been referred to the Senate Labor and Commerce Committee. This is to request a hearing for HB 418. The purpose of the bill is to require lunch breaks for people under the age of 18.

Federal and state law currently have no requirements for lunch breaks or lengths of shifts for children. Although most businesses probably do provide some kind of break for their employees there are some businesses in the state which do not.

Specifically, HB 418 requires that people under the age of 18 who are scheduled to work for six hours or more are entitled to a break of at least 30 minutes during the course of the work shift. The bill requires that the break must occur after the first hour and a half of work and before the beginning of the last hour of work.

HB 418 also addresses the situation where an individual may end up working more hours than originally planned and specifies that a person under the age of 18 who works for five consecutive hours without a break is entitled to a break of at least 30 minutes before continuing to work.

The Department of Labor would have the authority to monitor employers through their usual wage and hour audit procedures. If there was a violation of this section, then the department could impose a penalty which would result in the employee receiving compensation for the lunch break at twice the minimum wage rate, or $9.50 per hour. For a 30 minute lunch break this totals $4.75.

The House Finance Committee Substitute incorporated HB 461, by Representative Parnell. This would allow minors under the age of 14 years old to be employed as a performer in the entertainment industry.

HB 418 was amended on the House Floor on page 2, section 2, line 8 to add the words, or by mutual agreement between the employer and the employee. And also on page 2, section 2, lines 14-21, which limit the the application of work breaks for minors under section (c).

HB 418 passed the House with unanimous support. I would appreciate your consideration of scheduling this bill for a hearing in the Senate Labor and Commerce Committee. If you have any questions, or need any additional information, please contact Rena Bukovich of my staff at 465-4525.

E .332...under 17, kids must have written authorization by commissioner unless authorized under .360.

E .335...under 14, kids can't work outside school hours except for domestic work, baby sitting and handiwork, newspaper routes, canneries.

E .340...under 16, can't work for more than 9 hours combined in 1 day fo school and work. Limits hours to 5 am to 9 pm. Total work outside school=23 hour per week.

E .350...under 18, long list of how kids can and can't work.

N .325...purpose=to protect kids from exploitation

N .330...general exemption=for family businesses and family boats.

N .355...under 21, can't work in booze premises.

E .360 (a) department sets regs for safety, work conditions, kind of work, maximum hours for day and week, minimum rates of pay and other kid safeguards

E (b) department shall make deals with other state and fed agencies to provide opportunities for work experience in safe and healthy conditions for kids.

E (c) department shall adopt regs for employment of 18 and under and exempting appropriate employers from reporting under .332.

N .365...general enforcement provision.

N .370...penalties

Drue
In current version of HB 418 before the senate, the above provisions of Title 23 are exempted for minors in the entertainment industry concerning only times, hours + days of work.

I think the provisions marked "E" should remain exempted to keep in line with h+c vote.

I think the provisions marked "N" can apply to said minors without violating the committee's intent + in an attempt to solve Rep. Purnell's concern.
If you want me to prepare a floor amendment (and or have Pat) pls sign off advice. Billy 4/20

HB

441

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. HB 441

Revision Date:
Title: An Act relating to the disclosure of information... about job performance
Sponsor: Gruenberg
Requestor: House Labor & Commerce

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 02/19/92

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 02/19/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 1/92

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 441

Revision Date: _____
Title: "...disclosure of information by an employer about the job performance..."
Sponsor: Representative Gruenberg
Requestor: House Judiciary Committee

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL | | | 9 | 3 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

This bill protects an employer, who acts in good faith, from liability for oisclosing the job performance of an employee or former employee to a prospective employer. This protection would not shield an employer who provided information the employer knew was false or misleading, was given with a malicious purpose, or violated a civil right of the employee or former employee that is protected by Alaska's antidiscrimination laws under AS 18.80, or federal law. This bill will apply to all employers in the state and will not have a fiscal impact on the Department of Law.

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services — Date: March 5, 1992
Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law — Date: March 5, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 441

Revision Date:
Title: Disclosure of job performance information
Sponsor: Gruenberg
Requestor: House Labor and Commerce

Department Affected: Administration
BRU: Personnel/OEEO
Component: Personnel/OEEO
COMPONENT SERIAL NO. 5 6

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)
This bill will not leave a fiscal impact on this division.

Prepared by: R. H. King, Director
Division: Personnel/OEEO
Phone: 465-4430
Date: February 18, 1992

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 2/19/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
24906.kp1

1992 LEGISLATION
POSITION PAPER
DEPARTMENT OF ADMINISTRATION

Division Personnel/OEEO **Bill Number** HB 441

Bill Title An Act relating to the disclosure of information by an employer about the job performance of an employee or former employee.

Position Statement: Explain briefly what bill does, its impacts and Department's position, i.e., a) support, b) do not support, c) neutral or d) oppose.

Position:

The Department of Administration supports HB 441.

What the Bill Does:

This bill protects employers and former employers from liability when disclosing information about the job performance of an employee or former employee in good faith. Disclosure is presumed to be in good faith, but may be rebutted by showing that the information was knowingly false or deliberately misleading, was given with a malicious purpose, or violated a civil right that is protected under AS 18.80 or under a federal law.

Impact of the Bill:

This bill will assist the State both as an employer or former employer and as a prospective employer.

As an employer or former employer, this bill will provide a rebuttable presumption of good faith for supervisors to disclose job performance information when approached to provide a reference for an employee or former employee. This provision will clarify the ability of supervisors to provide that information based on their personal experience without reference to formal records protected by AS 39.25.080.

As a prospective employer, the State should be able to secure more accurate and useful information on candidates for State positions. The same protection provided to State supervisors will be provided to other employers in providing information to the State.

APPROVED:

Director R. H. King **Division** Personnel/OEEO

Signature Richard P. King **Date** 4/1/92

Commissioner Nancy Bea Usera

Signature N Bea Usera **Date** 4/1/92

Rev. 01/28/91

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House Majority Leader
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET. AFFAIRS
LEGISLATIVE COUNCIL

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

P.O. BOX V
JUNEAU, AK 99811
(907) 465-3718
465-4968/4986
(SESSION)

3111 C STREET, SUITE 440
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MEMORANDUM

TO: All Members
Senate Labor and Commerce Committee

FROM: Representative Max Gruenberg

DATE: April 9, 1992

RE: Support of HB 441

I would very much appreciate your support HB 441, "An Act relating to the disclosure of information by an employer about the job performance of an employee or former employee.".

HB 441, is modeled after a Florida law that passed in 1991 and was mentioned in State Legislatures magazine. HB 441, presumes that an employer was acting in good faith, unless it is shown that the reference was knowingly false, deliberately misleading, was given with malicious purpose or violated the employees civil rights.

If you have any questions, please call me or Stan Robbins, my Chief of staff, at ext 4968.

Thank you for your consideration.

State of Alaska

House Majority Leader
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET. AFFAIRS
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MEMORANDUM

February 19, 1992

To: Representative Max Gruenberg

From: Mark Handley MTH

Re: The Law of Defamation in the Context of Former Employee References

Defamation is a doctrine of the common law. It allows for the recovery of damages from people who cause one to suffer a loss by the publication of a lie that causes injury to one's reputation. Any communication between two or more people can constitute publication. The defendant must have been at least negligent in regards to whether or not the statement was false.

If the defamatory statement would tend to injure one in his or her business or profession, as would be the case in most lawsuits involving employer references, the injured party is not required to prove specific monetary damages.

There is a limited privilege in the common law that provides some protection to a person who makes a defamatory statement if that person was acting in the interest of others. This common law privilege has been applied to cases involving statements by a former employer. However, the scope of this privilege is so vague that the best way for an employer to limit their exposure to liability for defamation is to refrain from making any negative statements about former employees.

SLANDER.TXT\MTH

Defamation in the Workplace: The Law of Massachusetts

BY JAMES B. CONROY

James B. Conroy received his J.D. degree, magna cum laude, from the Georgetown University Law Center. He is a junior partner in the Litigation Department at the Boston law firm of Nutter, McClennen & Fish where he concentrates much of his practice in employment litigation.

CONTENTS

Introduction

An unprecedented wave of litigation is flooding the courts with libel and slander claims based on negative job reviews, unfavorable employment references, derogatory termination interviews and other forms of workplace defamation.[1] Reacting to the costs as well as the risks of such lawsuits, many employers have reduced their employees' performance evaluations to meaningless generalities, imposed strict censorship on interoffice communications and stopped giving references altogether. This is a loss for everyone concerned. The free exchange of information in the workplace is just as important to able employees as it is to their employers. More broadly, consumers are the ultimate beneficiaries when hiring, firing and promotion decisions are made on the basis of well-informed judgments.

At the same time, employees should have ample means to seek legal redress when their employers disparage their reputations without just cause. Few injuries are as thoroughly ruinous as the undeserved loss of one's good name, and the consequences may be particularly devastating on the job and in the marketplace.

For centuries, the common law of defamation has struggled to maintain an appropriate balance between these competing values. "On the one hand, the tort law of this Commonwealth has long recognized a right of redress to one who suffers injury to his reputation by the publishing of a defamatory falsehood. On the other hand, freedom of expression is guaranteed...."[2]

Following a brief review of libel and slander in general, this article focuses on the manner in which the law of Massachusetts balances these competing rights and values in the workplace.[3] Typically, employees' defamation claims are precipitated by 1) an unfavorable evaluation; 2) an allegation of workplace misconduct; 3) a derogatory comment in a company publication; or 4) an unflattering reference. This article reviews Massachusetts law governing all four scenarios, suggests how employers may be counselled to avoid inappropriate defamatory communications and discusses ways and means to reconcile more justly the conflicting interests which the law of defamation must balance in the workplace.

I. Basic Law of Defamation

A. *Elements of a Cause of Action*

Defamation consists of a false and unflattering statement communicated to one or more individuals about another.[4] Written defamation is libel. Oral defamation is slander. In either case, the plaintiff must prove all five of the essential elements of both torts:

1. Suits brought by employees against their employers now account for about one third of all defamation actions. *Wall Street Journal*, at 33, col. 4 (October 2, 1986).

2. *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 855 (1975).

3. For a full review of Massachusetts defamation law, *see* 37 J. Nolan, *Massachusetts Practice* §§91-104 (1979).

4. *McAvoy v. Shuman*, 401 Mass. 593, 597 (1988).

First, the statement at issue must be "defamatory," classically defined as "words which would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community."[5] Accusing an employee of misfeasance or malfeasance on the job is defamatory *per se*,[6] as is any publication which would tend to deter others from doing business with him.[7]

Second, since causes of action for libel and slander protect the plaintiff's reputation rather than his own peace of mind, the defamatory remark must be "published" to someone other than the one defamed.[8] Berating an employee when no one else is present, no matter how unfairly or energetically, cannot give rise to a defamation claim.[9] However, internal communications closely confined within a single business entity may well support a cause of action.[10] Because an unfavorable intra-corporate evaluation, report or casual conversation can have devastating consequences for the maligned employee, "[t]he argument that a communication between agents of the same corporation is not a communication to a third person is not impressive in dealing with such a subject as defamation...."[11]

Third, the defamatory statement must refer specifically to the plaintiff or be reasonably discernible as such.[12] Heavily veiled references to "certain parties" may not be actionable, but a suggestion that "a certain head of the Accounting Department is skimming from the till" leaves no room for doubt about the wrongdoer's identity.[13]

Fourth, the remark must be false. Although the plaintiff bears the burden of alleging falsity, under Massachusetts law it is up to the defendant to prove truth as an affirmative defense.[14] Even if a written defamatory statement is *true*, it may still be actionable if the defendant published it maliciously in a conscious effort to ruin the plaintiff's reputation without lawful reason.[15]

For all libel and most slander claims, nominal damages may be awarded without proof of actual injury;[16] but to recover compensatory damages, a plaintiff must prove genuine harm.[17] Typical general damages include lost reputation and resulting mental anguish.[18] Special damages may also be recovered when pleaded and proved.[19] However, where a multi-count complaint alleges defamation among other causes of action, only one recovery may be had for a single injury, no matter how many theories support it.[20]

Corporations,[21] sole proprietorships[22] and other business entities are accountable for defamatory statements made by their agents or employees acting within the scope of their employment. Employers are also directly liable for any defamatory statements which they expressly authorize.[23] Furthermore, employers are liable for any statements made by their agents or employees while acting within their actual or apparent authority.[24]

5. *Stone, supra* n.2, 367 Mass. at 853.

6. *Lyman* v. *New England Newspaper Pub. Co.*, 286 Mass. 258, 262 (1934).

7. *A.E.M. Corp.* v. *Corporate Aircraft Management*, 626 F.Supp. 1553, 1551 (D. Mass. 1985).

8. *Brauer* v. *Globe Newspaper Co.*, 351 Mass. 53, 56 (1966).

9. *Comerford* v. *West End Street Railway Co.*, 164 Mass. 13, 15 (1895).

10. *Bander* v. *Metropolitan Life Insurance Co.*, 313 Mass. 337, 348–49 (1943).

11. *Id.*

12. *MiGi, Inc.* v. *Gannett Massachusetts Broadcasters, Inc.*, 25 Mass. App. Ct. 394, 396 (1988).

13. *McCallum* v. *Lambie*, 145 Mass. 234, 238 (1887).

14. *McAvoy, supra* n.4, 401 Mass. at 597. In *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775–78 (1986), the Supreme Court held that in a libel case against a media defendant, the first amendment required that plaintiff bear the burden of proving falsity, and thus a state common law rule (similar to Massachusetts'), imposing the burden of proof on this issue on the defendant, was unconstitutional. In *McAvoy, supra*, the SJC did not decide whether *Hepps* applied in a case involving a nonmedia defendant. 401 Mass. at 597 n.4.

15. G.L.M. c.231, §92. However, in *Materia* v. *Huff*, 394 Mass. 328, 333 n.6 (1985), the Supreme Judicial Court held that this element of the statute is constitutionally invalid where the plaintiffs are public figures or public officials. The Court left open the issue of whether the same constitutional infirmity applies to actions brought by private plaintiffs. *Id.*

16. 37 J. Nolan, *Massachusetts Practice*, §99 at 125–26 (1979), and cases cited.

17. *Stone, supra* n.2, 367 Mass. at 860–61. Loss of prospective employment resulting from a defamatory reference has always been compensable. *E.g.*, *Doane* v. *Grew*, 220 Mass. 171, 176 (1915); *St. Clair* v. *Trustees of Boston University*, 25 Mass. App. Ct. 662, 665 n.2, *review denied*, 402 Mass. 1104 (1988). In a significant new development, however, the Appeals Court recently declined to disturb an award of damages for the loss of a job the plaintiff already held. In *Mendez* v. *M.S. Walker, Inc.*, 26 Mass. App. Ct. 431, 432 (1988), the plaintiff had worked for the defendant company as an employee at will. He was fired after the company's president told his supervisor that he had stolen company property. Although the plaintiff had only filed a defamation claim, asserting no cause of action for "wrongful termination" in any of its forms, the jury awarded damages for the loss of his job. On appeal, the defendant argued that the plaintiff's injuries resulted from the discharge rather than the slander and because the discharge was not unlawful in itself, the plaintiff's lost income, as opposed to his lost reputation, should not have been considered in assessing damages. The Appeals Court declined to consider this argument, solely because it had not been raised below. *Id.* at 435. Certainly, holding that lost wages are compensable whenever an employee is fired because of a defamatory accusation would radically transform the doctrine of employment at will. For a related discussion of *Mendez*, see *infra* notes 91–94 and accompanying text.

18. *Stone, supra* n.2, 367 Mass. at 860.

19. *Id.*

20. *See, e.g.*, *St. Clair, supra* n.17, 25 Mass. App. Ct. at 665 n.2 (where plaintiff lost a job opportunity after defendant defamed him in a reference, separate damages could not be awarded *seriatum* on theories of slander and intentional interference with advantageous relations).

21. *E.g.*, *Galvin* v. *New York, New Haven & Hartford Railroad Co.*, 341 Mass. 293, 296 (1960).

22. *E.g.*, *Pion* v. *Caron*, 237 Mass. 107, 111 (1921).

23. *E.g.*, *Mills* v. *W.T. Grant Co.*, 233 Mass. 140, 145 (1919).

24. *Ezekiel* v. *Jones Motor Co.*, 374 Mass. 382, 391 (1978); *Bander, supra* n.10, 313 Mass. at 348.

B. *Protected Expressions of Opinion*

Most of this article addresses employers' defamatory statements of *fact* about their employees; statements of pure *opinion* are immune from liability in the first instance. "[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[25] In sharp contrast, "there is no constitutional value in false statements of fact" and falsely defamatory factual statements enjoy no sanctuary under the first amendment.[26]

Whether a statement is one of fact or opinion is a question of law if reasonable persons could not decide the matter differently; but the issue is for the jury if the statement could reasonably be understood either way.[27] The best test seems to be whether the remark is susceptible of proof. A statement is factual if it can be proved, at least theoretically, to be true or false; it is an expression of opinion if it is subjective or open to speculation.[28] To say that John Smith is unfit for promotion may be a protected expression of opinion; to say that John Smith has stolen the company blind is an actionable statement of fact.[29] The court must consider not just one word or phrase but the entire statement in context, giving weight to the circumstances, the medium of dissemination, the audience, and any mitigating or cautionary terms that the publisher may have included.[30] Epithets deemed opinionated when uttered in the heat of a confrontational labor dispute might be taken as statements of fact when spoken calmly and with due reflection.[31]

Even an expression of otherwise unadulterated opinion may support a cause of action if it implies a basis in undisclosed fact.[32] Liability may come from saying too little rather than too much. Simply describing one's employee as an alcoholic may give him grounds to sue because the statement implies undisclosed evidence of excessive drinking; but noting that the employee had wine with dinner and concluding that he is an alcoholic is a protected expression of opinion based on disclosed, nondefamatory facts.[33]

Surely, an employer is entitled to its opinions of its employees, particularly when those opinions are imprecise and cannot be characterized as statements of particular facts.[34] Whether specific individuals should be hired, fired, promoted or demoted are "inherently subjective questions which rely as much on an assessment of [the company's] needs as on the plaintiff's capabilities."[35] Accordingly, to the extent that they neither express nor imply false statements of fact, evaluations and references ought to be protected absolutely as statements of pure opinion.

C. *Absolute and Conditional Privileges*

The law also provides absolute privileges for a narrow category of defamatory statements of fact. An absolute privilege is a license to defame, providing a complete defense even for statements which were maliciously motivated, known to be false, and published indiscriminately with reckless disregard for the rights of the person defamed.[36] Accordingly, absolute privileges are only justified in the most compelling circumstances. In Massachusetts, they are strictly confined to statements made in the course of litigation,[37] legislative proceedings,[38] or adjudicative agency hearings.[39] This is a measure of the paramount value which the law assigns to the free flow of information through the courts and the legislature. "[I]t is more important that witnesses be free from the fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy."[40]

Although no absolute privilege exists beyond the halls of government, conditional privileges are recognized in other settings where the law takes a more bal-

25. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

26. *Id.* at 340.

27. *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 709 (1987), *cert. denied*, 108 S.Ct. 1121 (1988).

28. *Cole* v. *Westinghouse Broadcasting Co., Inc.*, 386 Mass. 303, 310–12, *cert. denied*, 459 U.S. 1037 (1982).

29. *Id.* Although the accusation of theft would be actionable, defendant should prevail upon proof of the accusation's truth or a reasonable basis for belief in its truth.

30. *Id.* at 309.

31. *Id.* at 310. In *Tosti* v. *Ayik*, 386 Mass. 721, 723 (1982), the SJC stated that "[f]ederal labor law preempts State libel law to the extent that defamatory statements made in the context of a labor dispute are actionable only if made with knowledge or their falsity or with reckless disregard of the truth." The federal standard does not completely "preempt" state law so much as modify it to conform to first amendment standards. In some circumstances federal labor law may fully preempt state law—that is, remove the availability of a state law claim and consign a union worker to the remedies available under her collective bargaining agreement. This occurs when an employee's state law claim depends for its resolution on interpretation of the labor contract. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988). In most circumstances, however, unionized workers may pursue defamation claims without relying on the union contract. *E.g.*, *Linn* v. *Plant Guard Workers*, 383 U.S 53 (1966).

32. *King, supra* n.27, 400 Mass. at 713.

33. *Myers* v. *Boston Magazine Co.*, 380 Mass. 336, 339 (1980).

34. *Underwood* v. *Digital Equipment Corp., Inc.*, 576 F.Supp. 213, 217 (D. Mass. 1983), applying Massachusetts law and quoting *Cole*, *supra* n.28, 386 Mass. at 312 (no cause of action where plaintiff's employer opined after plaintiff's resignation that his departure was a "minor loss" and he should not be rehired).

35. *Underwood*, *supra* n.34, 576 F.Supp. at 217.

36. *Ezekiel*, *supra* n.24, 374 Mass. at 385; *Mezullo* v. *Maletz*, 331 Mass. 233, 236 (1954).

37. *E.g.*, *Aborn* v. *Lipson*, 357 Mass. 71, 72–73 (1970).

38. *E.g.*, *Sheppard* v. *Bryant*, 191 Mass. 591, 594–95 (1906).

39. *E.g.*, *Stepanischen* v. *Merchants Dispatch Transportation Corp.*, 722 F.2d 922, 932 (1st Cir. 1983). Originally, only defamatory statements deemed pertinent to the proceedings in which they were made were absolutely privileged. *E.g.*, *Hoar* v. *Wood*, 44 Mass. 193, 197 (1841). But appropriately liberal constructions of what may be pertinent have so eroded that limitation as to strip it of all effective meaning. *E.g.*, *Aborn*, *supra* n.37, 357 Mass. at 73.

40. *Aborn*, *supra* n.37, 357 Mass. at 72. It is curious that the law provides an absolute privilege only in settings where lawyers, legislators and judges ply their trades.

anced view, seeking not only to encourage uninhibited speech but also to guard against licentious defamation. Like absolute privileges, conditional privileges are created by circumstances. "An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."[41]

Unlike absolute privileges, however, conditional privileges are lost when abused. It has long been understood that people should be insulated from liability for what they say "when the cause or occasion of the publication is such as to render it proper and necessary for common convenience and the general welfare of society that the party making it should be protected from liability...*provided* it is made in good faith, and without a willful design to defame."[42] A conditional privilege is lost when the publisher's conduct or motives are inconsistent with the rationale which justifies the privilege.[43] The defendant has the burden to prove the existence of circumstances giving rise to a privilege.[44] The burden then shifts to the plaintiff to prove that the privilege was abused.[45]

One form of conditional privilege is created when publisher and recipient have a common interest and the communication is reasonably calculated to further it.[46] Among such conditionally privileged occasions are situations in which the publisher and the recipient share a legitimate business interest in the information exchanged.[47]

II. The Employer's Privilege

The employer's privilege is "a natural corollary" of these broader principles.[48] It is rooted both in self-interested rights and in disinterested duties. To protect themselves, employers are entitled to candid assessments of the people they hire and entrust with their affairs. To protect those who work for them, employers are not only allowed but required to investigate sexual harassment, invidious discrimination and other workplace misconduct. To protect outsiders, employers have a dispensation if not a duty to tell the unvarnished truth when asked to give references. None of these rights and duties can be discharged with due diligence unless employers are reasonably protected from liability while pursuing them. Accordingly, "[a]n employer has a conditional privilege to disclose defamatory information concerning an employee when the publication is reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job."[49]

The following discussion reviews the four most common scenarios giving rise to the employer's privilege and the three basic ways in which it may be lost through abuse.

A. *Privileged Occasions*

1. *Employee Evaluations*

The common law has long recognized that employers are entitled to accurate information about their employees' strengths and weaknesses.[50] Accordingly, employers and their managers are conditionally privileged to communicate frankly about the skills, performance and qualifications of their personnel. Standing alone, an unfavorable evaluation disseminated among legitimately interested persons will not support a defamation claim.[51] Nor does it matter whether the evaluation comprises a formal review[52] or a spontaneous critique of an employee's perceived shortcomings.[53] In either event, the employer's interest in assessing and communicating about the employee's fitness to do her job lends the privilege its legitimacy.[54] Beyond assessments of an employee's diligence, abilities and performance, appraisals of his character as well as his physical and mental health are also conditionally privileged, so long as they reasonably relate to his employment.[55]

Typically, an employee's reviews are prepared and disseminated entirely within the organization which employs her. But so long as two or more business entities share a common interest in the conduct and performance of each other's personnel, representatives of Company A enjoy a conditional privilege to make pertinent, unflattering comments to appropriate persons in Company B about the latter's employees.[56]

41. *Humphrey* v. *National Semiconductor Corp.*, 18 Mass. App. Ct. 132, 133, *review denied*, 393 Mass. 1102 (1984), *quoting Restatement (Second) of Torts* §594, at 263 (5th ed. 1977).

42. *Gassett* v. *Gilbert*, 72 Mass. 94, 97 (1856) (emphasis supplied).

43. *Doane*, *supra* n.17, 220 Mass. at 180.

44. *Humphrey*, supra n.41, 18 Mass. App. Ct. at 134 and cases cited.

45. *Id.*

46. *Sheehan* v. *Tobin*, 326 Mass. 185, 190–91 (1950); *Humphrey*, *supra* n.41, 18 Mass. App. Ct. at 133.

47. *Bratt* v. *International Business Machines Corp.*, 392 Mass. 508, 512–13 (1984); *Petitioner, Retailers Commercial Agency, Inc.*, 342 Mass. 515, 520 (1961); *Restatement (Second) of Torts* §594, comments e and f, at 265–66 (5th ed. 1977).

48. *Foley* v. *Polaroid Corp.*, 400 Mass. 82, 94–95 (1987).

49. *Bratt*, *supra* n.47, 392 Mass. at 509.

50. *Id.*; *Dexter's Hearthside Restaurant, Inc.* v. *Whitehall Co.*, 24 Mass. App. Ct. 217, 222, *review denied*, 400 Mass. 1104 (1987).

51. *McCone* v. *New England Telephone & Telegraph Co.*, 393 Mass. 231, 235–36 (1984) (remarks about employees contained in poor evaluations found privileged even though company policy required low ratings for a predetermined percentage of the workforce in order to achieve a "bell shaped curve" reflecting top to bottom ranges of performance and ability).

52. *E.g.*, *id.* at 232–33.

53. *E.g.*, *Foley*, *supra* n.48, 400 Mass. at 94.

54. *Bratt*, *supra* n.47, 392 Mass. at 509.

55. *Id.* at 516–17. The privilege should apply with equal force to evaluations of persons applying for positions as well as those who already have them. In either scenario, the employer has an equally legitimate interest in a frank evaluation.

56. *Humphrey*, *supra* n.41, 18 Mass. App. Ct. at 133–34 (a conditional privilege protected Company A's Regional Sales Manager who wrote to the President of Company B, expressing dissatisfaction with three of the latter's salesmen who sold Company A's products).

2. *Investigations of Misconduct in the Workplace*

An employer has "obvious and legitimate interests in determining the validity of an accusation of unlawful conduct leveled against [its] personnel."[57] So long as the employer acts upon such charges in good faith, with appropriate circumspection, and with reasonable cause to believe that they may be true, he is privileged to ask questions, make allegations and issue reports without fear of liability.[58]

Again, this aspect of the privilege is grounded not only in the employer's own interests but also in those of others. Employers are more than entitled to investigate workplace wrongdoing; they are bound by law to do so. For example, under Massachusetts law, as well as Title VII of the Civil Rights Act of 1964,[59] employers have an affirmative duty to maintain a workplace free of sexual harassment and intimidation[60] and to investigate sexual harassment charges.[61] Under the Federal Occupational Safety and Health Act ("OSHA"),[62] the employer's mandate to maintain a safe working environment includes a duty to investigate substance abuse and other safety hazards and discipline employees who violate OSHA regulations.[63] Even under traditional common law principles, employers are charged with a duty to maintain a safe environment for persons entering the workplace and may be held liable for their employees' violence.[64]

The privilege to conduct prudent, discreet and well meaning investigations of employee misconduct recognizes the employer's legitimate interest "in protecting its employees, in preserving employee morale, in promoting sound and efficient business operations and in insuring the highest level of professional conduct."[65] Workplace wrongdoing would rarely be addressed with appropriate dispatch if employers and their agents were likely to incur liabilities in the course of reasonable efforts to prevent or stop it. Indeed, failure to investigate alleged wrongdoing might even be deemed a form of acquiescence.[66]

3. *References*

"Where inquiries are made as to the character and capabilities of a former servant, the occasion is a privileged one. Of that there is no question. It is the typical case of a privileged occasion."[67]

The privilege to give unfavorable employment, credit and character references without undue liability benefits the recipient rather than the publisher. In knowingly passing off a dishonest, violent or incompetent employee on an unsuspecting prospective employer, the party giving the reference may do nothing to harm herself. Indeed, she may rid herself of a bad apple or, better yet, foist him off on a competitor. However, this is a disservice not only to the miscreant's new boss but also to his new coworkers and members of the public who will interact with him or pay for his work. An employer who tells the whole truth as she fairly sees it when asked for a reference by a legitimately interested party performs a public service. "Giving information as to the character and capabilities of a former servant...is not a legal obligation enforced by law...[but] [t]he law recognizes its existence as a social obligation which cannot be performed unless it creates a privileged occasion."[68]

Indeed, the day may not be far off when a past employer may be held liable for a falsely *favorable* reference. Massachusetts is among many jurisdictions which have recognized a cause of action for "negligent hire," rendering employers liable for their employees' crimes or negligence on the job where the employers were careless in screening them.[69] Third party complaints against past employers who failed to report such proclivities when asked if any existed may not be far behind.

Finally, most references are given with the express or constructive consent of the person defamed; and consent is a defense to libel or slander.[70] After asking for a reference from her former boss or supervisor or listing him as a reference in her application, a plaintiff is poorly positioned to complain when the result is not to her liking.[71] The privilege also applies, however, when the reference is given at the initiative of the prospective employer[72] or even with no solicitation at all, so long as the recipient is legitimately interested.[73] By implication, a defendant employer has been held protected even where a person asking about the defendant's former employee was not genuinely interested in hiring him, but was merely posing as such to elicit information. So far as the

57. *DiSilva v. Polaroid Corp.*, 1985 Mass. App. Div. 1, 4, 45 F.E.P. Cases 639 (Dist. Ct. 1985). This is a particularly thorough and well-considered Appellate Division opinion.

58. *Galvin, supra* n.21, 341 Mass. at 296, and cases cited, *DiSilva*, 1985 Mass. App. Div. at 4, and cases cited.

59. 42 U.S.C. §2000e *et seq*; G.L.M. c.151B §§4(1),16A; c.214 §1C; *College-Town, Division of Interco., Inc. v. M.C.A.D.*, 400 Mass.156, 163–67 (1987).

60. E.E.O.C. Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.11 (1988).

61. *College-Town, Division of Interco., Inc., supra* n.59, 400 Mass. at 163–67 and cases cited, *DiSilva, supra* n.57, 1985 Mass. App. Div. at 4–5.

62. 29 U.S.C. §651 *et seq*.

63. 29 U.S.C. §654(a); *Floyd S. Pike Electrical Contractor, Inc. v. OSHA*, 576 F.2d 72, 76 (5th Cir. 1978).

64. *See, e.g., Hobart v. Cavanaugh*, 353 Mass. 51, 52–53 (1967) (owner of service station held liable for station attendant's assault on a customer); *Rego v. Thomas Brothers Corp.*, 340 Mass. 334, 335 (1960) (employer of construction worker held liable for his attack on an intruder who interfered with his removal of boulders from a worksite).

65. *DiSilva, supra* n.57, 1985 Mass. App. Div. at 4.

66. *Id.* at 5 n.3.

67. *College-Town Division of Interco., Inc., supra* n.59, 400 Mass. 163–67; *Doane, supra* n.17, 220 Mass. at 176.

68. *Id.* at 177.

69. *Foster v. The Loft, Inc.*, 26 Mass. App. Ct. 289, 290, *review granted*, 403 Mass. 1102 (1988) (subsequently settled and dismissed); Silver, "Negligent Hiring Claims Take Off," 73 *A.B.A.J.* 72–78 (1987).

70. *Christopher v. Akin*, 214 Mass. 332, 334–35 (1913).

71. *Chilis v. Erhard*, 226 Mass. 454, 456 (1917); *Billings v. Fairbanks*, 136 Mass. 177, 178 (1883).

72. *Burns v. Barry*, 353 Mass. 115, 118–19 (1967).

73. *See e.g., Gassett, supra* n.42, 72 Mass. at 99 (agents of a charity

defendant knew, the inquiry was legitimate and the privilege was preserved.[74]

Of course, it is up to the plaintiff to prove that the defendant gave any defamatory reference at all.[75] Where no direct evidence exists that the defendant or any of its agents actually did give the plaintiff a poor review, "[w]ithout impermissible speculation, inferences to that effect could not be drawn merely from [the former employee's] lack of success in obtaining other employment."[76]

4. *Company Publications*

General circulation newspapers and magazines are conditionally privileged to report the news and make fair comment on any subject of public interest." The same conditional privilege covers publications distributed to limited groups who share a common interest.[78] This category includes bulletins, newsletters and other house organs which employers produce for employees. These should enjoy the same news and commentary privileges that cover more expansive journals. Because internal publications are a vehicle for employers to communicate with employees, they should also be covered by the employer's broad privilege to communicate with those who share an interest in the company's affairs.

B. *Losing the Privilege Through Abuse*

The employer's privilege protects free speech, promotes meritocracy in the workplace and serves other legitimate public interests, all by protecting well-intentioned communications among persons entitled to make and receive them. But along with the employer's protection from undeserved liability comes a corresponding diminishment of the employee's protection from unwarranted vilification. The common law's recognition of the employer's privilege constitutes a judgment that its benefits outweigh its costs. That rationale evaporates and the privilege is lost when an employer abuses it by "failing to confine itself to the purposes for which the law granted the privilege."[79]

The following discussion reviews the three principal forms of abuse through which the privilege may be destroyed.

1. *Knowing or Reckless Falsity*

When an employer discloses defamatory information about his employee in a privileged situation, the statement "may turn out not to be true...[but] [t]ruth or falsehood is not material if there is no abuse of the privilege or if no actual malice is shown."[80] Nevertheless, the privilege is meant to protect mistakes, not reckless or intentional falsehoods. It is settled that employers' false accusations are not privileged when they did not act on "their honest belief in the truth."[81] The employer need not prove that his statements were true; the employee must prove them false and demonstrate that the employer had no fair grounds for believing them.[82] Certainly, proof that the employer actually knew his statement was false has always been sufficient to defeat the privilege.[83]

On the other hand, an equally venerable principle permits an employer to communicate information that he has not verified. One old opinion goes so far as to say that in giving a reference about a former employee, an employer

> would not do his whole duty if he should confine his answer to facts which he knows to be facts of his own knowledge. Nor would he do his whole duty if he should confine himself to giving information which he has fully investigated. Indeed [so long as he informs the party making the inquiry that the information is unverified and of uncertain trustworthiness] he would fail in doing his full duty if he should omit to impart any material information which has come to him, even if he has not attempted to investigate it at all.[84]

An employer does not forfeit his privilege simply through negligent failure to determine the truth of what he said unless there is evidence that he actually disbelieved it "or that his belief was not reasonably grounded."[85] The employer must actually know that the statement is false, or disseminate it with "reckless disregard" for whether it is true or not.[86] The rationale for this heightened degree of protection stems from the very nature of a conditional privilege. Simple negligence gives rise to liability where no privilege exists. Therefore, "[t]o apply the negligence standard to a conditional privilege would defeat the concept [of a privileged communication] and its objective of promoting the free flow of

were privileged to issue unsolicited public warnings about a dishonest former employee who continued after her discharge to collect contributions which she kept for herself; the charity's "private interest and their duty to the public alike required that such notice should be given, if they believed the facts stated in it to be true, and acted honestly and in good faith in making the publication"].

74. *Burns, supra* n.72, 353 Mass. at 119.

75. *Mailhoit v. Liberty Bank & Trust Co.*, 24 Mass. App. Ct. 525, 527 n.3 (1987).

76. *Id.*

77. *E.g., Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 74–75 (1979), *cert. denied*, 444 U.S. 1060 (1980).

78. *E.g., Sheehan, supra* n.46, 326 Mass. at 191.

79. *Bander, supra* n.10, 313 Mass. at 343. For a recent review of cases discussing the conditional nature of the privilege and the ways in which it may be lost, *see Judd v. McCormack*, 27 Mass. App. Ct. 167, 173–76 (1989).

80. *Dexter's Hearthside Restaurant, Inc., supra* n.50, 24 Mass. App. Ct. at 222–23; *Burns, supra* n.72, 353 Mass. at 119.

81. *Gassett, supra* n.42, 72 Mass. at 99.

82. *Id.*

83. *E.g., Childs, supra* n.71, 226 Mass. at 457.

84. *Doane, supra* n.17, 220 Mass. at 177–78.

85. *Foley, supra* n.48, 400 Mass. at 95–96.

86. *Bratt, supra* n.47, 392 Mass. at 515–16. The term of art for a knowing or reckless publication of a false and defamatory communication is "actual malice," which does not necessarily entail ill will or hatred, the term of art for which is "specific malice." (*E.g. Stone, supra* n.2, 367 Mass. at 867). These and other variations on the "malice" theme have injected much confusion into an already tangled area of the law.

information to further a legitimate private or public interest."[87]

"Reckless disregard for the truth" cannot be comprehensively defined. Indeed, the standard seems to shift with the type of privilege at issue. At least where the defendant draws his privilege from the fact that he defamed a public figure or public official, a finding of recklessness requires evidence that he not only failed to verify the statement but actually doubted it himself. "That information was available which would cause a reasonably prudent man to entertain serious doubts is not sufficient."[88] The standard is subjective; it must be proved that the defendant himself mistrusted what he said.[89] Further, plaintiffs must prove such recklessness not merely by a fair preponderance, but by clear and convincing evidence.[90]

However, in *Mendez* v. *M.S. Walker, Inc.*, the Appeals Court applied a very different standard in considering whether an *employer* had forfeited his privilege.[91] In *Mendez*, the employer had accused his employee of stealing. The court suggested neither that the employer had no basis for believing this, nor that he had actually entertained serious doubts. On the contrary, he had watched the employee load what appeared to be a carton of the company's goods into the trunk of his car.[92] Notwithstanding, where the employer's suspicions were "easy and relatively sure of verification," his failure to investigate them deprived him of his privilege when they turned out to be false.[93] In sum, the court permitted a finding of recklessness based on what the employer *should* have doubted, not on what he did doubt: "Reckless disregard does not necessarily imply that the charge has a flimsy basis...Recklessness can also be shown by a failure to verify in circumstances where verification is practical and the matter is sufficiently weighty to call for safeguards against error."[94]

There is little to distinguish such a broad definition of "knowing and reckless falsity" from simple negligence. In either case, defendants are required to act "reasonably in checking on the truth or falsity...of the communication before publishing it."[95] It is difficult to reconcile *Mendez* with prior decisions of the Supreme Judicial Court.[96] Indeed, just one year before *Mendez*, the Appeals Court itself held that "[s]imple negligence, want of sound judgment, or hasty action will not cause loss of the privilege."[97]

Further uncertainty results from other case law exonerating employers from liability for defamation despite their failure to verify suspicions of criminal wrongdoing before publishing them. In *Arsenault* v. *Allegheny Airlines, Inc.*,[98] the United States District Court for the District of Massachusetts applied Massachusetts law and held that where an employer had reason to believe what he wrote when he wrote it, his letter suggesting that a certain employee had aided and abetted misuse of company funds retained its privileged status even though the putative thief was later acquitted of larceny.[99] Similarly, in *Foley* v. *Polaroid Corp.*, even *after* a male supervisor was acquitted of sexually assaulting a female employee, the Court held that a Polaroid executive was privileged to tell a colleague that he remained convinced of the accused man's guilt where no evidence existed that he did not believe it.[100]

Notwithstanding the fine lines between mere negligence and recklessness, broad general principles can be drawn from the foregoing cases. First, statements of pure opinion about an employee's conduct, character or performance are never actionable so long as they imply no undisclosed facts and no evidence exists that they were not genuinely believed when made. Second, where defamatory facts are at issue, the publisher's actual belief in their truth and the absence of recklessness in holding and expressing that belief will generally preserve the privilege; but if ready means are available to confirm or refute the validity of the charge with little or no expense or delay, failure to do so may vitiate the privilege. Third, an employer need not believe charges of misconduct in order to reveal them to legitimately interested parties while making reasonable inquiries. Finally, even false and unsubstantiated hearsay may be privileged so long as the employer identifies it as such and does not vouch for its truth or reliability.

2. *Malicious Motivation*

Apart from the content of the communication, the privilege may be lost through malicious motives. "Malice, which destroys the defense of privilege, must be taken to mean that the defamatory words, although spo-

87. *Bratt*, *supra* n.47, 392 Mass. at 515 n.11.

88. *Stone*, *supra* n.2, 367 Mass. at 867–68.

89. *Id.*; *McAvoy*, *supra* n.4, 401 Mass. at 599.

90. *Stone*, *supra* n.2, 367 Mass. at 870.

91. 26 Mass. App. Ct. 431, 433–34 (1988).

92. *Id.* at 434. When confronted with this evidence, the employee claimed that the carton contained not company goods but his own property. He invited his supervisor to inspect the carton and satisfy himself of the employee's innocence. The supervisor declined. *Id.*

93. *Id.*

94. *Id.* at 433–34.

95. *Appleby* v. *Daily Hampshire Gazette*, 395 Mass. 32, 36 (1985), *quoting Restatement (Second) of Torts* §580B comment g (5th ed. 1977).

96. *E.g.*, *Petitioner, Retailers Commercial Agency, Inc.*, *supra* n.47, 342 Mass. at 522, *quoting Fecue* v. *West*, 233 N.Y. 316, 322, 135 N.E. 515, 517 (1922) ("the conduct which would destroy a qualified privilege must be 'more than mere negligence or want of sound judgment' and there must be 'more than hasty or mistaken action'").

97. *Dexter's Hearthside Restaurant, Inc.*, *supra* n.50, 24 Mass. App. Ct. at 223.

98. 485 F.Supp. 1373 (D. Mass.), *aff'd*, 636 F.2d 1199 (1980), *cert. denied*, 454 U.S. 821 (1981).

99. *Id.* at 1380.

100. 400 Mass. 82, 94–96 (1987).

ken on a privileged occasion, were not spoken pursuant to the right and duty which created the privilege but were spoken out of some base ulterior motive."[101] The privilege exists to advance legitimate interests, not as a pretext for giving vent to grudges, prejudices or personal rivalries. Even valid accusations may be unprivileged if made for invalid reasons.[102]

Where an occasion would otherwise be privileged, the employee has the burden of proving improper motivation.[103] Often, this is not easy, particularly because a combination of proper and improper purposes will not defeat the privilege. So long as the "motivating force" is legitimate, ill will is immaterial.[104] Nonetheless, circumstances may support an inference of nefarious motives even if the defendant does not admit them. The jury may be permitted to decide whether ill will was the motivating force or merely coincidental where evidence suggests that the person who defamed the employee disliked him,[105] was his rival,[106] bore him a grudge for some previous incident,[107] vilified him angrily or cursed or shouted at him,[108] maligned him repeatedly,[109] needlessly did so in the presence of others,[110] or sought to retaliate against him for exercising lawful rights.[111]

On the other hand, the privilege is not defeated by the mere fact that the communication was intemperate.[112] Although the employer expressed himself more vehemently than he might have, he may testify that his motives were legitimate, leaving the jury to find the truth.[113] Even if a defamatory statement was tinged with hostility, so long as it was made to serve a legitimate end, the privilege remains.[114] It is neither surprising nor blameworthy for an employer to be irked about an employee's misfeasance or malfeasance. Certainly, juries should be cautioned not to confuse the intensity of concern which justifies the employer's privilege with the "malice" which negates it. An employer or his agent is not acting maliciously simply by doing his job.[115]

Given the endless diversity of circumstances, the simplest statement of the rule is that "the defendant is not liable if he spoke the words in good faith under the right or duty which the occasion created, and that he is liable if he spoke the words from some other motive."[116]

3. *Recklessly Excessive Publication*

Even with the purest of motives and the highest regard for the truth, an employer may still lose his privilege by recklessly giving "excessive publicity" to a defamatory communication. This form of abuse lies neither in the publisher's ill will nor in his mendacity but in his amplification of the slander or libel beyond what is reasonably necessary. An excessive publication may say more than is required to advance a legitimate purpose, say it more often or more loudly than is needed, or gratuitously spread it beyond the circle of persons entitled to hear it.[117] The plaintiff has the burden of proving excessive publication.[118]

In the early cases, juries were permitted to infer from such excesses that the employer's real purpose was to injure the employee maliciously rather than to serve a legitimate end.[119] But in *Galvin* v. *New York, New Haven & Hartford Railroad*,[120] the Supreme Judicial Court broke new ground and held that the privilege may be lost even without actual or imputed malice, if the publication is "so unreasonable or excessive as to constitute an abuse of the privilege."[121]

In *Bratt* v. *International Business Machines Corp.*,[122] however, the Court cut back on the *Galvin* rule and held that even "unnecessary, unreasonable or excessive" publication will not destroy the privilege unless the defendant acted recklessly. Even under the older holdings, the mere fact that bystanders may have overheard a slanderous remark would not destroy the privilege;[123] but *Bratt* goes much further and appears to require *scienter*: the publisher must know that he is publishing excessively before the privilege is lost. The Court in *Bratt* cited the commentary accompanying §604 of the *Restatement (Second) of Torts*, which suggests that there is no excessive publication so long as the

101. *Dexter's Hearthside Restaurant, Inc., supra* n.50, 24 Mass. App. Ct. at 223.

102. *See, e.g., Ezekiel, supra* n.24, 374 Mass. at 390 (employer had no privilege to accuse employee of stealing company property where it was motivated by his prior industrial accident claims and a desire to rid itself of those who make them); *Bander, supra* n.10, 313 Mass. at 344 (where motivated by a desire to humiliate an employee and "make an example of him," employer had no privilege to vilify him as a "forger" and a "disloyal disgrace" after he testified to a congressional committee that the company signed policyholders' names to board of directors election ballots without their consent).

103. *Ezekiel*, 374 Mass. at 390.

104. *Id.* at 391, and cases cited.

105. *Grindall* v. *First National Stores, Inc.*, 330 Mass. 557, 559 (1953); *Doane, supra* n.17, 220 Mass. at 176.

106. *Childs, supra* n.71, 226 Mass. at 457.

107. *Grindall, supra* n.105, 330 Mass. at 559; *Childs, supra* n.71, 226 Mass. at 457.

108. *Grindall, supra* n.105, 330 Mass. at 559; *Pion* v. *Caron*, 237 Mass. 107, 110 (1921); *Doane, supra* n.17, 220 Mass. at 181; *Robinson* v. *Van Auken*, 190 Mass. 161, 166 (1906).

109. *Bander, supra* n.10, 313 Mass. at 345.

110. *Galvin, supra* n.21, 341 Mass. at 298; *Grindall*, 330 Mass. at 559.

111. *Bander*, 313 Mass. at 344; *Ezekiel*, 374 Mass. at 384–89.

112. *Atwill* v. *Mackintosh*, 120 Mass. 177, 182–83 (1876).

113. *Childs, supra* n.71, 226 Mass. at 457.

114. *Sheehan, supra* n.46, 326 Mass. at 195.

115. *DiSilva, supra* n.57, 1985 Mass. App. Div. at 6.

116. *Doane, supra* n.17, 220 Mass. at 180.

117. *See infra* notes 125–27.

118. *Foley, supra* n.48, 400 Mass. at 95.

119. *E.g., Christopher, supra* n.70, 214 Mass. at 334; *Atwill, supra* n.112, 120 Mass. at 183; *Brow* v. *Hathaway*, 95 Mass. 239, 242–43 (1866).

120. 341 Mass. 293, 298 (1960).

121. *Id.*

122. 392 Mass. 508, 513–17 (1984).

123. *E.g., Billings* v. *Fairbanks*, 136 Mass. 177, 179 (1883).

publisher: (a) reasonably believed that he was pursuing proper means to communicate with a legitimately interested recipient; or (b) made a merely "incidental" publication to unprivileged persons in the ordinary course of business; or (c) made a remark which unprivileged persons overheard simply because they were on the scene.[124]

However, at least three different scenarios continue to exist in which the privilege may be lost through excessive publication. First, the employer may say too much, disclosing more facts or indulging in more hyperbole than legitimate ends require.[125] Second, the employer may rebuke the employee too often or with too much enthusiasm.[126] Third, the employer may lose his privilege through indiscretion, recklessly spreading the defamation to persons who are not legitimately entitled to hear it.[127] Conversely, however, a plaintiff will not be heard to complain if he was the one who insisted on airing the matter in front of bystanders.[128]

The privileged circle expands and contracts from case to case. It generally includes the plaintiff's supervisors,[129] the company's attorneys,[130] its security personnel (at least in cases of alleged misconduct),[131] persons whose jobs involve employee relations,[132] clerical workers who type and transmit sensitive letters and memoranda,[133] and any other necessary or legitimately desirable participant in the evaluation, investigation or other activity that renders the communication privileged.[134]

III. Summary Judgment

"In the area of defamation, summary judgment procedures have been described as particularly appropriate because 'the stake here....is free debate....The threat of being put to the defense of a lawsuit...may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.' "[135] To be sure, persons who may have lost their good names unjustly through malicious or reckless vilification are entitled to make their cases to a jury; but some judges are inappropriately reluctant to dispose of frivolous claims summarily. There is ample support for a more decisive approach in the appellate decisions. Time and again, summary dismissals of defamation claims have been affirmed where the plaintiff produced no specific evidence sufficient to overcome the defendant's privilege.[136]

In employment cases, it is more than clear that a plaintiff states no defamation claim if he points to no specific facts suggesting that the employer abused his privilege.[137] "A party against whom summary judgment is sought is not entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim."[138] If the record contains no evidence that the employer recklessly abused its privilege, summary judgment for the employer should be appropriate. Though *Bratt* v. *International Business Machines Corp.* was not decided on summary judgment, its theme is important to many summary judgment cases: "*Whatever* the manner of abuse, recklessness, at least, should be required" to state a claim.[139]

Particularly when all of the circumstances have been disclosed and the record is replete with depositions, affidavits and other documentary evidence, the court may well have all it needs to award summary judgment, even when motive, intent or state of mind is at issue, so long as the plaintiff can point to no specific evidence from which a jury would be permitted to infer abuse of privilege.[140] Merely suggesting, without more, that an employer or its agent may have been hostile to the plaintiff because of some unrelated event is not enough to defeat a properly supported motion.[141] "[W]here it is unlikely that the plaintiff will succeed on the merits of his claim, courts have been more willing, within the area of libel than elsewhere, to grant sum-

124. *Bratt*, *supra* n.47, 392 Mass. at 515 n.11.

125. *E.g.*, *Sheehan*, *supra* n.46, 326 Mass. at 193–94 (a union magazine might legitimately report that members of the brotherhood assaulted a business agent but an unsubstantiated embellishment suggesting the victim was "old enough to be their father" was excessive); *Brow*, *supra* n.119, 95 Mass. at 243 (employer may accuse employee of theft if circumstances warrant such a charge but he may not accuse her of unchastity for good measure; no allegations can be made which are "not appropriate to the legitimate objects of the occasion").

126. *See, e.g.*, *Bander*, *supra* n.10, 313 Mass. at 344 (where executive heatedly condemned on three different occasions employee who gave unwelcome congressional testimony, such "expressions so often repeated in a manner so unrestrained were unnecessary in order to secure the benefit of the privilege"); *Doane*, *supra* n.17, 220 Mass. at 177 ("if there is great excess in repeating what he has heard there is evidence that the defendant was not acting within the privilege which the occasion gave him but outside it").

127. *E.g.*, *Galvin*, *supra* n.21, 341 Mass. at 298 (the privilege was lost where the employer's agent loudly and repeatedly accused employee of theft before a growing crowd of onlookers, even after employee asked that the inquiry continue in private).

128. *Christopher*, *supra* n.70, 214 Mass. at 334–35.

129. *E.g.*, *McCone*, *supra* n.51, 393 Mass. at 236.

130. *E.g.*, *DiSilva*, 1985 Mass. App. Div. at 6.

131. *Id.*

132. *E.g.*, *Mendez*, *supra* n.17, 26 Mass. App. Ct. at 433.

133. *E.g.*, *Arsenault*, *supra* n.98, 485 F.Supp. at 1377.

134. *Bander*, *supra* n.10, 313 Mass. at 336.

135. *Cefalu*, *supra* n.77, 8 Mass. App. Ct. at 74, *quoting Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

136. *E.g.*, *Pritsker* v. *Brudnoy*, 389 Mass. 776, 783 (1983); *Myers*, *supra* n.33, 380 Mass. at 337; *MiGi, Inc.*, *supra* n.12, 25 Mass. App. Ct. at 398.

137. *McCone*, *supra* n.51, 393 Mass. at 236.

138. *Dexter's Hearthside Restaurant, Inc.*, *supra* n.50, 24 Mass. App. Ct. at 223.

139. *Bratt*, *supra* n.47, 392 Mass. at 515 (emphasis supplied).

140. *Arsenault*, *supra* n.98, 485 F.Supp. at 1378–81.

141. *Driscoll* v *Boston Edison Company*, 25 Mass. App. Ct. 954, 956 (1988) (rescript).

mary judgment."[142] With the preservation of free speech and the uninhibited sharing of information at stake, there is ample reason for such liberality.

IV. Staying Out of Trouble

No employer can immunize itself from defamation litigation, but prudent management can reduce the errors, excesses and carelessness which most often produce it.

First, with respect to references, the most cautious policy is to give none at all. Many companies invariably respond to reference requests with nothing more informative than the title, job description and employment dates of the person about whom the inquiry is made. This is the safest course; but it poorly serves the common interest. At some point, an uninformative reference may even produce a lawsuit for contributing to another employer's "negligent hire." Straightforward opinions about a former employee's work, work habits and character are well protected by the employer's privilege, so long as they are reasonably based and rendered without unseemly vitriol. Certainly, companies that do give only name, rank and serial number in response to requests for references should do so uniformly, so that good performers will not be penalized by inferences to the contrary and poor performers cannot argue that no reference is a good reference.

Second, evaluations, investigations of misconduct, references and similar matters should be coordinated by persons sensitive to the issues discussed in this article. In larger organizations, all such matters should be referred to the personnel department. In smaller ones, at least one senior manager should be trained and directed to coordinate them.

Third, sensitive communications should be strictly confined to those who need to know. When references are given, employers should take precautions to ensure that the inquiring party is who he claims to be and is legitimately interested. Internally, oral reviews should be delivered behind closed doors and no employee should be dressed down in front of others. Written evaluations should be typed by trusted secretaries (or the persons who write them) and delivered to their subjects in hand. Employers should either destroy copies of written references, investigatory reports and evaluations after the event or should keep them under lock and key. Similarly, care should be taken to limit access to data stored in computer systems.

Fourth, no reference, evaluation or report should contain any information not reasonably related to the employee's fitness to perform his job.

Fifth, all investigations, evaluations, and references should be scrupulously fair, discreetly conducted and carefully considered. Employees charged with wrongdoing should be permitted to explain themselves, confront their accusers and challenge any allegations before they are made to or in the presence of persons other than authorized investigators.

Finally, employers should closely screen all press releases, newsletters, and other publications. Editors and managers should think more than twice before publishing derogatory material unless its accuracy is unimpeachable and the necessity for its publication is clear.

Conclusion

Reduced to its essence, the law of defamation generously protects employers from incurring unfair liability in the course of legitimate efforts to obtain information about the talents, ability, conduct and performance of their employees while protecting the employees from malice, reckless falsity or reckless indiscretion. While the balance may not be easily struck in a particular case, the governing principles are likely to produce just results when applied with care and reason.

142. *Cefalu, supra* n.77, 8 Mass. App. Ct. at 74, *quoting Herbert v. Lando*, 568 F.2d 974, 979 n.16 (2d Cir. 1977), *rev'd on other grounds*, 441 U.S. 153 (1979).

ALASKA STATE LEGISLATURE
HOUSE BILL NO. 441

HISTORY IN THE HOUSE

1992

Read first time and refe d to:
2/5 L&C, JUD

L&C RPT CS( ) New Title
2/19 4 DP ~~0~~ DNP ~~0~~ NR ~~0~~ AM
FN 2 0FN Previous FN

JUD RPT CS( ) New Title
3/9 6 DP 0 DNP 0 NR 0 AM
FN 0FN 2 Previous FN 0

RPT CS( ) New Title
DP DNP NR AM
FN 0FN Previous FN

4/1 Read second time
CS( ) Adopted

Amended

4/1 Advanced

4/1 Read third time

Return to second for specific amendment

4/1

PASSED	EFD Same ___ or
Yeas 34	Yeas
Nays 0	Nays
Excused 2	Excused
Absent 4	Absent

___Intent adopted

Reconsideration
Reconsideration not taken up

PASSED ON RECON.	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

___Intent adopted

4/1 Reported correctly engrossed
Signed by Speaker, to the Senate

Kristin Green
Chief Clerk of the House

HISTORY IN THE SENATE

1992

4/2 Read first time and referred to:
L&C, JUD

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ Rules Calendar(___) CS ___AM ___Other
___New Title ___Same Title ___Previous FN
___FN ___0FN

Read second time

___ CS Adopted (___) ___New Title
___Amended ___Advanced

Read third time

___ Letter of Intent adopted
___ Return to second for specific amendment

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reconsideration
Reconsideration not taken up

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reported correctly engrossed
Signed by President, to the House

Secretary of the Senate

HB

HB

445

Alaska State Legislature
House of Representatives

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SESSION

P.O. Box V
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Representative Dave Choquette

M E M O R A N D U M

DATE: April 7, 1992

TO: Senator Drue Pearce, Chairwoman
Senator Drue
Senate Labor & Commerce Committee

FROM: Rep. Dave Choquette DAVE THANKS!

RE: CSHB 445 (L&C)am, "An Act relating to an alcohol server education course."

I respectfully request that you schedule CSHB 445 (L&C)am for a hearing before the Senate Labor & Commerce Committee at your earliest convience.

As you are well aware, alcohol abuse is a severe problem in Alaska, impacting individuals, families, and communities throughout our State. In fact, Alaska ranks 4th in the nation for per capita alcohol consumption, and has one of the highest rates of fetal alcohol syndrome in the country, with more than 30 infants born each year with alcohol related impairments.

In 1990, there were more than 1600 alcohol related vehicular accidents in Alaska which resulted in more than 40 fatalities. In Anchorage alone there were more than 1,800 DWI arrests in 1991.

Over the interim I worked with Mothers' Against Drunk Driving (MADD), the alcohol industry, the Department of Motor Vehicles, and the A.B.C. Board to help address the alcohol problems our State faces. One of the results of this cooperative effort is HB 445.

Under HB 445, the A.B.C. Board would establish criteria with which to evaluate alcohol server education programs currently available, and then approve a package of alcohol server education courses. This package would include a variety of courses which would ensure accessibility to alcohol servers in both urban and rural Alaska. Various instruction mediums, ranging from classroom instruction to viewing a video cassette followed by written exercises, would likely be utilized depending on the program.

Courses would include such topics as alcohol's affect on the body and behavior, particularly driving ability, drunk driving and civil liability laws, identifying fraudulent IDs, methods of recognizing

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the problem drinker, use of community treatment programs, and methods to peacefully terminate service to the problem customer and get him or her home safely, to name a few.

Alcohol servers would have 30 days from the date the A.B.C. Board approves a package to complete a course, and, for new employees, 30 days from the date of hire. Proof of completion of an approved course must be kept on the licensed premises during working hours.

Alcohol server education is already required by ordinance in the Municipality of Anchorage.

CSHB 445 (L&C)am, if enacted, should go a long way towards reducing incidents of drunk driving, and will aid problem drinkers by helping alcohol servers identify and intervene before they endanger themselves and others.

This bill maintains a zero fiscal note, and has the support of the Alaska Cabaret, Hotel, Restaurant & Retailers Association, the Anchorage Restaurant & Beverage Association, Mothers' Against Drunk Driving, the Municipality of Anchorage's Health & Human Services Commission, the Bristol Bay Area Health Corporation, and the A.B.C. Board. I've attached these and other letters of support.

If you have any questions, please contact myself or my staff, Josh Fink, at x2995.

Thank you for your timely consideration of this request.

FISCAL NOTE

No. 1

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill Version: CSHB 445(L&C)
(H) Publish Date: 3/2/92

Revision Date: _____ Department Affected: REVENUE

Title: ALCOHOL SERVER EDUCATION COURSE BRU: ALCOHOLIC BEVERAGE CONTROL BOARD

Component: OPERATING

Sponsor: REP. CHOQUETTE

Requestor: HOUSE L & C COMMITTEE COMPONENT SERIAL NO. 0 1 0 0

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year impact: NONE

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: PATRICK L. SHARROCK Phone: 277-8638

Division: ALCOHOLIC BEVERAGE CONTROL BOARD Date: 2-11-92

Approved by Commissioner: _____

Agency: DEPARTMENT OF REVENUE Date: 2/12/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Otc., & Impacted Agency(ies).

Rev 10/7/91

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Alaska State Legislature
House of Representatives

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Representative Dave Choquette

SPONSOR'S STATEMENT FOR HOUSE BILL 445:

"AN ACT RELATING TO AN ALCOHOL SERVER EDUCATION COURSE"

Alcohol abuse is a severe problem in Alaska, impacting individuals, families, and communities throughout our State. In fact, Alaska ranks 4th in the nation for per capita alcohol consumption, and has one of the highest rates of fetal alcohol syndrome in the country, with more than 30 babies each year born with alcohol related impairments.

In 1990, there were more than 1600 alcohol related vehicular accidents which resulted in more than 40 fatalities. 180 of those accidents were caused by alcohol impaired minors which resulted in 6 of those deaths. In Anchorage alone there were more than 1,800 DWI arrests in 1991.

Over the interim I worked with Mothers' Against Drunk Driving (MADD), the alcohol industry, the Department of Motor Vehicles, and the A.B.C. Board to address this problem. The result of this cooperative effort is HB 445.

This legislation would require alcohol servers to take an approved alcohol server education course within 30 days of being hired. This training would include such topics as alcohol's affect on the body and behavior, particularly driving ability, drunk driving and civil liability laws, identifying fraudulent IDs, methods of recognizing the problem drinker, use of community treatment programs, and handling problem customers to cut off service and get them home safely.

The A.B.C. board would establish criteria with which to evaluate education programs currently available, and approve a package of alcohol server education courses. This package would include a variety of approved courses which would ensure accessibility to alcohol servers in both urban and rural Alaska at minimal cost, most likely utilizing instruction mediums varying from the classroom to the viewing of video cassettes followed by written excercises or an exam.

HB 445, if enacted, should go a long way towards reducing incidents of drunk driving, and will aid problem drinkers by helping alcohol servers identify and intervene before they endanger themselves and others.