ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672 634
8369 SENATE LABOR & COMMERCE

[11] The California Supreme Court, in deciding a similar case, concluded that the fundamental purpose of workmen's compensation is to protect individuals from the "special risks" of employment. *Laeng*, 494 P.2d at 8–9. Therefore, when an employer exposes potential employees to risks inherent in a tryout period and the applicant is under his direction or control, any injury resulting during such a period is compensable as a matter of law. *Id. See also Mansfield Enters., Inc. v. Warren*, 154 Ga.App. 863, 270 S.E.2d 72, 74 (1980); *Moore*, 223 N.W.2d at 648; *Venezian Lamp Co.*, 168 N.Y.S.2d at 766.

[12] The Lodge argues that the tryout exception analysis is inappropriate to this case because Childs was on a personal errand for Tulin and the Lodge did not control the time, manner and method of work. We cannot accept this argument. These facts were disputed at the hearing and never decided by the Board.

[13] It is not this court's task on review to reweigh conflicting evidence, or substitute its judgment for that of the Board. *Whaley v. Alaska Workers' Compensation Bd.*, 648 P.2d 955, 957 (Alaska 1982). Nor is it within the province of this court to reweigh witness credibility and competing inferences from testimony because those functions are reserved to the Board. *See Delaney v. Alaska Airlines*, 693 P.2d 859, 863 (Alaska 1985). Accordingly, this court may not ascertain the facts of this case. However, it is sufficient to note, as suggested by the dissenting board member, that a tryout period may have been initiated.

III. CONCLUSION

The decision of the superior court is REVERSED and the case is REMANDED to the superior court with directions to remand it to the Board for further proceedings consistent with this opinion.

Hollis VAN BIENE, Personal Representative of the Estate of Michael Brian Van Biene, and Stanley Thomson, Personal Representative of the Estate of Stanley Mark Thomson, Appellants,

v.

ERA HELICOPTERS, INC.; Employers Insurance of Wausau; Rowan Companies, Inc.; Intercontinental Dynamics Corporation; Gates Learjet, Appellees.

No. S–2571.

Supreme Court of Alaska.

Aug. 18, 1989.

Estates of two airline pilots who died in an airplane crash brought suit against the employer for the intentional tort of "overworking" the two pilots and against the employer's workers' compensation carrier for its negligence in the inspection, certification, authorization and approval of the employee's working conditions. The Superior Court, Third Judicial District, J. Justin Ripley, J., dismissed the claims, and the estates appealed. The Supreme Court, Moore, J., held that: (1) complaint alleging that employer violated a number of FAA regulations in dispatching pilots for a night flight without adequate rest or sleep, failed to allege the type of intentional tort actionable outside Workers' Compensation Act; (2) exclusivity doctrine did not bar negligence action against employer's workers' compensation carrier for negligent inspection of employer's workplace and therefore estates of pilots could bring suit against employer's workers' compensation carrier for negligent performance of a safety inspection; and (3) workers' compensation carrier could be held liable to estates of deceased pilots for negligent performance of a safety inspection if insurer actually inspected the working conditions of the employer prior to the accident.

Affirmed in part, reversed in part, vacated in part and remanded.

VAN Biene v. ERA

1. Workers' Compensation ⇐2084, 2093, 2168

Liability of an employer under Workers' Compensation Act is exclusive and in place of all other liability of employer and any fellow employee to the employee, employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from employer or fellow employee; however, exception to exclusivity doctrine exists in cases of intentional torts committed by a fellow employee or employer. AS 23.30.055.

2. Workers' Compensation ⇐2093

Complaint alleging that employer violated a number of FAA regulations in dispatching pilots for a night flight without adequate rest or sleep, failed to allege the type of intentional tort actionable outside Workers' Compensation Act. AS 23.30.055.

3. Workers' Compensation ⇐2161

Exclusivity doctrine did not bar negligence action against employer's workers' compensation carrier for negligent inspection of employer's workplace and therefore estates of pilots could bring suit against employer's workers' compensation carrier for negligent performance of a safety inspection. AS 23.30.015(a), 23.30.055.

4. Workers' Compensation ⇐2161

Employer's workers' compensation carrier could be held liable to estates of deceased pilots for negligent performance of a safety inspection if insurer actually inspected the working conditions of the employer prior to the accident.

5. Parties ⇐65(1)

Trial court did not abuse its discretion in dismissing claims of estates of deceased pilots against Doe defendants where estates were unable to identify which allegedly defective component of airplane was manufactured by Doe defendants.

6. Death ⇐109

Award of 80% of actual attorney fees to employer was not manifestly unreasonable where pilots' estates' claims against employer were barred by exclusivity doctrine of Workers' Compensation Act. AS 23.30.055.

Robert H. Wagstaff, Wagstaff, Pope & Clocksin, Anchorage, for appellants.

Clark Reed Nichols, Perkins, Coie, Anchorage, for appellees.

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

OPINION

MOORE, Justice.

I. INTRODUCTION

This appeal arises out of litigation by the estates of two airline pilots who died in an airplane crash while employed by ERA Helicopters, Inc. (ERA). The estates seek recovery against ERA for the intentional tort of "overworking" the two deceased pilots and against Employers Insurance of WAUSAU (WAUSAU), ERA's workers' compensation carrier, for its negligence in the inspection, certification, authorization, and approval of ERA's working conditions.

For the reasons set forth below, we affirm the trial court's dismissal of the claims against ERA and the claims against the "Doe defendants." We reverse the trial court's dismissal of the claims against WAUSAU.

II. FACTS AND PROCEEDINGS

Stanley Thomson and Michael Van Biene were pilots employed by ERA. At 2:00 a.m. on August 20, 1985, ERA dispatched them to fly a Learjet to Gulkana, Alaska. By completing this mission, Thomson and Van Biene would necessarily violate the Federal Aviation Administration's (FAA) flight time and duty regulations. The Learjet crashed on approach to the Gulkana airport, killing both pilots. WAUSAU paid compensation for the pilots' deaths.

In the investigation of the accident, other ERA pilots told the National Transportation Safety Board (NTSB) of lengthy on-duty periods and exhausting flight sched-

ules. Three captains reported ERA's disapproval of pilots' refusals to fly because they were fatigued. One captain believed that ERA intentionally overworked its pilots to increase its profits.

On September 14, 1987, the estates filed their Second Amended Complaint alleging negligence against WAUSAU in their inspection, certification, authorization, and approval of ERA's working conditions. The complaint made the following allegations against ERA:

> On or about August 20, 1985, at 0205 AKDT, Stanley Thomson and Michael Van Biene were Captain and First Officer of Learjet N455JA which was dispatched by defendants ERA, Jet Alaska, and ROWAN for a night flight to Gulkana, Alaska. The mission dispatch was accomplished without obtaining current weather information and would necessarily exceed the flight time and duty requirements of Plaintiffs, and the aircraft was overweight for appropriate landing. The dispatch of the aircraft under the conditions described and given the preceding flying time of Plaintiffs without rest or sleep, constitutes negligence and gross negligence.

The estates contended at oral argument before the trial judge, and on appeal, that this language alleges an "intentional tort of dispatching [the deceased pilots] for a night flight ... without adequate rest or sleep." ERA argues that the complaint only alleges negligence against it as an employer, and that therefore, the claim is barred by the exclusivity provision of the Alaska Workers' Compensation Act, AS 23.30.055.

The estates argue that WAUSAU is a separate legal entity from the employer and thus may be sued for its own negligence as a third party pursuant to AS 23.30.015(a). In response, WAUSAU argues that the exclusivity doctrine also protects it from such a negligence claim and that regardless of any immunity protection, WAUSAU did not owe a duty to the decedents to inspect, certify, authorize or approve ERA's working conditions.

The superior court granted ERA and WAUSAU's motions to dismiss under Civil Rule 12(b)(6) on the ground that the Alaska Workers' Compensation Act provides the workers' exclusive remedy against an employer or its compensation insurer. The estates appeal.

III. DISCUSSION

A. Did the Court Err in Dismissing the Estates' Claims Against ERA under Civil Rule 12(b)(6) Instead of Treating It as One for Summary Judgment Under Civil Rule 56?

The estates argue that the trial judge should have treated ERA's motion to dismiss as one for summary judgment because ERA submitted affidavits and the court did not expressly or affirmatively rule that it was not considering this evidence outside the pleadings.

Civil Rule 12(b) states that when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56." When material outside the pleadings is presented to the trial court, a motion to dismiss "is automatically converted into one for summary judgment unless the court 'affirmatively' and 'expressly' rules that it is not considering evidence outside of the pleadings." *Adkins v. Nabors Alaska Drilling, Inc.*, 609 P.2d 15, 21 n. 11 (Alaska 1980).

From our review of the remarks of the judge and counsel during oral argument, we conclude that Judge Ripley expressed his intention not to rely on the affidavits when granting the motion to dismiss. Consequently, the court correctly dismissed the claims under Rule 12(b)(6) rather than Rule 56.

B. Did the Court Err in Holding that the Estates' Claim Against ERA Was Barred by the Exclusivity Doctrine of AS 23.30.055?

1) Standard of Review

"A motion to dismiss for failure to state a claim is viewed with disfavor and should

rarely be granted." *Mattingly v. Sheldon Jackson College*, 743 P.2d 356, 359 (Alaska 1987) (citing *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986)). "In determining the sufficiency of the stated claim it is enough that the complaint set forth allegations of fact consistent with and appropriate to some enforceable cause of action." *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983). The court "is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Mattingly*, 743 P.2d at 359 (emphasis deleted).

2) Application of Exclusivity Doctrine to Intentional Torts of the Employer

[1] Under AS 23.30.055, the liability of an employer under the Workers' Compensation Act "is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee." *See Wright v. Action Vending Co., Inc.*, 544 P.2d 82, 85 (Alaska 1975).

In *Elliott v. Brown*, 569 P.2d 1323 (Alaska 1977), we recognized an exception to the exclusivity doctrine in cases of intentional torts committed by a fellow employee or employer. We found that the socially beneficial purposes of the workers' compensation law "would not be furthered by allowing a person who commits an intentional tort to use the compensation law as a shield against liability." *Id.* at 1327. The court concluded that the fellow employee's assault on the worker fell outside the purview of the accidental injuries covered by the act. The worker was therefore permitted to pursue a common-law tort action against the fellow employee.[1] Similarly, in *Stafford v. Westchester Fire Insurance Co.*, 526 P.2d 37, 43 n. 29 (Alaska 1974), *overruled on other grounds*, 556 P.2d 525 (Alaska 1976), we noted that:

> In suits for other intentional torts committed by the employer, recovery is permitted on the theory that the harm is not accidental and therefore not covered by the act. A stiff burden is placed on the employee to demonstrate intent to harm by the employer, or in some cases by his agents.

[2] The estates argue that the trial court erred in dismissing their claims against ERA since they allege an intentional tort which is not barred by the exclusivity doctrine. ERA argues that the complaint fails to allege an intentional tort by ERA.

The estates' Second Amended Complaint alleges that ERA violated a number of FAA regulations and that "given the preceding flying time of Plaintiffs without rest or sleep, [dispatching the flight] *constitute[d] negligence and gross negligence.*" (Emphasis added). Paragraph IX generally alleges:

> Defendants' actions as described and in other particulars as to be shown at trial constitute wilful misconduct and were jointly and separately negligent, gross, and wanton.

The estates contend that the complaint alleges an intentional tort of dispatching the deceased pilots for a night flight without adequate rest or sleep.

We conclude that these allegations fail to constitute the type of intentional tort actionable outside the workers' compensation system. Liberally construed, the facts alleged fail to make out an intentional tort. At best, the complaint alleges gross negligence or wilful and knowing violation of FAA regulations.

The vast majority of courts have held that such allegations do not constitute an intentional act allowing suit outside of the workers' compensation act. As Professor Larson notes:

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common-law liability of the employer cannot, under

1. The *Elliott* court, however, held that the corporate employer was not liable in tort on a theory of respondeat superior for the intentional tort of its supervisor. 569 P.2d at 1325–26.

the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury.

. . . . . .

Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.

2A A. Larson, *Larson Workmen's Compensation* § 68.13, at 13–8 to –26 (1983 & Supp.1985) (footnotes omitted).

In *Stafford* we recognized this majority rule. As the court explained, suits for intentional torts have been permitted on the grounds that the harm is not accidental but "[a] stiff burden is placed on the employee to demonstrate intent to harm by the employer or in some cases by his agents." 526 P.2d at 43 n. 29.

Even under a liberal interpretation of the allegations made by the complaint, the estates fail to allege an intent to harm the pilots so as to overcome the exclusivity provision of the act. In conclusion, we affirm the trial court's dismissal of the claims against ERA under Rule 12(b)(6).

C. Did the Court Err in Holding that the Exclusivity Doctrine Contained in AS 23.30.055 Bars a Negligence Action Against the Employer's Workers' Compensation Carrier, WAUSAU?

[3] The estates argue that WAUSAU is a separate legal entity from the employer and thus may be sued for its own negligence as a third party pursuant to AS 23.30.015(a). In response, WAUSAU argues that the exclusivity doctrine protects it from such a negligence claim.

The issue of whether a workers' compensation carrier can be sued for its own negligence in inspecting the employer's workplace is a question of first impression in Alaska. This court considered a related but distinctly different issue in *Stafford*. The court considered whether an employee was barred from suing his or her employer's compensation carrier for intentional torts. Stafford had alleged that the carrier wilfully and maliciously withheld compensation benefits resulting in infliction of emotional distress. The court concluded that "[u]nder our compensation act the carrier is considered a separate entity from the employer." 526 P.2d at 42. The court, however, then noted:

> Stafford recognizes that the principle of subrogation may be utilized to conclude that the carrier derives immunity from the exclusive remedy provisions in a damage action brought by the employee. However, Stafford argues that this immunity should not extend to intentional torts. This is supported by the decision of the Supreme Court of California in *Unruh v. Truck Insurance Exchange*, in which suit for an intentional tort by an injured employee against her employer's compensation carrier was allowed.

Id. (footnote omitted). After discussing the reasoning in *Unruh v. Truck Insurance Exchange*, 7 Cal.3d 616, 102 Cal.Rptr. 815, 498 P.2d 1063 (1972), the court concluded:

> We believe that AS 23.30.155 was envisioned by Alaska's legislature to cover situations where the employer or carrier negligently, or wilfully, failed to make timely compensation payments, but that this section was not intended to operate as the exclusive remedy for all intentional wrongdoings. In so holding we adopt the reasoning of *Unruh*. In circumstances where there is tortious conduct that goes beyond the bounds of untimely payments, the immunity from suit provided by the Workmen's Compensation Act is lost. Normally the carrier must investigate claims in order that the compensation scheme of payments for actual injuries will be properly administered. However, intentional torts committed in

> connection with the investigation of claims and payment thereof are not to be protected. Stafford has alleged that Westchester did more than delay in mak ing benefit payments; he has asserted that it intentionally and maliciously misled him about his right to compensation and discouraged him from exercising his rights, resulting in emotional injury. We conclude that Stafford is not precluded, by virtue of AS 23.30.155, from a trial on the merits of his claims.

526 P.2d at 43–44.

We conclude that the *Stafford* court did not decide the issue in this case: whether the exclusivity provision bars suit against an insurance carrier for negligent inspection of an employer's workplace. First, the court did not expressly hold that the immunity extends to a carrier. Rather, the court accepted *arguendo* that the doctrine of subrogation *might* be utilized to conclude that the carrier derives immunity from the exclusive remedy provisions. However, the court held that regardless of whether such immunity existed, intentional torts committed in the investigation of claims and payment thereof were actionable. *Id.* at 43–44.

While *Stafford* relied on the reasoning of *Unruh*, this should not be construed as an acceptance of the California courts' interpretation of its workers' compensation scheme since the Alaska scheme differs significantly from the California scheme.[2] Unlike the Alaska scheme, the California statute explicitly defines "employer" to include "insurer." Cal.Lab.Code § 3850(b) (West Supp.1987). In *Unruh*, this identification was held forfeited when the insurer stepped outside the proper bounds of an investigation of the nonmedical facts of the case. 102 Cal.Rptr. at 821, 825, 498 P.2d at 1069, 1073. Because the California statute specifically identified the insurer with the employer, the court resorted to a negligence/intentional tort distinction to hold that the insurer no longer was the employer's alter ego when it committed intentional torts.

Other jurisdictions confronting this question of third-party actions against insurers for alleged negligence in either safety inspections or medical services have reached differing results.[3] These decisions are of limited value since each state's statutory scheme differs greatly. We therefore turn to the specific language of the Alaska Act.

The Alaska Workers' Compensation Act does not mention an insurer in the exclusivity provision of AS 23.30.055, the definition of employer in AS 23.30.265(13), or in the third-party suit provision in AS 23.30.-015(a). A "carrier" is defined in AS 23.30.-265(5) as "a person authorized to insure under this chapter and includes self-insurers." Thus, as noted in *Stafford*, the Act defines "employers" and "insurers" as separate, distinct entities. 526 P.2d at 42.

Alaska Statute 23.30.015(i) subrogates an insurer to all the rights of the employer after the carrier has assumed the payment of compensation. WAUSAU argues that this provision provides them with the employers' immunity from a negligence action. Other courts have been hesitant to

2. *Unruh* cites two California Court of Appeal cases holding that a carrier may not be sued for negligence in performing work place inspections. *Burns v. State Comp. Ins. Fund*, 265 Cal. App.2d 98, 71 Cal.Rptr. 326 (1968); *State Comp. Ins. Fund v. Superior Court (Breceda)*, 237 Cal. App.2d 416, 46 Cal.Rptr. 891 (1965).

3. For decisions allowing suit against carriers as third-parties in the absence of express statutory language, *see Beasley v. MacDonald Eng. Co.*, 287 Ala. 189, 249 So.2d 844 (1971); *Nelson v. Union Wire Rope Corp.*, 31 Ill.2d 69, 199 N.E.2d 769 (1964); *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963); *Andrews v. Insurance Co. of N. Am.*, 60 Mich. App. 190, 230 N.W.2d 371, 374 (1975); *Corson v. Liberty Mut. Ins. Co.*, 110 N.H. 210, 265 A.2d 315 (1970); *Rothfuss v. Bakers Mut. Ins. Co.*, 107 N.J.Super. 189, 257 A.2d 733 (App.Div.1969); *Derosia v. Duro Metal Products Co.*, 147 Vt. 410, 519 A.2d 601 (1986).

For decisions prohibiting suit against an insurer as a third party, *see Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir.1985) (Arkansas law); *Gerace v. Liberty Mut. Ins. Co.*, 264 F.Supp. 95 (D.D.C.1966); *Mustapha v. Liberty Mut. Ins. Co.*, 268 F.Supp. 890 (D.R.I.1967), *aff'd*, 387 F.2d 631 (1st Cir.1967); *Barrette v. Travelers Ins. Co.*, 28 Conn.Sup. 1, 246 A.2d 102 (1968); *Reid v. Employers Mut. Liab. Ins. Co.*, 59 Ill.2d 194, 319 N.E.2d 769 (1974); *Flood v. Merchants Mut. Ins. Co.*, 230 Md. 373, 187 A.2d 320 (1963); *Matthews v. Liberty Mut. Ins. Co.*, 354 Mass. 470, 238 N.E.2d 348 (1968).

allow suit against a carrier due to the related problem of a subrogated carrier suing itself.[4] The concern is that since the carrier is subrogated to the injured employee's cause of action against a third-party tortfeasor, "if the carrier can be a third-party tortfeasor, the carrier will end by suing itself"—an incongruous result that the legislature could not have intended. 2A A. Larson § 72.95, at 14–321. However, as Larson points out:

> This argument has been rejected on several grounds by the courts finding carrier liability. One is that the subrogation provisions are purely procedural and thus cannot be held to modify the definition of "employer." Another is that the subrogation passage "does not deal with the subject matter" in issue, which is the question whether the employee's common-law right is taken away from him. The original *Smith* case invoked a sort of dual capacity doctrine, saying that the carrier was being sued not as compensation carrier but as an independent third party. All such cases made short work of the spectre of double recovery by pointing out that the carrier would of course be entitled to set off in a judgment against itself as a tortfeasor the amount of compensation paid by it as insurance carrier. And running through all these opinions was the thought that this kind of result was really not all that preposterous. Increasingly common is the spectacle of an insurance carrier acting as compensation subrogation plaintiff and as defendant insurer on a third party's automobile liability risk. Problems of conflict of interest and of public policy may arise; but no one worries much anymore about the conceptual problem whether the carrier can sue itself.

Id. at 14–322 (footnotes omitted). We similarly conclude that the subrogation provision in AS 23.30.015(i) does not bootstrap an insurer into the definition of an employer in subsection (a). We therefore conclude that there is nothing in the statutory language of the Alaska scheme which prevents an employee from bringing a negligence action against a carrier for negligent inspection of the employer's workplace.[5]

WAUSAU contends that such a result is contrary to public policy since the threat of potential tort liability will discourage carriers from inspecting employers' workplaces.[6] We decline to judicially amend the Act on the basis of such a policy argument. This type of policy determination is appropriately left for the legislature.

In conclusion, we find that there is nothing in the statutory language of the Alaska scheme which prevents an employee from bringing suit against a compensation carrier for the negligent performance of a safety inspection. Therefore, Judge Ripley erred in dismissing the estates' claims against WAUSAU.

D. Did WAUSAU Owe a Duty to the Pilots to Inspect ERA's Working Conditions in a Non-negligent Manner?

[4] WAUSAU argues that even if a carrier is not immune from suit for its negligent inspection of an employer's work place, dismissal was proper on the alternative ground that WAUSAU owed no duty to the decedents to inspect ERA's working conditions. The estates contend that, even in the absence of contractual obligation between WAUSAU and ERA, WAUSAU may

4. *See Mustapha v. Liberty Mut. Ins. Co.*, 268 F.Supp. 890 (D.R.I.), *aff'd*, 387 F.2d 631 (1st Cir.1967); *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F.Supp. 547 (E.D.Mich.1965), *aff'd*, 372 F.2d 95 (6th Cir.1967); *Schulz v. Standard Acc. Ins. Co.*, 125 F.Supp. 411 (E.D.Wash.1954) (Idaho law); *Flood v. Merchant Mut. Ins. Co.*, 230 Md. 373, 187 A.2d 320 (1963).

5. In the absence of express legislative intent to the contrary, "[s]tatutes ... that establish rights ... in derogation of the common law are construed in a manner that effects the least change possible in the common law." *Hugo v. City of Fairbanks*, 658 P.2d 155, 161 (Alaska App.1983) (citing 3 C. Sands, *Sutherland Statutory Construction* § 59.03, at 6–7 (4th ed. 1973)).

6. Some courts have extended immunity to carriers from third-party suits since they believed imposing liability on carriers would create a great disincentive to their carrying out the socially useful function of independent safety inspections. *See Kifer*, 777 F.2d at 1335, 1338–39; *Nelson*, 199 N.E.2d at 796 (Schaefer, J., dissenting); *Matthews*, 238 N.E.2d at 348; *Kotarski*, 244 F.Supp. at 558–59 (Michigan law); 2A A. Larson § 72.98.

be held liable for "negligent performance of undertaking to render services" if WAUSAU actually inspected the working conditions of ERA prior to the accident.

The estates' argument is well taken. The Restatement (Second) of Torts § 324A (1965) imposes liability on a defendant to a third party when the defendant negligently performs an undertaking to render services:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

See Adams v. State, 555 P.2d 235, 240 n. 7 (Alaska 1976) (citing § 324A of the Restatement). In *Adams*, the court held that victims of a hotel fire had a cause of action against the state for failure to take action after fire inspectors discovered extremely dangerous fire conditions. *Id.* at 240–42. The court noted that "once an inspection has been undertaken the state has a further duty to exercise reasonable care in conducting fire safety inspections, and that liability will attach where there is a negligent failure to discover fire hazards which would be brought to light by an inspection conducted with ordinary care." *Id.* at 240. The court then cited a number of cases in which employees were allowed to sue workers' compensation carriers for negligent safety inspections.[7]

The second amended complaint alleges that "WAUSAU ... did inspect, certify, authorize, and approve the working conditions of Defendants Jet Alaska, ERA and Rowan" and that WAUSAU's actions "were accomplished negligently." This language is sufficient to make out a cause of action for negligent performance of an undertaking. As a result, it would be improper to dismiss the allegations against WAUSAU for failure to state a cause of action. We, therefore, reverse the trial court's dismissal of the claims against WAUSAU under Civil Rule 12(b)(6) and remand the issue to the trial court for further proceedings.

E. Did the Court Err in Dismissing the Allegations Against the John Doe Defendants?

[5] We initially note that since all claims against the Doe defendants were dismissed by the trial judge, this question is ripe for review and properly before us.[8]

Judge Ripley dismissed the allegations against the "John Doe" defendants on the grounds that such use of fictitious defendants is not permissible under our rules of civil procedure.

At common-law, it was essential that a person's name appear in the complaint before he or she could be made a defendant in the action.[9] The majority of courts consid-

7. *Beasley*, 249 So.2d at 847; *Sims v. American Cas. Co.*, 131 Ga.App. 461, 206 S.E.2d 121 (1974); *Nelson*, 199 N.E.2d at 779; *Fabricius*, 121 N.W.2d at 365.

8. ROWAN contends that the issue is not ripe for review since the superior court had not entered final judgment with respect to the "John Doe" defendants. In *Greater Anchorage Area Bor. v. City of Anchorage*, 504 P.2d 1027, 1030 (Alaska 1972), this court stated that the "basic thrust of the finality requirement is that the judgment must be one which disposes of the entire case...." "[T]he reviewing court should look to the substance and effect, rather than the form, of the rendering court's judgment, and focus primarily on the operational or 'decretal' language therein."

We conclude that since Judge Ripley's order dismisses the Does from the case, the order disposes of the entire case as to the Does and the finality requirement is thereby satisfied.

9. Note, *Designation of Defendants by Fictitious Names—Use of John Doe Defendants*, 47 Iowa L.Rev. 773, 775 (1961). This requirement has been eliminated in certain situations by statutes which allow the pleading of fictitious or John Doe defendants. *Id.* at 776. However, as the above commentator noted "[t]his is not to say that the rule requiring the true name of the defendant to be stated in the complaint is with-

ering this issue have held that jurisdiction to sue unknown or fictitious persons must be obtained pursuant to some express rule or statute.[10] However, at least one state has judicially adopted Doe pleading without an express statute or rule.[11]

The estates argue that there has been a long standing practice of Doe pleading in this state. While we acknowledge this past use of Doe pleading, we note that we have never been called upon to consider the propriety of this practice. We decline, however, to address the general propriety of Doe pleading in this case.[12] In the action before us, we find that Judge Ripley did not abuse his discretion in dismissing the claims against the Doe defendants since the estates are unable to identify which allegedly defective component of the Learjet was manufactured by the Doe defendants.[13] We therefore affirm the superior court's dismissal of the Doe defendants.

F. Did the Court Abuse Its Discretion in Awarding ERA and WAUSAU $14,476 in Attorney's Fees, which Represented 80 Percent of Their Actual Attorney's Fees?

[6] The trial court awarded ERA and WAUSAU 80 percent of their fees, finding that the plaintiffs' claims "bordered very closely upon the nonmeritorious and the frivolous." Since we reversed the court's dismissal of the claim against WAUSAU, the award of fees to them is vacated. As to the award of fees to ERA, we conclude that the trial court did not abuse its discretion in awarding fees.

In *State v. University of Alaska*, 624 P.2d 807, 817-18 (Alaska 1981), this court held that an award of "substantially full attorneys fees" is manifestly unreasonable in the absence of a claim that is "frivolous, vexatious or devoid of good faith." The court held that an award over 90 percent of actual costs was a substantially full award of fees. *Id.*

However, this court has affirmed partial awards of fees as high as 86 percent of actual fees even when the claims were not frivolous. *See Hausam v. Wodrich*, 574 P.2d 805, 811 (Alaska 1978) (court affirmed award of 86 percent of actual attorney's fees even though the case involved no improper conduct by the losing party); *see also O'Buck v. Cottonwood Village Condominium Ass'n, Inc.*, 750 P.2d 813, 821 (Alaska 1988) (court affirmed award of approximately 80 percent of actual attorney's fees to prevailing defendants); *Steenmeyer Corp. v. Mortenson-Neal*, 731 P.2d 1221, 1226 (Alaska 1987) (court affirmed award of 75 percent of actual attorney's fees); *Crook v. Mortenson-Neal*, 727 P.2d 297, 306 (Alaska 1986) (court affirmed award of 80 percent of actual attorney's fees).

We conclude that in this case an award of 80 percent of actual attorney's fees is not manifestly unreasonable. We therefore decline to interfere with the trial court's exercise of discretion and affirm the award of attorney's fees to ERA.

out force; John Doe complaints are still an exception to the rule and used only under exceptional circumstances." *Id.*

10. *Hailey v. Interstate Machinery Co.*, 121 Ill. App.3d 237, 76 Ill.Dec. 709, 459 N.E.2d 346, 347 (1984) (citing 59 Am.Jur.2d *Parties* § 17 (1971)); *Hutchinson v. Fish Engineering Corp.*, 38 Del.Ch. 414, 153 A.2d 594 (1959); *Grantham Realty Corp. v. Bowers*, 215 Ind. 672, 22 N.E.2d 832, 836 (1939); *Hill v. Henry*, 66 N.J.Eq. 150, 57 A. 554 (1904); 59 Am.Jur.2d *Parties* § 16, at 401 (1987) ("In actions or proceedings which are not strictly in rem but are in personam or only quasi in rem, there is generally no authority to proceed against unknown persons in the absence of statute or rule. Jurisdiction to sue such persons must be obtained pursuant to some statute or rule."); Note, *supra* note 9, at 776.

11. *Maddux v. Gardner*, 239 Mo.App. 289, 192 S.W. 14, 18 (1945).

12. We acknowledge the potential importance of this issue and have referred its consideration to the Civil Rules Committee.

13. The Second Amended Complaint contains the following allegations against the "John Doe" defendants:

> Defendants Doe I, II, and III negligently manufactured and designed other equipment used in Learjet N455JA, which items were not manufactured and designed in accordance with generally accepted standards.

IV.

In conclusion, we affirm the superior court's dismissal of the claims against ERA and the John Doe defendants. We reverse the dismissal of the claims against WAUSAU and remand the claims back to the superior court for further proceedings consistent with this opinion. We vacate the award of attorney's fees to WAUSAU and affirm the award of fees to ERA.

AFFIRMED in part, REVERSED in part, VACATED in part and REMANDED for further proceedings consistent with this opinion.

Dale DRESSEL, Appellant,

v.

Marion S. WEEKS, Shirley Craft, personal representative of the Estate of Dorothy Kuhns, deceased, Appellees.

No. S-2580.

Supreme Court of Alaska.

Aug. 18, 1989.

Executor brought action against testator's live-in companion alleging conversion of money. Purchaser of cabin from testator filed third-party complaint against live-in companion. The Superior Court, Fourth Judicial District, Mary E. Greene, J., upheld conversion claim and held that quasi estoppel applied to preclude live-in companion from asserting legal title to cabin. Appeal was taken. The Supreme Court, Moore, J., held that: (1) trial court's finding that cash taken by companion belonged to the estate was not clearly erroneous, and (2) quasi estoppel applied to divest legal title to real property from companion who was titleholder of record.

Affirmed.

1. Trover and Conversion ⇐40(3)

Trial court's finding in conversion action that cash found in safe of testator's house belonged to testator's estate rather than to person with whom testator was living at the time of her death was not clearly erroneous; evidence showed that safe had been emptied of cash before testator's death and that live-in companion did not have combination to safe.

2. Wills ⇐563

Will which left beneficiary house and "all furnishings therein" did not encompass cash which was in safe in house.

3. Trover and Conversion ⇐4

Tort of "conversion" is intentional exercise of dominion or control over chattel which so seriously interferes with right of another to control it that actor may justly be required to pay the other full value of chattel.

See publication Words and Phrases for other judicial constructions and definitions.

4. Trover and Conversion ⇐40(6)

Evidence presented by executor was sufficient to meet her burden of proof of amount of damages sustained when testator's live-in companion took money from testator's safe after her death.

5. Estoppel ⇐52(1)

"Quasi-estoppel" precludes party from taking position inconsistent with one he or she has previously taken where circumstances render assertion of second position unconscionable.

See publication Words and Phrases for other judicial constructions and definitions.

6. Estoppel ⇐52.15

"Equitable estoppel" requires assertion of position by conduct or word, reasonable reliance thereon by another party, and resulting prejudice.

See publication Words and Phrases for other judicial constructions and definitions.

7. Estoppel ⇐52.15

When applied to preclude the assertion of title to real property, equitable estoppel

Sponsor Statement
SB-64 (L&C)
Civil liability / workplace safety inspections

In 1988 the Legislature passed a comprehensive revision of Alaska's worker' compensation laws. Since taking effect the new workers' compensation provisions have proven successful.

In 1991, SB-219 was introduced by the Labor & Commerce Committee. The bill addressed two problems in the workers' compensation statutes; 1) injuries incurred as a result of employer sponsored recreational activities and; 2) removal of liability for safety inspections conducted on behalf of self-insured employers and workers' compensation carriers. These provisions have passed the Senate twice, but **HCS CSSB 219 (Jud) am H was vetoed by the Governor** because many more objectionable provisions were added in the House. The safety inspection issue was brought to the forefront as a result of the *1989 Van Biene v. ERA Helicopters, Inc.* decision our Supreme Court, which held that *"workers' compensation carrier could be held liable to estates of deceased pilots for negligent performance of safety inspection if insurer actually inspected the working conditions of the employer prior to the incident."* (See decision in bill file.)

SB-64, removes civil liability from insurers, insurance service agents, self-insured employers, or trade associations for damages resulting from the performance or failure to perform a workplace safety inspection or a safety advisory service unless the act is intentional.

SB-64, ensures workplace safety inspections will continue, that workers' compensation insurance will be available and affordable because of safety inspections, and that employees benefit from safety inspections.

The Department of Commerce is neutral on the bill, (see position paper) although their position suggests the law might better be placed under AS 23 (Labor and Workers' Compensation). Legislative Legal Services responds (see memo) that ***"the workplace safety inspection immunity provision seems to logically fit alongside the workplace safety program."*** Legal Services further advised that placement of the law under AS 21 was the recommendation of the revisor of statutes, and Commerce responded that it was a minor point not germane to the issue at hand.

ZERO Fiscal Note, Department of Commerce, Division of Insurance.

Sponsor Statement

John L. George and Associates
9515 Moraine Way
Juneau, Alaska 99801
Tel 907 789-0172 Fax 907 789-6964

February 4, 1993

Senator Tim Kelly, Chairman
Senate Labor and Commerce Committee
Pouch V
Juneau, Alaska 99811

Ref: Senate Bill 64

Dear Senator Kelly,

I represent the National Association of Independent Insurers, a property and casualty insurer trade association. NAII member companies provide substantial insurance markets in Alaska.

NAII fully supports Senate Bill 64 and urges passage. SB 64 corrects a current inequity in the system that discourages insurers from providing safety inspections for employers. By providing immunity from civil liability for work place safety inspections, insurers and agents of self-insurers will perform more safety inspections. More safety inspections will directly benefit employees by providing a safer work place.

NAII stands ready to provide testimony in support of this bill.

Sincerely,

John L. George

SENATE LABOR & COMMERCE COMMITTEE
AGENDA

DATE: FEB. 9th, 1993

TIME: 1:30

LOCATION: FAHRENKAMP ROOM

1. Call meeting to order

2. Note time/day/year

3. Note members present and members excused
   *remember to note any late arriving members

4. Recognize any VIP's

5. Remind participants/witnesses to sign in

6. Announce order of bills to be heard

SB 64 - INSURER IMMUNITY FOR WORKPLACE INSPECTIONS

SB 66 - LIMITED PARTNERSHIPS

SB 85 - EXTEND ALASKA TOURISM MARKETING COUNCIL

SB 73 - LIABILITY OF DESIGN/CONSTRUCTION PROFESSIONALS

7. Begin by announcing first bill to be heard and proceed through the agenda.

8. Announce time of Adjournment

NOT BEING TELECONFERENCED

SB 66

Alaska State Legislature

SENATOR JIM DUNCAN

COMMITTEES:
VICE CHAIR – FINANCE
VICE CHAIR – STATE AFFAIRS
RULES
BUDGET & AUDIT
ETHICS REFORM

MEMORANDUM

Date: February 3, 1993

To: Senator Tim Kelly, Chair
Senate Labor & Commerce Committee

From: Senator Jim Duncan

Subject: SB 66, an act relating to limited partnerships

Thank you for scheduling SB 66, relating to limited partnerships, for a hearing before the Senate Labor and Commerce Committee.

This bill completes the upgrade of Alaska's Limited Partnership Act to conform to the recommendations of the national Conference of Commissioners on Uniform State Laws.

Section 1 of the bill substitutes the "notice" form of the certificate of limited partnership for the old "long form" certificate. The rest of the bill simply conforms the remainder of the Limited Partnership Act to the change in section 1.

I believe this type of accommodation to modern business practices will encourage formation of limited partnerships in this state.

Attachments

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DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM February 3, 1993

SUBJECT: Sectional analysis of SB 66

TO: Senator Jim Duncan
Attn: Roxanne

FROM: Theresa L. Bannister TB
Legislative Counsel

You have requested a sectional analysis of the above described bill. As a preliminary matter, note that a sectional analysis of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 of the bill removes the requirement that two or more persons have to execute the certificate of limited partnership. Reduces the amount of information that must be provided in the certificate of limited partnership. This is the major change in the bill. The majority of the other changes in the bill reflect this change. The bill takes the approach of relying on a written partnership agreement or on the partnership records as the sources for the information deleted from the certificate.

Section 2 of the bill amends the section relating to the amendment of the certificate of limited partnership. Deletes partnership contribution changes from the list of events that require an amendment to the certificate of limited partnership. This reflects the deletion of contribution information from the information required to be in the certificate.

Section 3 amends the section on the execution of partnership certificates. Simplifies the execution requirements of certain partnership certificates by only requiring execution by the general partners. Deletes the reference to contributions. These changes are necessary because the certificate of limited partnership is no longer required to include information on limited partners and the contributions of the partners.

Section 4 of the bill allows a person to use an attorney-in-fact to sign original certificates of limited partnership, certificates of amendment, and certificates of cancellation. Since the certificates are no longer required to contain information on

SECTIONAL ANALYSIS

limited partners or partnership contributions, the reference in this subsection to partners is limited to general partners, and the reference to contributions is deleted.

Section 5 of the bill changes the scope of the notice provided by a filed certificate of limited partnership. The certificate provides notice of who is a general partner, not who is a limited partner.

Section 6 of the bill changes the section on the admission of limited partners. The section is amended (1) to add subsection (a), and (2) to delete a subsection that provided that new limited partners are added by amending the certificate of limited partnership. These changes result from the changes made to the certificate of limited partnership. Under those changes, limited partners are no longer required to be identified in the certificate.

Section 7 of the bill indicates that a person who makes certain contributions to a limited partnership is liable as a general partner to certain third parties until either of two listed events occurs. Rewrites the second event to refer to general partners and not to limited partners, since the chapter no longer requires limited partners to be identified in the partnership certificates.

Section 8 of the bill addresses the enforceability and compromise of a partner's promise to contribute to the limited partnership. Adds a new subsection (a), and makes other changes to implement the fact that contribution information is no longer required to be included in the certificate of limited partnership.

Section 9 of the bill directs how profits and losses of a limited partnership are to be allocated among the partners. Substitutes a reference to the partnership records for the reference to the certificate of limited partnership, since information on the value of partnership contributions is no longer required to be contained in the certificate.

Section 10 of the bill directs how distributions are to be allocated among the partners. Substitutes a reference to the partnership records for the reference to the certificate of limited partnership, since information on the value of partnership contributions is no longer required to be contained in the certificate.

Section 11 of the bill states the extent and time when a partner is entitled to receive distributions from a limited partnership. The deletion of paragraph (2) reflects the changes made in sec. 1 of the bill to the information required to be in the certificate of limited partnership.

Section 12 of the bill establishes when a limited partner can withdraw from a limited partnership. Since under sec. 1 of the bill the certificate of limited partnership will contain less information, the section substitutes references to the partnership

agreement for the references to the certificate. Requires the time or events of withdrawal to be specified in written form in the agreement or the section takes over.

Section 13 of the bill makes changes to reflect the bill's general approach to require less information in the certificate of limited partnership and refers instead to a written partnership agreement.

Section 14 of the bill makes changes to reflect the bill's general approach to require less information in the certificate of limited partnership and refers instead to the records required under AS 32.11.840 as the source of the information.

Section 15 of the bill makes changes to reflect the bill's general approach to require less information in the certificate of limited partnership. Refers instead to the partnership agreement as the source of the authority for giving an assignee of a partnership interest the right to become a limited partner.

Section 16 deletes the reference to the certificate of limited partnership since, under sec. 1 of the bill, the certificate is no longer required to contain information from which liabilities of the limited partnership could be ascertained.

Section 17 of the bill makes changes to reflect the bill's general approach to require less information in the certificate of limited partnership. The section substitutes a written partnership agreement as a source for determining what events trigger the dissolution of the partnership.

Section 18 of the bill deletes paragraph (3) from the registration application for a foreign limited partnership. The same deletion was made for domestic limited partnerships. Requires the foreign limited partnership to include in its registration application the name and address of each general partner, the address where information on the limited partners is kept, and an undertaking by the partnership to maintain the records.

Section 19. The deletion of AS 32.11.810(3) reflects that information on the character of the limited partnership's business is no longer required to be included in the certificate of limited partnership.

Section 20 of the bill requires a limited partnership to maintain records containing some of the information that is no longer required to be included in the certificate of limited partnership.

Section 21 of the bill makes a deletion to reflect that the identity of the limited partners is no longer required to be included in the certificate of limited partnership.

Section 22 of the bill provides transition provisions for the bill.

Section 23 of the Act makes its provisions retroactive to the desired effective date if the Act is not enacted by the effective date.

Section 24 of the bill provides that the Act takes effect on July 1, 1993, the date when AS 32.11, the chapter being amended, is scheduled to go into effect.

If I may be of further assistance, please advise.

TLB:lmb
93-022.lmb

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February 5, 1993

Hon. Tim Kelly, Chair
Senate Labor and Commerce Committee
Alaska State Legislature
Room 101, Capitol Building
Juneau, Alaska 99801-1182

HAND-DELIVERED

Re: SB 66 (limited partnerships)

Dear Sen. Kelly:

Your assistant, Josh Fink, has told me that this bill is scheduled for a hearing in your committee next week. He also requested any additional material I have that might help the committee's deliberations.

You will find the following items enclosed, furnished by the National Conference of Commissioners on Uniform State Laws (NCCUSL):

- "A Few Facts About ..." (2 pages);
- "Revised Uniform Limited Partnership Act" (2 pages);
- "The 1985 Amendments to the Uniform Limited Partnership Act" (2 pages);
- "It's Time to Adopt the Revised Uniform Limited Partnership Act" (2 pages).

You will also find copies of two letters to former Senator Pat Rodey attached. One, dated March 23, 1992, from Anchorage attorney Bob Manley, urged inclusion of all 1985 amendments of the Act (specifically the change in the certificate section) as promulgated by the NCCUSL. The other one, dated April 2, 1992, from a group of 16 Anchorage business and tax law practitioners, organized by John Tindall (who is, incidentally, an authority on partnership law and has published on the subject), urged the same thing.

The gist of both letters is as stated in my January 29, 1993 letter to you. The old, long-form certificate of limited partnership is no longer feasible. Modern use and size of limited partnerships renders the long form infeasible. The information they contained is readily available to investors and lenders, in partnership records. The short form, proposed in this bill,

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LETTER FROM ART PETERSON, UNIFORM LAW COMMISSIONER FOR ALASKA

minimizes costs and facilitates use of this type of business organization.

Yours truly,

Arthur H. Peterson
Uniform Law Commissioner
for Alaska

AHP/sh
Enclosure

sh/art/kelly.let

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January 29, 1993

Hon. Tim Kelly, Chair
Senator Labor and Commerce Committee
Alaska State Legislature
Room 101, Capitol Building
Juneau, Alaska 99801-1182

Re: SB 66 (limited partnerships)

Dear Sen. Kelly:

SB 66 (limited partnerships) has been referred to your committee, and I would appreciate your scheduling a hearing on it as soon as possible.

This bill is a vital element in the completion of the updating of Alaska's 1917 version of the Uniform Limited Partnership Act. It picks up the National Conference of Commissioners on Uniform State Laws' 1985 amendments to the modern Act that were omitted from the bill passed by the legislature last year (ch. 128, SLA 1992).

The bill has a July 1, 1993 effective date, which coincides perfectly with the effective date of last year's enactment. So we will be able to have a completed update of our Uniform Limited Partnership Act this summer.

The heart of the bill is sec. 1. It substitutes the "notice" form (i.e., "short form") of the certificate of limited partnership for the old "long form" certificate. It thus recognizes modern-day types and uses of limited partnerships, conforms to the national standard, and facilitates doing business by means of this kind of entity in Alaska.

Thank you for considering this matter.

Yours truly,

Arthur H. Peterson
Uniform Law Commissioner
for Alaska

AHP/sh

sh/art/hudson.let

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DILLON & FIN[illegible]

MAR 25 1992

RECEI[illegible]

Reply to: Anchorage

Direct Dial:
(907) 263-8251

March 23, 1992

Senator Pat Rodey
State Capitol, Room 113
Juneau, AK 99801-1182

Re: Committee Substitute For Senate Bill No. 193 / Limited Partnerships

Dear Senator Rodey:

I am away from the law firm and on sabbatical attending the Boston University Graduate Tax Program. Accordingly, I have not been able to discuss the above bill with members of the Business Law Section of the State Bar Association and other interested persons.

Nevertheless, I do note that the bill seems to deviate from the 1985 version of the Revised Uniform Limited Partnership Act by requiring the inclusion of substantial additional information in the certificate of limited partnership. Specifically, proposed AS 32.11.010 would require that a laundry list of 13 items to be included in the certificate of limited partnership. Those items include "the amount of cash and a description and statement of agreed value of other property or services" contributed or to be contributed by each partner and "the name and business address of each partner." This is in contrast to the 5 items required to be listed in the current (1985) version of the Revised Uniform Limited Partnership Act which do not include the two items specifically listed above.

HUGHES THORSNESS
GANTZ POWELL & BRUNDIN
ATTORNEYS AT LAW

The longer laundry list seems to be drawn from the original (1976) version of the Revised Uniform Limited Partnership Act. The preface to the current (1985) version of the Revised Uniform Partnership Act notes that "the former requirement [identified above] served no significant practical purpose while it imposed on limited partnerships (particularly those having a large number of partners or doing business in more than one state) inordinate administrative and logistical burdens and expenses connected with filing and amending their certificates of limited partnership." I think that the reasoning of the Uniform Law Commissioners on this point is persuasive.

In addition, public disclosure of this private financial information is not required (at least not to the same extent) for either general partnerships or corporations. If a business creditor of a limited partnership needs to the information, the creditor can simply refuse to provide credit until the information is supplied. Similarly, a limited partner has access to this information under the provisions of law.

Accordingly, I suggest that proposed AS 32.11.010 be modified to include simply the 5 item list from the current (1985) version of the Revised Uniform Limited Partnership Act. Likewise proposed AS 32.11.420 should be modified to track section 902 of the current (1985) version of RULPA. ☆

Very truly yours,

HUGHES, THORSNESS, GANTZ,
POWELL & BRUNDIN

By: Robert L. Manley by
Robert L. Manley

RLM/kah/1483:XKAH
cc: Fred Zharoff, Chairman of the Senate Rules Committee
John Tindall, Chairman, Business Law Section, Alaska Bar Association
Dave Donley, House Judiciary Chairman
Max Gruenberg, House Judiciary Vice-Chairman
Lori Nottingham, Deputy Legislative Liaison
Arthur H. Peterson, Uniform Law Commissioner

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John H. Tindall
(907) 263-8401

April 2, 1992

VIA EXPRESS MAIL & FACSIMILE

Senator Pat Rodey
State Capital, Room 113
Juneau, Alaska 99801-1182

Re: Committee Substitute for Senate Bill No. 193/
Limited Partnerships

Dear Senator Rodey:

The undersigned business and tax law practitioners met in Anchorage on March 11, 1992, to discuss pending legislation. Of particular interest to the group was CSSB 193.

As a group, we strongly and unanimously support your effort to update Alaska's Uniform Limited Partnership Act by adoption of the 1976 version of the Uniform Limited Partnership Act with the 1985 amendments. We are equally committed, however, in our unanimous belief that the 1985 amendments should be adopted in the form proposed by the Uniform Law Commissioners ("ULC"), and not with the deviations found in CSSB 193. Specifically, we believe Section 201 of the 1985 amendments as promulgated by the ULC, which provides for a shorter or "notice" form of certificate of limited partnership, should be adopted, rather than proposed AS 32.11.010, which requires substantially greater and more detailed information and reflects no substantial change from current law.

We believe a notice filing is preferable because the longer form certificate imposes significant costs and burdens on limited partnerships with no resultant benefit to third-party creditors of or investors in limited partnerships.

Financial institutions and others who may extend credit to or otherwise do business with limited partnerships are in a position to acquire such information from the general partners of a limited partnership as they deem necessary as a condition to the extension of credit or commencement of business with the limited partnership.

Investors in limited partnerships are adequately protected by the disclosure requirements of the Alaska Securities Act of 1959. Even in instances where an investor transaction is exempted from the registration requirements of the Act, a prudent investor has the ability and incentive to request additional information of the type provided by the long form certificate prior to investing.

Current practice and the 1985 amendments demonstrate that no benefit is obtained from the longer form certificate after initial investment either. It is common under current law for limited partners to grant powers of attorney to allow a general partner to sign certificates, amendments, and even the writing that cancels a certificate. See Bankston & O'Hara, The Creation, Operation and Dissolution of a Limited Partnership in Alaska, 2 Alaska L. Rev. 271, 303-304 (1985). This practice is expressly sanctioned by proposed AS 32.11.040(b). The longer form limited partnership certificate thus provides no additional protection to existing limited partners.

Finally, no other Alaska statutory business entity is required to provide the level of financial disclosure required by AS 32.11.010: no par value stock and essentially "notice" type articles of incorporation are permitted by our corporate code; general partnerships are not required to make any filings reflecting their existence or respective partner contributions.

The limited partnership entity fulfills a unique and valuably different role in Alaska's business hierarchy, and should not be hindered or rendered economically unfeasible at a time when all investment vehicles are necessary to facilitate a hopefully recovering economy.

We strongly support your efforts to amend Alaska's Uniform Limited Partnership Act and thank you for your efforts. As business and tax law practitioners, however, we urge you to abandon CSSB's deviation from the ULC's 1985 proposed Section 201 and instead support adoption of the notice form of certificate of limited partnership.

Very truly yours,

John H. Tindall
Heller Ehrman White & McAuliffe

Robert C. Brink
Law Offices of Robert C. Brink

cc: Fred Zharoff, Chairman of the Senate Rules Committee
Dave Donley, House Judiciary Committee
Max Gruenberg, House Judiciary Vice-Chairman
Lori Nottingham, Deputy Legislative Liaison
Arthur H. Peterson, Uniform Law Commissioner

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Martin J. Barrack
Heller Ehrman White & McAuliffe

Steven T. O'Hara
Bankston & McCollum

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1976 REVISIONS

IT'S TIME TO ADOPT THE REVISED UNIFORM LIMITED PARTNERSHIP ACT

The original Uniform Limited Partnership Act, ULPA (1916), sets guidelines for the organization of limited partnerships, defines the rights and liabilities of both limited and general partners, and provides rules for the registration of the partnership in the state of operation.

The revised act, ULPA (1976), does not change the basic structure of limited partnerships as defined in the original act. But it does improve the capacity of limited partnerships both to do business and serve the best interests of partners and third parties conducting business with the partnership.

Adoption of the 1976 Uniform Limited Partnership Act will enhance a state's business climate. The act encourages development of new enterprise by making the limited partnership form even more appealing to business ventures -- and assuring limited partnerships they will be recognized in other states.

Limited partnerships can be found across the spectrum of American enterprise. They have been established for real estate development, mining ventures, oil exploration, book publication, movies and Broadway plays. But whatever their business, all limited partnerships share some key characteristics:

- They are composed of people and/or firms organized to do business under a written partnership agreement;
- the partners share in profits and losses, according to the agreement and their capital contribution to the enterprise; and
- the limited partners give up the right to participate in control of the business, in exchange for limited personal liability for the financial obligations of the partnership.

The revised ULPA facilitates the operation of limited partnerships in four areas. First, the new act upgrades the importance of the partnership agreement in the running of the enterprise. This gives the partners much more flexibility in tailoring the partnership to the needs of the business.

Second, ULPA (1976) spells out in greater detail the liability issues of concern to both limited and general partners. Special provisions have been added to help protect the limited liability position of the limited partners.

Third, the revised act provides greater flexibility in the financing of limited partnerships, by accomodating the admission of more kinds of limited partner investors.

Fourth, the 1976 act provides for registration of "foreign" -- or out-of-state -- limited partnerships. This allows the partnership to conduct interstate business, without jeopardizing the liability position of the limited partners.

Even more important, states that don't enact ULPA (1976) risk losing businesses to the other states which have adopted the revised act.

A Few Facts About

THE UNIFORM LIMITED PARTNERSHIP ACT

PURPOSE: To provide a more flexible and stable basis for the organization of limited partnerships, and help states stimulate new limited partnership business ventures.

ORIGIN: The Uniform Limited Partnership Act was originally promulgated in 1916 and was adopted in 49 states and the District of Columbia. A major revision occurred in 1976, and is officially entitled the Uniform Limited Partnership Act (1976). This replaces the 1916 Act entirely. In 1985, limited amendments were made to the 1976 Act, and the Act is now entitled the Uniform Limited Partnership Act (1976) with 1985 Amendments.

STATE ADOPTIONS OF ULPA (1976):

Alabama
Arizona
Arkansas
California
Colorado
Connecticut
Idaho
Iowa
Maryland
Michigan
Montana
Missouri
Nebraska
New Jersey
Ohio
South Carolina
Washington
Wyoming

STATE ADOPTIONS OF ULPA (1976) WITH 1985 AMENDMENTS:

Delaware
District of Columbia
Florida
Georgia
Hawaii
Illinois
Indiana
Kansas
Kentucky
Massachusetts
Minnesota
Mississippi
Nevada
New Hampshire
New Mexico
New York *
North Carolina
North Dakota
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Dakota
Tennessee
Texas
Utah *
Virginia
West Virginia
Wisconsin *

INTRODUCTIONS OF ULPA (1976) WITH 1985 AMENDMENTS:

INTRODUCTIONS OF 1985 AMENDMENTS ONLY:

Idaho
Missouri

* 1990 Adoption

NEED A SPEAKER?

These persons are available to provide testimony or give presentations on the Uniform Limited Partnership Act:

Joel Adelman
Detroit, Michigan
Advisor

Robert Berger
Chicago, Illinois
Reporter

Howard Walthall
Birmingham, Alabama
ABA Advisor

For information on arranging a speaker, contact John McCabe or Katie Robinson at 312-915-0195.

DATE: 1/25/93

FURTHER: JUD
FINANCE

Date of 5-Day Notice: 2/4/93
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 2/9/93

L&C Committee considered SENATE BILL NO. 66

"An Act relating to limited partnerships; and providing for an effective date."

and recommends:

[ ] replace with ________ CS ________________ (______)

[ ] same title
[ ] new title
[ ] technical title change (HB only)

[ ] attaches amendment(s)

[ ] adopts ________________________ Letter of Intent

[ ] further referral to the ________________________

[ ] do pass

[ ] do not pass

[ ] no recommendation

[X] individual recommendations

FISCAL NOTE INFORMATION

Department	Date	Zero	Fiscal
DCED	2/8/93	✓	
~~Court System~~		~~✓~~	
LAW	2/4/93	✓	

Department	Date	Zero	Fiscal

[ ] Appropriation No Fiscal Note

[ ] Governor's Bill with Previous Fiscal Notes (enter information above)

DO PASS:

Judith E. Salo

[signature]

OTHER RECOMMENDATIONS:

Tim Kelly... Do Rec

Albert Kookesh No Recommendation

Tim Kelly - Do Pass

Chair: Signature and Recommendation

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 66

Revision Date: February 4, 1993
Title: "An Act relating to limited partnerships; and providing for an effective date."
Sponsor: Senator Duncan
Requestor: Senator Duncan

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

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						

REVENUE FUND SOURCE:						

FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

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

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
This bill repeals, reenacts, and amends a good part of the state's Limited Partnership Act, AS 32.10, which was first adopted in 1992. The bill deals with transactions between private parties, and it will not have a fiscal impact for the Department of Law.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: February 4, 1993

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: February 4, 1993

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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

☐ *KEY BANK BUILDING*
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☒ *P.O. BOX K— STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) ~~463-5295~~ 465-6735

February 8, 1993

Hon. Tim Kelly
Alaska State Senate
State Capitol Building, Room 101
Juneau, AK 99801

Re: SB 66

Dear Senator Kelly:

The Department of Law has reviewed SB 66, updating the Uniform Limited Partnership Act in Alaska.

We find no legal problems. The bill is important for making Alaska's law consistent with other states that have enacted the uniform Act on this subject.

If you have questions, please let us know.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Deborah E. Behr
Deborah E. Behr
Assistant Attorney General

DEB:cl

cc: Alaska's Uniform Law Commissioners Delegation
Justice Jay Rabinowitz
Arthur H. Peterson, Esq.
Jerry Kurtz, Esq.
Tam Cook, Esq.
Grant Callow, Esq.

REVISED UNIFORM LIMITED PARTNERSHIP ACT

The Uniform Limited Partnership Act (ULPA) was promulgated originally in 1916. It has been adopted in 45 jurisdictions and, with the Uniform Partnership Act, is the basis for law regulating partnerships in the United States. The limited partnership is distinguished from a general partnership by the existence of limited partners who invest in the partnership with liability limited to the amount invested. A general partner is liable individually for all the obligations of the partnership. In return for limited liability, the limited partner relinquishes any right of control or management of partnership affairs.

Limited partnerships have become, in 60 years, an important means of business organization and are used extensively. Over the 60 years of generally salubrious usage, this form of organization has encountered some problems. In 1976, a revision has been drafted, based on 60 years of extensive experience, to improve this method of organization even more.

The most important changes have been made in the scope of the limited partner's activities vis-a-vis the partnership. Under the original ULPA, a limited partner could not contribute services to the partnership. He had to contribute property or other valuable obligations to obtain his status. Under the revision, services may now be contributed, as well as property or valuable obligations.

The second change regards voting rights. The original ULPA did not deny voting rights to limited partners, but neither did it permit them. The revision allows limited partners to be granted voting rights in the partnership agreement. These two provisions both change and enhance a limited partner's status.

When a limited partner can vote and contribute services, the question of control or participation in management becomes more critical. The Revised Act, therefore, takes special care in distinguishing those acts which do not alone determine control. The question of control is to be answered in the light of all the facts and circumstances, but, if the limited partner does singly any of certain things, he or she is not by that fact liable as a general partner. These things include being a contractor for or agent of a general partner, consulting or advising a general partner with respect to partnership business, acting as a surety for the limited partnership, approving or disapproving an amendment to the partnership agreement, or voting on certain specific matters. The object of these specific enumerations is to prevent unreasonable determinations that a limited partner takes part in the control of the business.

The original ULPA provided only for a certificate of partnership. It made no mention of partnership agreements. The Revised Act changes the face of the partnership by changing the emphasis from the certificate to the agreement. Under the Revised Act, the certificate of limited partnership is confined principally to matters respecting the addition and withdrawal of partners and of capital. Other issues that are important are left to the agreement.

For example, a partner may lend money to and transact other business with a limited partnership as if the partner were a total outsider, except as otherwise provided in the partnership agreement. The partnership agreement determines the distribution of voting rights. The shares in profits and losses are decided in the partnership agreement. The partnership agreement becomes the important working document in the operation of the partnership.

There are other important changes, also, in the Revised Act. For example, a central registry is provided for limited partnerships. It is anticipated that the registrar for corporations and other business organizations, usually the Secretary of State, will also perform the function for a limited partnership.

Another important addition guarantees limited partners the right to partnership records, a right not before accorded. This permits a limited partner to protect his or her investment in the partnership by keeping better track of the business itself.

Also provided is a derivative action by limited partners against the partnership to redress mismanagement affecting a limited partner's interests. This would be very like a stockholder's derivative suit against a corporation. One of the historically apparent difficulties of limited partnerships has been protection of limited partner's rights. People have been induced to invest only to find that the investment has been squandered, and nothing could be done until general insolvency. These changes would curtail this problem.

Another significant, new contribution of the Revised Act is registration of foreign limited partnerships. Doing business interstate is a commonality for all business organizations, including limited partnerships. Therefore, the problems of jurisdiction and notice parallel those of corporations. Accordingly, a registration requirement for limited partnerships from other states doing business in an enacting state is established. This is required now in almost all jurisdictions for a foreign business corporation. The requirement recognizes the scope of the limited partnership as utilized in the United States today.

The 1916 ULPA has served will as the backbone of the law on limited partnerships. However, usages change, and new problems arise. The old Act is remarkably resilient, considering the historical record. Its revision now comes forward as a response to the changes that have occurred. It is the same business organization, but with characteristics for today's business. It should be good, at least, for another 60 years.

THE 1985 AMENDMENTS TO THE UNIFORM LIMITED PARTNERSHIP ACT

Two developments impelled the National Conference of Commissioners on Uniform State Laws (ULC) to make amendments to the Uniform Limited Partnership Act (1976) (ULPA (1976)) in 1985. There were two reasons for these amendments:

1. A number of states had adopted variations of ULPA (1976) that were sufficiently compelling to cause the ULC to re-evaluate earlier policy decisions.

2. In 1984, the IRS approved the adoption of ULPA (1976) in a number of states, even though there were significant variations in those states from the official text of ULPA (1976). Included were the enactments in California, Delaware, and Maryland. IRS approval of these enactments provided the opportunity to reconsider issues.

In 1985, the ULC promulgated a limited series of amendments and, with them, the Act becomes known as the Uniform Limited Partnership Act (1985) (ULPA (1985)). Seven sections of ULPA (1985) have been amended, substantively. A number of other sections have been amended to conform them to those sections that have been substantively amended. A summary of substantive amendments follows:

Section 201. Shorter Certificate of Limited Partnership.

In ULPA (1976) and the original 1916 Act, the names and contributions of limited partners, along with other specific information about partners, are required components of the certificate of limited partnership. The 1985 amendments eliminate the majority of these requirements. The certificate becomes a notice certificate that establishes the existence of a limited partnership, and identifies the general partners.

Because the certificate has provided information of importance to limited partners, the amendments require it to be maintained for limited partners in the partnership agreement or the records of the limited partnership under Section 105. Further, because the certificate is referred to in eighteen other sections, the bulk of the conforming amendments involve appropriate substitute language in those sections.

Section 303. New Test for Liability: Expansion of the "Safe Harbor."

The 1984 tax rulings made these crucial amendments possible. Paragraph (a) of ULPA (1976) requires a twofold

test for liability that, at best, is cumbersome and difficult to apply. The new test provides liability when a third party reasonably believes, based on conduct, that the limited partner is participating in the control of the business, and relies upon that belief in dealing with the partnership.

Paragraph (b) is the so-called "safe harbor" for limited partners. It enumerates the kinds of actions limited partners can take without assuming general liability. The original 1916 Act is silent on this subject; ULPA (1976) incorporates the accumulated case law interpreting the 1916 Act. It establishes several statutory categories of action that limited partners can take without incurring liability. The 1985 amendments extend the category of limited partner actions that are within the "safe harbor."

Section 401. Lesser Consent Rule for Admitting New General Partners.

ULPA (1976) requires the unanimous consent of all partners for the admission of any new general partner, a burdensome rule that can jeopardize a partnership's existence and the investment of its partners. While the problems were considered during the drafting of the 1976 Act, it was thought that a less rigorous consent rule would not meet IRS approval.

However, the 1984 IRS approval of the California, Delaware, Maryland and Michigan acts - acts that provide for a less rigorous rule - called for a re-evaluation by the ULC. The 1985 amendments retains unanimous consent only as a default when a partnership agreement does not provide otherwise.

Four other sections contain substantive changes. Amendments to:

Section 202 provide for restated certificates;

Section 204 eliminate the need for any signatures other than the general partner signatures on the certificate;

Section 205 permit the filing of any certificate, whether original or a certificate of amendment or cancellation, as need requires; and

Section 1104 clarify the original text of this Section, which governs transition between existing limited partnership law and ULPA (1985).

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 66

Revision Date:
Title: An Act relating to limited partnerships

Sponsor: Senator Duncan
Requestor:

Department Affected: Commerce and Economic Development
BRU: Banking, Securities and Corporations
Component:

COMPONENT SERIAL NO. 1233

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
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:						
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	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 (FY 93) impact: 0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Willis F. Kirkpatrick, Director
Division: Banking, Securities and Corporations
Phone: 465-2521
Date:

Approved by Commissioner: Paul Fuhs
Agency: Commerce and Economic Development
Date: 2-05-93

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DCED FISCAL NOTE & POSITION

Department of Commerce & Economic Development / POSITION PAPER

SB 66: "An Act relating to limited partnerships; and providing for an effective date."

The Department of Commerce and Economic Development favors passage of Senate Bill 66, as it provides greater uniformity to the Uniform Partnership Act. These amendments to Chapter 128, SLA 1992, effective July 1, 1993, will have, to a small degree, some filing reduction of activity by the department, due to the deletions of information to be filed.

While no amendments are offered by the department, the Legislature may wish to consider the following:

1. Section 1 and Section 18 delete the requirement of a limited partnership to file a general character of the business it proposes to transact. It is suggested that the Legislature may wish to weigh the inclusion of a Standard Industrial Classification code (SIC) to be filed with the department. This would provide statistical information to agencies of the state government and to others who wish to determine the scope of Limited Partnership businesses operating in the State of Alaska. The SIC codes are a requirement for business licenses and for corporations filing with the department. This information has been helpful in Economic Development studies.

2. The department in preparation for the July 1, 1993, effective date of Chapter 128 SLA 1992, has found that other states have had some administrative problems with the lack of authority to dissolve a limited partnership when it becomes known that the limited partnership no longer has any operational existence. The only action available to the department would be to remove the nonfunctional limited partnership at the expiration date listed on its certificate. It might be appropriate for the Legislature to consider including the department as one that could make application to Superior Court for judicial dissolution (Section 32.11.380).

The department appreciates the opportunity to state our position, and finds that should SB 66 pass, there would be no fiscal impact upon the agency.

Paul E. Reed

Paul Fuhs, Commissioner

2-8-93

Date

PF/WFK/lvs149.WK/2893c

SB

69

Alaska State Legislature

Chair, Special Committee on Oil & Gas
Vice Chair, Transportation Committee
Member, Resources Committee
Rules Committee
Committee on Committees
Western States Legislative Forestry Task Force

District A
Ketchikan, Wrangell, Petersburg, Saxman
Hyder, Meyers Chuck, Kupreanof

Senator Robin L. Taylor

State Capitol
Juneau, Alaska 99801-1182
(907) 465-3873
Fax: (907) 465-3922

352 Front Street
Ketchikan, Alaska 99901
(907) 225-8088
Fax: (907) 225-8546

January 28, 1993

Senator Tim Kelly, Chairman
Senate Labor and Commerce Committee

Dear Senator: Tim

Please consider this my formal request that the Senate Labor and Commerce Committee hear SB69, " an Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work".

I understand that your calendar for February 2, 1993 may be able to accommodate a hearing on this legislation and would request that you schedule for that date.

Thank you in advance for your consideration.

Robin L. Taylor

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 69

Revision Date:

Department Affected: Administration

Title: "An Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work."

BRU: Personnel/OEEO

Component: Personnel/OEEO

Sponsor: Senators Taylor, Duncan

Requestor: Sen. L&C

COMPONENT SERIAL NO. 56

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
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:						
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	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 (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: R. H. King, Director

Phone: 465-4430

Division: Personnel/OEEO

Date:

Approved by Commissioner: Nancy Bear Usera NBU

Agency: Administration

Date: 1/29/93

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February 1, 1993

The Honorable Tim Kelly
Chair, Labor & Commerce Committee
Alaska State Senate
State Capitol, Room 101
Juneau, AK 99801-1182

Dear Senator Kelly:

On behalf of the Alaska Civil Liberties Union (AkCLU), an affiliate of the American Civil Liberties Union (ACLU), I am writing to urge you to support SB 69. This bill is designed to prohibit employers from discriminating against employees based on their use of lawful products during non-working hours and away from the employer's premises. This is a civil liberties and privacy issue of vital concern to the AkCLU and one which the ACLU has strongly supported nationwide.

Employers have the right and the responsibility to be concerned about every employee's job performance, and to take action if that performance is not up to company standards. But an employee's private life is none of his or her employer's business unless it affects their performance.

Unfortunately, many employers today have forgotten this basic rule. These companies refuse to hire people because they smoke or drink at home, because they are overweight, or because they scuba dive or ride motorcycles on their days off. Some of these employers even fire employees who were hired before the policies were adopted.

While a few companies are doing this for paternalistic reasons, most are doing it in an effort to reduce their health care costs. This

A.C.L.U. LETTER OF SUPPORT & LEGISLATIVE BRIEFING

is unquestionably a legitimate corporate goal. But consider the implications of a rule that permits employers to regulate private behavior unrelated to job performance simply because it affects the employee's health. Virtually everything we do affects our health. The list of private choices that may increase health care costs is almost endless: alcohol, tobacco, red meat, fried food, coffee, not getting enough sleep or exercise, even lying on the beach on vacation creates a risk of skin cancer.

The decision with the greatest impact on our employer's health care costs is the decision to have children. If health alone is adequate reason for a company to control private behavior, virtually every aspect of our private lives will be subject to our employer's control.

Even if such interference represented a solution to our nation's health care problems, the civil liberties costs would be too high. But it does not. While the amount of money employers would save by forcing us all to give up our bad habits is unclear, even those who support such corporate programs admit that these habits are not at the core of the problem of increasing health care costs.

We are also concerned about the techniques which employers will be forced to use to enforce such policies. Will all employees be required to submit urine samples for analysis? Will Pinkertons be hired to watch employees while they are away from work? Will employees be encouraged to turn each other in?

As Americans, proud of our heritage of individualism, we cannot accept employers getting into the business of policing private conduct.

We also appreciate the concerns of the health organizations. The government should not be in the business of encouraging people to hurt themselves. Government has the right, and the obligation, to educate its citizens about the dangers of tobacco and alcohol, and to help those who want to quit. But permitting employers to use the power of the paycheck to coerce those who do not want to quit is wrong.

Twenty-three states have already acted to protect their citizens' private lives from employer control. The large majority of these statutes are tobacco specific. This limitation is most unfortunate. While off-duty smokers are among the many groups entitled to protection, what is needed are laws that protect everyone's right to conduct their private life free from employer interference. By passing SB 69, Alaska will be setting an example for the rest of the nation.

If you or your staff would like to discuss this issue in more detail, please feel free to contact our office in Anchorage. In addition, the ACLU has a "National Task Force on Civil Liberties in the Workplace," located in New York City. You may contact the task force director, Lewis L. Maltby, at 212-944-9800 (ext. 402).

Respectfully yours,

Randall P. Burns
Executive Director

Attachment

sb69pp-2193

LEGISLATIVE BRIEFING SERIES

LIFESTYLE DISCRIMINATION

- INTRODUCTION
- QUESTIONS AND ANSWERS
- CURRENT LEGAL STATUS
- MODEL BILL
- LOBBYING STRATEGIES
- SUPPORTING ORGANIZATIONS
- BIBLIOGRAPHY

INTRODUCTION TO LIFESTYLE DISCRIMINATION IN THE WORKPLACE

In 1989, Daniel Winn, an employee at the Best Lock Corporation in Indiana, admitted to his superiors that several years earlier he had a few drinks in a bar with friends. Mr. Winn was promptly fired on the basis of Best Lock's policy that its employees cannot drink alcohol under any circumstances.

Two officials at the Ford Motor Box Co. in Wabash, Ind. pulled Janice Bone aside and escorted her from the plant. Bone is a smoker, and although she did not smoke on the job, Ford's policy barred her from smoking at all. "I was very shocked. It's devastating when this happens to you", said Bone. [1]

In Michigan, Donna O'Leary, a bus driver, was unable during a physical exam to run in place for three minutes. O'Leary, who weighs over 368 pounds was simply terminated after 26 years employment. [2]

Americans have long accepted that employers have a certain degree of control over what we do while at the workplace. But increasing numbers of employers are dangerously broadening the sphere of their control to include what employees do in their own homes. Many employers now refuse to hire people whose private lives are deemed "unhealthy". A few even fire current employees who don't change their lifestyle to meet new company demands. The most common victims of this type of discrimination are smokers and fat people. [3] According to a 1988 survey taken by the Administrative Management Society, 6% of all employers (about 6,000 companies) now discriminate against off-duty smokers. The number has almost certainly increased since then. It is more difficult to estimate the number of companies which discriminate against fat people, since this is seldom an official corporate policy. However, anecdotal evidence collected by the National Association for Advancement of Fat Acceptance (NAAFA) suggests that discrimination against fat people is even more common. Other employers refuse to hire people who drink alcohol, have high cholesterol levels, or ride motorcycles.

The driving force behind this trend is economics. Health care costs for employers are increasing by at least 15% per year, [4] almost 3 times as fast as inflation. Although several factors contribute to these rising costs, the only factor employers have control over is their employees. With such an incentive, employers may well try to dominate every

[1] "Private lives becoming employers' business" Philadelphia Inquirer, March 31, 1991.
[2] Schlosch, John, *Employment Discrimination Based on Employee Lifestyle*, A.C.L.U. Document Bank #P13 (1991)
[3] This is the term fat people have chosen to describe themselves.
[4] Search, *A New Look at Wellness Plans: Well-Designed Programs Twist Knot from Health Care Tab*, Bus. Ins. February 18, 1991

health-related aspect of their employees' lives, including diet, exercise and sleep habits — and without protective legislation they will succeed.

The early Americans adopted the Bill of Rights to limit the government's involvement in their lives and modern Americans demonstrate the same unwillingness to tolerate intrusion whether by government or by employer. According to a 1990 poll by the National Consumers League, [5] 81% of Americans believe that an employer has no right to refuse to hire an overweight person. 76% believe employers have no right to refuse to hire a smoker. 73% believe employers have no right to require an employee or applicant to change their diet.

Recognizing that refusing to hire people for reasons unrelated to job performance is unfair and often prevents the company from hiring the best qualified person, some employers have adopted a different strategy. Employees who have lifestyles the employer considers unhealthy are required to pay more for their company health insurance. Some employers say they are charging unhealthy employees a premium over their "normal" rate, some say they are giving healthy employees a discount. Either way, one employee is paying more for their health care than another.

This may not be wrong in principle, but such programs should be based on sound actuarial data. The company should be able to demonstrate that the behavior in question increases employer health care costs by a measurable amount. While such relationships may exist, the data currently available does not demonstrate it clearly. For example, the Bureau of National Affairs reports that 95% of companies banning smoking reported no financial savings, [6] and the U.S. Chamber of Commerce has found no connection between smoking and absenteeism.

The methods used to enforce these policies raise independent civil liberties issues. Most employers currently take an employee's word that they are not violating the rules for off-duty behavior. As discrimination grows more common, however, it will become more difficult to simply avoid companies with whose policies one doesn't comply. People will take jobs, not reveal their lifestyle, and hope the employer doesn't find out. When this occurs, employers will have to hire spies to follow people away from work and/or require frequent universal medical testing (such as urinalysis) in order to enforce the policy.

[5] See A.C.L.U. Document Bank #P4.
[6] Bureau of National Affairs, *When They) Smoke Problem, Policies Concerning Smoking in the Workplace*, 2nd ed. 1987

QUESTIONS AND ANSWERS: LIFESTYLE DISCRIMINATION

WHICH COMPANIES PRACTICE LIFESTYLE DISCRIMINATION?

There is no comprehensive list of companies which practice lifestyle discrimination. A few examples of employers who discriminate include:

- ➤Cardinal Industries refuses to hire smokers stating it "only hires non-smokers and gives every applicant a urine test and promises to fire those who say they have quit, but don't."
- ➤U-Haul International charges its smoking employees an extra $130 per year for health insurance.
- ➤Pointe Resorts, which operates 3 hotels in Phoenix, pays 40% more of the insurance costs of employees with a normal weight than of those who are overweight.
- ➤In 1990, the city government of Athens, Georgia initiated a health screening for prospective city workers. Applicants whose cholesterol level was in the worst 25% of national ranges were simply ineligible for any position.

SHOULDN'T EMPLOYERS BE ABLE TO KEEP THEIR COSTS DOWN BY HIRING EMPLOYEES WHO WON'T GENERATE HIGH MEDICAL BILLS?

It is unfair and dangerous to allow employers to discriminate against certain employees because they believe their private lifestyle choices are unhealthy and lead to higher health insurance costs. To begin with, it is unclear that employers can achieve significant savings through lifestyle discrimination. Also, if it becomes acceptable to deny employment because of potentially higher health care costs, people who are capable of working will be effectively banned from any employment, preventing them from providing for themselves or their dependents. Finally, even if employers could achieve substantial savings, sacrificing the private lives of all working Americans is too high a price to pay.

WHY SHOULDN'T EMPLOYERS BE ABLE TO RESTRICT THEIR EMPLOYEES' HIGH-RISK BEHAVIOR?

Risks are associated with nearly every personal lifestyle choice we make — from smoking cigarettes, to sitting in the sun, to having children. Where do we draw the line as to what our employer can regulate? The real issue here is the individual right to lead our lives as we choose. It is important that we preserve the distinction between company time and the sanctity of our private lives.

ISN'T IT WRONG TO ENCOURAGE PEOPLE TO SMOKE WITH PROTECTIVE LEGISLATION?

The government has the obligation to insure that people understand the health risks of smoking. Government and employers ought to help people who want to quit smoking. Ultimately, however, it is up to the individual to decide if they want to engage in risky behavior such as smoking or riding a motorcycle. What is wrong is using the power of the government or the paycheck to tell other people how to live.

ISN'T THIS CREATING A RIGHT TO SMOKE?

No. The A.C.L.U. does not oppose smoking bans in public buildings, in the work-place, or in other locations where non-smokers may be subjected to sidestream smoke. We object only to bans on smoking (or beer or junk food) in a person's own home.

ISN'T LIFESTYLE DISCRIMINATION LEGISLATION JUST A TOOL OF TOBACCO COMPANIES?

No. Lifestyle discrimination legislation is supported by a variety of civil rights and labor organizations and by the majority of Americans.

CURRENT LEGAL STATUS OF LIFESTYLE DISCRIMINATION

Federal Law

At the federal level, civil rights laws barring discrimination on the basis of race, gender or disability may apply to lifestyle discrimination.

Race and Gender

There is demographic dam showing that blacks and young women smoke in disproportionately large numbers. It is possible that this disproportion is large enough to constitute disparate impact under Title VII of The Civil Rights Act of 1964, which prohibits discrimination in the workplace on the basis of race and gender.

Disability

The new Americans with Disabilities Act (ADA) prohibits employment discrimination against people with "any physical or mental impairment that substantially limits one or more of an individual's major life activities" and also people who are "regarded as having such an impairment."

While the ADA does not take effect until July of 1992, employees of federal agencies and federal contractors already have this protection under section 504 of the Federal Rehabilitation Act of 1973.

While there is not yet case law on point, it can be argued that certain forms of lifestyle discrimination are illegal under ADA. The critical issue is whether the individual's limitation (real or perceived) is serious enough to qualify as a "disability".

State Law

Most states have statutes parallel to the Federal Rehabilitation Act of 1973, which cover both public and private sector employees. There have already been state court decisions holding that under these statutes fat people are protected from discrimination. For example, the New York Court of Appeals held that Xerox Corp. violated the New York Human Rights Law by denying Catherine McDermott a job because of her obesity. The Court rejected the company's claim that it had a right to deny employment because of the likely future health costs her condition would create for the company. The Court said that "employment may not be denied because of any actual or perceived undesirable effect the person's employment may have on disability or life insurance programs." [7]

Even the best state disability laws, however, provide no protection for lifestyle choices that are recreational rather than medical.

To correct the shortcomings of current law, twenty-one states have passed lifestyle discrimination statutes. The majority of these protect only smokers, but a few are broader. Colorado and North Dakota ban discrimination based on any form of legal off-duty behavior.

[7] Schloesh, Supra. (Note 2)

A complete list of state lifestyle discrimination statutes:

Enacted Privacy Legislation
1989 - 1991

STATE	LANGUAGE	BILL NUMBER	ENACTED
Virginia	Smokers Only	S607	March 27, 1989
Oregon	Smokers Only	S986	July 28, 1989
Tennessee	Smokers Only	H2516	March 29, 1990
Kentucky	Smokers Only	H628	April 9, 1990
Colorado	Legal Activities	H1123	April 17, 1990
S. Carolina	Smokers Only	S981	June 25, 1990
Rhode Island	Smokers Only	H8768	July 12, 1990
S. Dakota	Smokers Only	SB102	March 1, 1991
New Mexico	Smokers Only	S132	April 4, 1991
North Dakota	Legal Activities	SB2498	April 5, 1991
Mississippi	Smokers Only	SB2172	April 16, 1991
Indiana	Smokers Only	H1439	May 4, 1991
Oklahoma	Smokers Only	HB1590	May 8, 1991
New Hampshire	Smokers Only	S171	June 10, 1991
Nevada	Legal Products	AB667	June 14, 1991
Maine	Smokers Only	LD1696	June 18, 1991
Connecticut	Smokers Only	H7211	June 25, 1991
Arizona	Smokers Only	SB1153	June 25, 1991
New Jersey	Smokers Only	A4699	July 15, 1991
Louisiana	Smokers Only	HB499	July 19, 1991
Illinois	Legal Products	HB1533	January 1,1992

New York & Michigan have pending legislation.

Government Employees

Government employees are protected by equal protection and due process clauses of the federal constitution.

There are comparable clauses in many state constitutions.

These constitutional provisions should protect public employees from discrimination based on non-job related criteria. Perhaps for this reason, lifestyle discrimination by public employers is rare.

The city of North Miami, however, recently adopted an ordinance barring smokers from any municipal employment. The Florida A.C.L.U. has challenged this policy in court, [8] and the result will shed much light upon the extent to which public employees are already protected.

[8] Kurtz v. City of North Miami, Florida Bar No. 4440006 (filed January 1991)

MODEL ACT

1.Prohibited Practices

1.1 It shall be illegal for an employer to discriminate against any employee or applicant on the basis of that person's conduct during non-working hours away from the employer's premises or on the basis of personal characteristics unless that conduct or characteristic affects the person's ability to properly fulfill the responsibilities of the position in question.

1.2 No employer shall collect information about the off-duty behavior or personal characteristics of employees or applicants which would not be a legitimate basis for personnel decisions under section 1.1.

2.Exceptions

2.1 Nothing in sections 1.1 and 1.2 shall be construed to make it illegal for an employer to:

2.2 Maintain a bona fide conflict of interest policy. This section applies only to current employees and does not affect the law of this state regarding restrictive covenants for former employees.

2.3 Refuse to employ a person whose off-duty conduct, while not incomparible with the requirements of the position, is incompatible with the fundamental objectives of the organization.

3.Enforcement

3.1 Any person who has been aggrieved by a violation of this act shall have a private right of civil action in any court of competent jurisdiction in this state.

3.2 In any such civil action the plaintiff shall have the burden of proving that he or she was qualified for the position in question. The defendant shall then have the burden of producing a basis for its decision which is consistent with this statute. The plaintiff then has the burden of proving by a preponderance of the evidence that the actual reason for the decision was off-duty behavior or a personal characteristic. The defendant then has the burden of proving that this behavior or characteristic is job related.

4.Remedies

4.1 A prevailing plaintiff in a civil action under this action is entitled to:

4.2 Injunctive relief.

4.3 An award of damages equal to the harm caused by the violation (both economic and non-economic) or $1,000, whichever is greater.

4.4 Full costs of action plus reasonable attorney's fees.

5.Waiver

5.1 The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act.

COMMENTS ON DRAFTING A LIFESTYLE DISCRIMINATION STATUTE

The crucial choice in drafting a statute is deciding how broad the protection should be. There are four basic alternatives:

1. Prohibit Discrimination Based on Off-Duty Smoking

This is the most limited form of protection. While it protects one of the largest groups of victims, it leaves many unprotected. It also lends credence to the charge that the legislation is about smoking rather than autonomy and privacy. Its only real benefit is that its impact is limited and clearly defined. This can reduce, or even eliminate, opposition from organized business.

2. Prohibit Discrimination Based on Off-Duty Use of All Legal Substances

This formulation expands the coverage to off-duty drinking and, possibly, people with high cholesterol or other conditions related to diet.

3. Prohibit Discrimination Based on Any Legal Off-Duty Behavior

This is the broadest coverage that has yet been obtained. It clearly protects all dietary lifestyle choices and also choices of hobbies (skiing, motorcycles, etc.). It also prohibits discrimination based on sexual orientation in the 25 states that have repealed their sodomy laws.

The pragmatic problem with this approach is that it is so sweeping that its exact impact is hard to determine in advance. This uncertainty increases opposition from organized business. While we have addressed all the legitimate concerns they have raised (see "exceptions"), there is concern that not all the legitimate concerns have yet been identified.

4. Prohibit Discrimination Based on Anything Not Related to Job Performance

This is the ideal way to write the statute. It not only prevents discrimination based on off-duty conduct, but prevents discrimination based on personal characteristics unrelated to job performance. All fat people are clearly protected under this approach. So are short people, the physically unattractive, and others who are often discriminated against, but whose condition is not serious enough to be classified as a "disability".

The second question is the position you want to take on illegal off-duty behavior.

The ideal position is that the employer's legitimate interest is limited to behavior that is related to job performance, and that even illegal off-duty behavior that does not affect a person's fitness for duty should not be grounds for discrimination.

This position is probably politically untenable at the present time, especially where illegal drugs are involved. We may have to limit our bills to legal off-duty behavior, even in our initial proposal.

Assuming you choose general coverage option 3 or 4 above, there are a series of proposed exceptions from the business community to consider. Each of these purports to

be a situation where a certain form of off-duty behavior is legal, but the employer has a legitimate reason for prohibiting it. These include:

1. Conflict of Interest: This is straightforward, and we have included it in the model.

2. Anti-nepotism Policies: Having relatives working together can create conflict. Many companies, however, have found ways to manage this without discriminating against relatives of employees. This is a judgment call. Our model does not include this exception.

3. Conduct Incompatible with Organizational Goals: The American Lung Association believes it should have the right to refuse to hire smokers. The model incorporates language which would allow this practice. It can be argued that this exception should be limited to high level employees.

4. Surcharges: Even when they support legislation banning lifestyle discrimination in hiring, organized business will lobby vigorously for the right to charge "unhealthy" employees more for company health insurance. (See introduction).

There is no compelling civil liberties argument against this in principle. It is not, however, a practice we want to encourage, and is not included in our model.
The best position may be to remain neutral in principle, but insist on two conditions if a surcharge authorization is included in legislation:

1. Any difference in employee contributions must be supported by sound actuarial data on employer costs.

2. No surcharge may have a disparate impact on a group which is protected from job discrimination under federal or state law.

LOBBYING STRATEGIES

The political landscape is much different for lifestyle discrimination legislation than for other workplace rights bills.

We do not have strong opposition from organized business. The U.S. Chamber of Commerce has taken the position that it is wrong for an employer to refuse to hire (or fire) someone because of off-duty conduct unrelated to job performance. At least one state chamber (New Jersey) has actually supported lifestyle discrimination legislation.

In most states, disagreements over statutory drafting (especially damages) and a general reluctance to support legislation that restricts business led the chamber to remain neutral or offer lukewarm opposition. Seldom, however, have we encountered the strident opposition that has frustrated our efforts on other issues.

The real opposition comes from anti-smoking groups. This includes both national groups like the American Lung Association and local voluntary organizations. Although they are loath to admit it, these people are prohibitionists. They believe that smoking is so harmful that it should not be a matter of personal choice but should be stamped out by any available means. They are not very articulate or candid, but they have a great asset in public antipathy toward smoking, and they know how to play to it.

Critical to this issue, as usual, is organized labor. The AFL-CIO and the Communications Workers of America (CWA) have generally supported lifestyle legislation. We have also had support from police and firefighters unions (those most likely to be victims). Another likely ally is the Carpenters and Joiners union. Their President, Sigurd Lucassen, has been labor's spokesman against outright bans on workplace smoking.

This is a relatively new issue, however, and one cannot assume that all labor leaders are familiar with it or will automatically make it a priority. As with any emerging issue, support for lifestyle discrimination laws must be developed.

Other progressive groups, including religious organizations, should support this legislation, but have generally not yet been asked.

PRESENTING THE ISSUE

It is always true that the way an issue is framed influences, and often determines, the response. That is especially true here. Opponents will claim that the issue is smoking, even if the bill covers all legal off-duty behavior. The public's tendency to think in the concrete rather than the abstract, the fact that smokers are among the most common victims, and the fact that tobacco companies support the legislation, all work in our opponents' favor. If they succeed in casting the issue this way, we will surely lose.

The real issue here is privacy—the right of all adults to live as they choose in their own homes. The public strongly supports this value. They are not inclined to view the issue this way, and you will have to repeat our position ad nauseum. But experience has shown that with enough repetition, the public will understand the real issue. Once this happens, we will be successful.

Do's and Dont's

Labor Law- not Civil Rights

Some states have attempted to create lifestyle legislation by amending their state civil rights act. This lends credence to the charge that we are trying to turn smoking (or drinking) into a civil right. It also offends some people in the civil rights community.

It is vastly better to place this protection in the state labor law. It is also more correct; the law's purpose is to modify the legal relationship of employers and employees.

Health Economics

There is in fact a great deal of uncertainty over the health care cost implication of various lifestyle choices. Even where a given behavior clearly causes a measurable increase in health care costs, it is not necessarily true that these costs will be paid by employers.

Health care economics, however, is not the issue. The issue is privacy. Any discussion of economics plays into the hands of those who would mislead the public by mis-stating the issue.

Spokespeople

Since the issue is not smoking, drinking, or hang gliding, but privacy, the spokespeople for the issue should be those who care about this principle rather than the specific behavior.

SUPPORTING ORGANIZATIONS

Here are some of the organizations which support lifestyle discrimination legislation. The addresses and phone numbers listed are for national offices, but you can use these contacts to reach the appropriate state and local offices.

AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

Communications Workers of America
501 3rd Street, N.W.
Washington, D.C.
(202) 434-1300

Fraternal Order of Police
2100 Gardiner Lane
Louisville, Kentucky 40205
(502) 451-2700

National Association for Advancement of Fat Acceptance (NAAFA)
P.O. Box 188620
Sacramento, California 95818
(916) 443-0303

Philip Morris U.S.A.
120 Park Avenue
New York, N.Y. 10017
(212) 880-4131

Smokers' Rights Alliance
20 East Main Street
Suite 710
Mesa, Arizona 85201
(602) 461-8882

United Brotherhood of Carpenters and Joiners of America
101 Constitution Avenue, NW
Washington, DC 20001
(202) 546-6206

BIBLIOGRAPHY

Bureau of National Affairs, Where There's Smoke: Problems & Policies Concerning Smoking in the Workplace, 2nd edition, 1987

Rothstein, Mark, Medical Screening and the Employee Health Cost Crisis, Bureau of National Affairs, 1989

Schiller, Zachary, If You Light Up on Sunday, Don't Come in on Monday, Business Week, August 26, 1991

Schloerb, John, Employment Discrimination Based on Employee Lifestyles, A.C.L.U. Document Bank #P13 (1991)

Produced by the ACLU National Task Force on Civil Liberties in the Workplace

#191

The ACLU is a District 65, UAW AFL-CIO Shop

National Consumers League
Founded 1899

115 15th Street NW • Suite 928-N • Washington, DC 20005 • (202) 639-8140 Linda F. Golodner, Executive Director

January 15, 1992

Dear Editor:

Attached are a news release and report on a special survey commissioned by The National Consumers League on vital issues of workplace privacy in Alaska. The survey is being released in Alaska by the Older Persons Action Group.

The vast majority of those polled in Alaska believe that employers and prospective employers have no business asking applicants and employees about religion, smoking habits, lifestyle, outside hobbies and activities, and other personal, off-the-job factors which have nothing to do with their ability to perform a job. They also believe an employer has no right to force an employee to change diet, stop smoking, or quit a second job. Those polled in Alaska were also opposed to credit checks on job applicants and monitoring of personal telephone calls.

In spite of their opposition to such intrusions on their personal lives, many respondents reported that they or someone they knew had had such an experience.

Because of the importance of this issue and the overwhelming reaction of people in Alaska to the questions we have put to them, we have taken the unusual step of expressing the survey results to you.

Sincerely,

LINDA F. GOLODNER
President

LFG:jb
Attachments

League
Founded 1899

815 15th Street NW • Suite 516 • Washington, DC 20005 • (202) 639-8140

Linda F. Golodner, Executive Director

FOR IMMEDIATE RELEASE
January 16, 1992

CONTACT: Linda Golodner
202-639-8140
Vera Gazaway
907-276-1059

WORKPLACE PRIVACY SURVEY

ALASKA FEATURED IN MAJOR PUBLIC OPINION POLL
ON WHAT THE BOSS NEEDS TO KNOW ABOUT EMPLOYEES

WASHINGTON, D.C. ---- People in Alaska value their privacy, on the job and outside the workplace. The vast majority says that the boss has no business asking questions about the private lives, lifestyles, and off-work activities of job applicants and employees. Although most Alaskans believe employers should not ask these questions, many of those polled reported that an employer has done such things either to them or to someone they know.

Alaska was one of four states participating in the survey released today by the National Consumers League and the Older Persons Action Group in Anchorage.

The other states were Arizona, Utah, and Washington.

According to the Penn and Schoen Associates poll for the National Consumers League, Americans clearly believe:

o Employers have no right to ask intrusive questions during job interviews.

o It is inappropriate for employers to hire and fire an employee for personal matters unrelated to the job.

o Employers have no right to try to change personal habits and lifestyles of employees.

Linda F. Golodner, executive director of the National Consumers League, said: "This poll confirms what we have found in many other states - that Americans believe they have a right to privacy on the job and off the job. It also shows that a significant number of employers are not respecting those rights."

In releasing the report, Vera Gazaway, executive director of the Older Persons Action Group, said: "The poll also reveals the vast majority of workers in Alaska are adamantly opposed to attempts by employers to force upon them a company-blessed lifestyle. Those 65 and over who were polled are in agreement with the rest of the state's population. As far as they are concerned, it's none of the boss's business who employees date, how much they eat, whether they smoke, take part in a political demonstration, hold a second job, drive a motorcycle, or have pending workers' compensation claims.

"As far as Alaska senior citizens and the general public are concerned, the ability to perform the job should be the sole criterion for winning and holding a job," she said.

I. NO RIGHT TO ASK

Overwhelmingly, those interviewed in Alaska said a prospective employer has no right to ask the following questions:

- o 88 percent, about an applicant's religion;
- o 87 percent, whether applicant lived with member of opposite sex;
- o 84 percent, if applicant had elderly parents;
- o 82 percent, whether applicant planned to have children;
- o 77 percent, if applicant smoked after work hours;
- o 59 percent, about hobbies and outside activities; and
- o 53 percent, about applicant's marital status.

II. NO JUSTIFICATION FOR HIRING OR FIRING

Those surveyed in Alaska were presented with nine examples of activities that employees may pursue on their own time away from work, their physical condition, and controversial opinions they may hold. Respondents were asked if they thought it was appropriate for the employer to base a decision to hire or fire on these criteria:

- o 98 percent said it was inappropriate for an employer to base hiring or firing on whether an individual dated a person of a different race.
- o 98 percent said whether an individual drives a motorcycle should not be a criterion.
- o 91 percent said participating in political demonstrations should not be a basis for hiring or firing.

- o 91 percent said it was inappropriate for employers to consider whether an employee participates in gambling at a racetrack.
- o 74 percent said holding an unusual second job should not be a consideration for employers.
- o 84 percent said being overweight should not be a consideration in hiring or firing an individual.
- o 95 percent said it was inappropriate to base hiring or firing on an individual's support for abortion.
- o 97 percent said it was inappropriate to base hiring or firing on an individual's opposition to abortion.
- o 94 percent said it was inappropriate to base hiring or firing on whether an individual smoked after work hours.

III. NO RIGHT TO FORCE A CHANGE IN LIFESTYLE

The vast majority of Americans believe that employers have no right to force employees to change their lifestyles.

Here's the level at which survey respondents in Alaska opposed employer rights in the following categories:

- o 77 percent opposed employers monitoring personal telephone conversations.
- c 86 percent opposed a prohibition of employees dating rival firm employees.
- o 81 percent opposed an employer's refusal to hire an overweight person.
- o 78 percent opposed an employer's refusal to hire a smoker.
- o 92 percent opposed an employer's requirement that an employee or job applicant change his or her diet.
- o 85 percent opposed requiring an employee to quit smoking.
- o 68 percent opposed an employer requiring an employee to quit a second job.
- o 67 percent opposed employers performing a credit check on a prospective employee.

IV. PERSONAL EXPERIENCE

The poll also asked Alaskans if they or anyone they knew had ever been asked any of the types of questions they objected to from employers. Sixty percent said they had been asked about their marital status;

- o 45 percent, about outside hobbies and activities;
- o 21 percent, about their religion;
- o 18 percent about whether or not they planned to have children;

- o 15 percent, about whether or not they smoked away from the workplace;
- o 7 percent, whether they had elderly parents; and
- o 6 percent, whether they lived with a non-family member of the opposite sex.

Seventeen percent reported personal experience with monitored personal telephone conversations;

- o 17 percent, credit checks on prospective employees;
- o 15 percent, required to quit a second job;
- o 13 percent, refused to hire an overweight person;
- o 10 percent, refused to hire a smoker;
- o 7 percent, required an employee or applicant to quit smoking;
- o 6 percent, forbid an employee or applicant from dating an employee from a rival firm; and
- o 4 percent, required an employee or applicant to change diet.

Nine percent of those polled indicated they or someone they knew had been denied a job or fired because of a weight problem;

- o 7 percent because of an unusual second job;
- o 7 percent because of participation in a political demonstration;
- o 3 percent for smoking away from the workplace;
- o 4 percent for dating a person of a different race;
- o 2 percent for driving a motorcycle;
- o 2 percent for gambling at a racetrack; and
- o 1 percent for supporting or opposing abortion.

The Penn and Schoen poll, conducted in December 1991 on behalf of the National Consumers League, was based on a random sample of 609 respondents in Alaska. The margin of error in the survey is +/- four percent.

The National Consumers League, founded in 1899, is a private, non-profit consumer advocacy organization concerned with workplace and marketplace issues.

-30-

Alaska State Legislature

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Member, State Affairs Committee
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Western States Legislative Forestry Task Force
Legislative Council

Senator Robin L. Taylor

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SPONSOR STATEMENT - SB 69

Senate Labor and Commerce Committee
February 2, 1993

First of all, I would like to thank Senator Kelly and the committee for hearing this legislation in such a timely manner.

SB69 is entitled "an Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work". A more accurate title would call it the workers' right to privacy act.

The right to privacy goes to the very heart of the Constitution of the State of Alaska. SB69 would strengthen that Constitutional guarantee by prohibiting employers from refusing to hire, discharge or otherwise discriminate against an individual because that individual uses a lawful product in a lawful manner during non-working hours.

The results of a survey conducted in December of 1991 show Alaskans have a growing concern about employer intrusion into their private lives. Nationally, the New York Times has reported that 6,000 firms refuse to hire smokers and that in some instances individuals have been fired when random drug testing revealed they had used tobacco at home. Some corporations bar employees from using alcohol off the job.

91% of the people surveyed in Alaska said they thought it is inappropriate for employers to deny a job to someone or fire someone based on conduct away from the workplace. At the same time, nearly 20% of those surveyed in Alaska report that an employer has denied a job or fired either them or someone they know for non-job-related activities.

Quoting an editorial from the Anchorage Daily News "In the workplace, only one question should matter: How well do workers do their jobs? As long as what employees do on their own time doesn't affect their job performance, it's none of their employers' business."

SPONSOR STATEMENT

Sponsor Statement - SB69
Senate Labor and Commerce Committee
February 2, 1993

SB69 **does not** impose restrictions on employers from discharging or penalizing an employee for failure to meet job performance standards. It **does not** limit an employers ability to pass on any differential premium rates based on an employees use of legal products and it **does not** apply to the employees of a religious corporation, educational institution, or society who perform work connected with such an entity's activities.

Mr. Chairman, I ask for the support of this committee for Senate Bill 69.

Thank you.

Anchorage Daily News

Gerald E. Grilly
Publisher

Howard Weaver
Editor

Michael Carey, Editorial Page Editor
Patrick Dougherty, Managing Editor

Katherine Fanning, Editor and Publisher 1971 to 1983
Lawrence Fanning, Editor and Publisher 1967 to 1971
Founded in 1946 by Norman C. Brown

Nose out

For once, the tobacco lobby is right

American tobacco firms routinely bombard the public with transparently bogus or self-serving rhetoric.

Listening to the industry line, you'd think that there's still some doubt smoking causes cancer, that tobacco firms are disinterested guardians of the First Amendment and that smokers have made rational, fully informed decisions to take up their addictive and life-shortening habit.

But there is one instance where the tobacco industry has a legitimate point. The move by some firms to ban all smoking by all employees — not just at work, but off the job, too — is an illegitimate intrusion on workers' privacy.

Some 6,000 firms refuse to hire smokers, according to The New York Times. A case from Indiana drew national attention earlier this year when a woman was fired because a random drug test showed she'd been smoking cigarettes at home.

Smoking isn't the only unhealthy habit that gets workers in trouble with nosy employers. Best Lock Corporation of Indianapolis bars its workers from drinking alcohol — any time, anywhere. The city of Athens, Ga., even went so far as to reject job applicants with high cholesterol levels.

How do employers rationalize trying to run their workers' private lives? The best answer they can give is that bad habits like smoking or drinking can drive up their health insurance bills.

When that's the case, firms have good reason to charge those workers higher insurance premiums. But they don't have any grounds to tell employees how to live their lives outside of working hours.

In the workplace, only one question should matter: How well do workers do their jobs? As long as what employees do on their own time doesn't affect their job performance, it's none of their employers' business.

THE NATIONAL BLACK CAUCUS OF STATE LEGISLATORS

NBCSL GENERAL ASSEMBLY MEETING
DECEMBER 6, 1991
LAS VEGAS, NEVADA

RESOLUTION ON EMPLOYEE PRIVACY

WHEREAS: It has come to the attention of the National Black Caucus of Stat Legislators that individuals have been fired from their jobs or disadvantaged ir other employment and compensation decisions for smoking tobacco products in th privacy of their homes: and

WHEREAS: There is a growing trend in job classification notices published ir daily newspapers to stipulate "smokers need not apply" and "nonsmokers only": and

WHEREAS: Twenty-one state legislatures have enacted legislation protecting employee privacy; and

WHEREAS: The National Black Caucus of State Legislators believes in individual privacy; and

WHEREAS: The National Black Caucus of State Legislators believes that employment decisions should be based solely on an individual's job skills, training and performance

THEREFORE BE IT RESOLVED: The National Black Caucus of State Legislators supports legislation that would make it unlawful for employers to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual is a smoker or non-smoker; and

The National Black Caucus of State Legislators supports legislation that would make it unlawful for an employer to require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours, provided the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours.

SMOKERS HAVE RIGHTS—JUST ASK THE TOBACCO COMPANIES

Last spring, a Georgia State Senator introduced into committee a "smokers'-rights" bill outlawing discrimination against people who smoke off the job. In the ensuing week, the lieutenant governor's office got a flood of phone calls supporting the law. So many, in fact, that the phone system broke down.

A strong grass-roots response from the good folk of Georgia? Yes, to some extent. But these complaining constituents got a little help from Philip Morris Cos. When Georgia residents called a toll-free hotline, they heard a recorded message lambasting the lieutenant governor—who was against the bill—for interfering with smokers' rights.

PRAIRIE FIRE? The recording then encouraged callers to "stay on the line—we can connect you to his office right now, toll-free." Hence, the flood of calls. A Philip Morris spokesperson says: "We want to make it easier for consumers to voice their concerns."

The Georgia bill was ultimately withdrawn. But 20 other states have passed similar legislation. Antismoking and health groups warn, however, that these laws are not some "prairie wildfire among state legislators," as Walker P. Merryman, vice-president of the Tobacco Institute, describes them. Rather, they represent a campaign by the deep-pocketed tobacco companies to counter the antismoking movement. Replies Tobacco Institute spokesman Thomas Lauria: "These bills are put through by the ACLU and the AFL-CIO. The tobacco companies simply help smokers'-rights groups that have already formed."

Early this year, a bill that would prohibit companies from refusing to hire smokers or firing people who smoke was introduced in the state legislature of New Jersey. The tobacco industry hired lobbyists to get lawmakers to vote for the bill. Philip Morris also blanketed the state with support-the-bill letters. R. J. Reynolds Tobacco Co. joined in, using videotapes, sample petitions, and slide shows to help smokers start activist groups. Ultimately, the measure passed the legislature, and the governor allowed it to become law without his signature in July.

The tobacco companies also target big businesses opposed to smokers'-rights bills. Last year, the New York State Legislature passed a broadly worded law that would have prohibited companies from forbidding any legal activity off the job. IBM, Eastman Kodak Co., and other businesses wrote strong letters against the bill, arguing that it would let employees ignore corporate conflict-of-interest policies. Governor Mario M. Cuomo vetoed it.

Now, another version is about to be presented to Cuomo. This time, however, there is no outcry from IBM and Kodak. The reason: Tobacco companies are big buyers of IBM computers and materials for cigarette filters made by Kodak. Rather than risk their accounts, the companies have withdrawn from the debate, say state government officials and sources close to the companies. Neither Kodak nor IBM will comment on their change of heart, saying only they take no position on the bill.

Surveys show that employees are concerned about employers' legislating their lifestyles. Aware of this, says Joseph Marx of the American Cancer Society: "The tobacco companies are trying to elevate smoking to a civil right"—and taking care of business at the same time.

By Waleria Konrad in Atlanta

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[tell us what you think]

Does a company have the right to control your life-style?

BONNIE COOK WAS A hospital attendant in Rhode Island with an excellent job record. When she tried to get a job at a hospital where she had previously worked, however, she found the door closed. Because Cook weighed 315 pounds, her former employers believed that their worker's compensation costs might rise if they rehired her. "If you lose weight, you'll be considered," she was told. After trying and failing to drop below 300 pounds, Cook filed suit, now pending in federal court.

Cook's supporters see her as the target of a dangerous trend—the desire of companies to control employees' behavior both on and off the job, through hiring and employment practices. "This is an example of Big Brother at work," says Steven Brown, the executive director of the Rhode Island American Civil Liberties Union (ACLU), which is handling Cook's suit. "They are essentially telling Bonnie Cook that they can control her life simply because twenty or thirty years from now she *might* cost the state a little money."

With the sum of lowering skyrocketing health costs or promoting a "healthier workplace," a number of companies have instituted policies to penalize certain workers. Turner Broadcasting System, for instance, simply won't hire smokers. The Best Lock Corporation in Indianapolis prohibits employees from drinking alcoholic beverages even during their off-hours. At U-Haul International, Inc., workers who smoke or are underweight or overweight pay about $120 for annual health insurance. Some companies, according to the ACLU, even bar employees from high-risk activities such as riding motorcycles.

Such policies are increasingly under challenge: Twenty states have passed laws limiting the rights of companies to impose life-style requirements on workers. But Fred H[illegible], president of the Society of Professional Benefit Administrators, maintains that companies' policies are instituted for legitimate reasons. "An employee benefit plan should be viewed as a contract between employer and employee," he says. "If the employee is paying her own medical costs, then she can behave any way she wants. If not, then she is taking something of value, and should be expected to behave responsibly and help minimize costs."

At U-Haul, corporate executives feared they wouldn't be able to provide health care for any employees unless they took action to control health costs. The company's decision to make selected employees pay was a logical extension of standard policy in homeowners or auto insurance, says Public Information Manager Melora Foley. "If you have a smoke detector or fire extinguisher, you get a rebate. In our company, if you don't smoke or you're not overweight or underweight, you don't have to pay."

Opponents of such policies feel they set a dangerous precedent. "The premise of insurance is a pooled risk. Once you start pulling out groups, it undermines the purpose," says Sally E. Smith, executive director, National Association to Advance Fat Acceptance. "If today it's fat people and smokers, who will it be tomorrow?"

Adds John Rosenthal, an ACLU spokesperson: "Almost any personal choice can have health insurance implications. If employers balance their books by invading our lives, virtually *every* aspect of our personal lives will be subjected to their control."

Tell us what you think.

---

1. Do employers have the *right* to make life-style demands (such as forbidding smoking) when workers are on the job?
❑ *Yes* ❑ *No* ❑ *I don't know*

2. Do employers have the right to make life-style demands of workers during their *off-hours*?
❑ *Yes* ❑ *No* ❑ *I don't know*

3. If you answered yes to number two, which demands do you think employers have the right to make?
❑ *Staying within weight guidelines*
❑ *No smoking at any time*
❑ *No drinking at any time*
❑ *No hazardous sports*

4. Do employers have the right to use economic incentives to encourage healthy practices, such as charging overweight workers more for health insurance?
❑ *Yes* ❑ *No* ❑ *I don't know*

5. Which of the following would *you* be willing to do in order to keep your current job? (Check as many as you want, even if you're not, say, a smoker.)
❑ *Quit smoking*
❑ *Lose or gain weight*
❑ *Refrain from drinking any alcohol*
❑ *Not participate in risky sports*
❑ *None of the above*

6. If your company wanted you to make one of those changes and you weren't willing, what would you do?
❑ *Quit*
❑ *Ignore the ruling and hope I wouldn't get caught*
❑ *Lodge a formal protest*
❑ *I don't know*

Please feel free to comment on any of these questions in the space provided. Make yourself heard. To ensure that your answers reach us in time, please mail them within the next two weeks to: "Tell Us What You Think," Glamour, 350 Madison Ave., New York NY 10017. OR FAX IT: (212) 880-6922.

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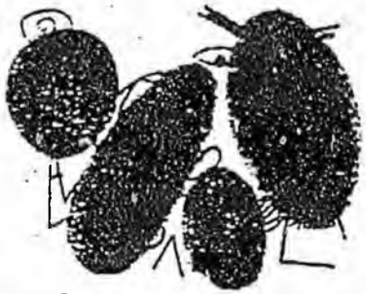
almost Magazine
Jan. 1992

from Glamour

[this is what you thought



Do companies have the right to dictate off-hours behavior?

93 percent say no

OVER 90 PERcent of the respondents to our Novemter survey think that company should not be alwed to prohibit its employees om engaging in certain types behavior, such as drinking, moking and playing risky orts, during their off-hours. Almost half the respondents said that they would not hange their behavior to keep their jobs. nd 72 percent feel that employers con't ave the right to charge "unhealthy" workrs more for health insurance. For more sults of the survey, read on.

1. DO EMPLOYERS HAVE THE RIGHT TO MAKE LIFE-STYLE DEMANDS (SUCH AS FORBIDDING SMOKING) WHEN WORKERS ARE ON THE JOB?

65% say yes

"I'm a sales rep for a computer company, nd part of what we sell is an image. It's ny company's right to make sure I project hat image when I go out in the field."

33% say no

"Not allowing smoking in the office is ne thing, but there should be designated reas for those of us who still wish to xercise our right to free choice!"

2% say they don't know

2. DO EMPLOYERS HAVE THE RIGHT TO MAKE LIFE-STYLE DEMANDS OF WORKERS DURING THEIR *OFF*-HOURS?

93% say no

"Unless my life-style *negatively* affects ny ability to perform on the job, it's none of my company's business what I do."

"I work to support my life. I don't live o support work."

4% say yes

"A company has the right to demand legal nd noncontroversial behavior from its mployees."

3% say they don't know

3. IF YOU ANSWERED YES TO NUMBER TWO, WHICH DEMANDS DO YOU THINK EMPLOYERS HAVE THE RIGHT TO MAKE?

30% say staying within weight guidelines

"I've struggled with my weight and know I have more energy when I'm eating properly and exercising regularly. A healthier person makes a better worker."

34% say no drinking at any time

"What people do during off-hours *can* affect the quality of their work. My co-worker's drinking problem has an impact on everyone in the office."

16% say no smoking at any time

"If you smoke, you're going to get sick. With odds like that, all employers should demand their employees quit."

3% say no hazardous sports

4. DO EMPLOYERS HAVE THE RIGHT TO USE ECONOMIC INCENTIVES TO ENCOURAGE HEALTHY PRACTICES, SUCH AS CHARGING OVERWEIGHT WORKERS MORE FOR HEALTH INSURANCE?

72% say no

"I suffer from an inactive thyroid gland and can't help that I'm a few pounds overweight. I watch my cholesterol and fat intake. Why should I have to pay extra for health insurance?"

18% say yes

"I'd rather my employer offer incentives to encourage healthy practices than not offer insurance benefits at all."

10% say they don't know

5. WHICH OF THE FOLLOWING WOULD *YOU* BE WILLING TO DO IN ORDER TO KEEP YOUR CURRENT JOB?

18% say none of the choices listed below

"I don't need my company telling m what's wrong with my personal habits."

"At my former company, the smoking an weight policy applied to employees an spouses. Who are they to tell us what w can and can't do in our own home?"

16% say refrain from drinking any alcohol

"I don't drink because of company poli cy. I haven't felt this good in years!"

15% say quit smoking

"I've been trying to stop smoking fo months. If my employer gave me an ulti matum, it would be just the thing I need."

11% say not participate in risky sports

"I don't see why people feel the need t Bungee jump off bridges. Especially if i means higher insurance rates."

10% say lose or gain weight

"If my company wanted me to maintain a certain weight for better health, I'd do it. But if it was because of my looks, tha would be discrimination."

6. IF YOUR COMPANY WANTED YOU TO MAKE ONE OF THOSE CHANGES AND YOU WEREN'T WILLING, WHAT WOULD YOU DO?

55% say lodge a formal protest

"It's a short hop from 'Don't smoke at home' to 'Who are you sleeping with?' to 'Don't have more than three kids.' "

16% say ignore the ruling and hope they don't get caught

"I'd like to think that I'd protest, but I really fear losing my job."

12% say quit

"I'd quit and move to Europe where, as far as I know, they're not as snick on moralizing and controlling."

17% say they don't know

Please turn the page for this month's survey—How much do you want to know about someone's health?

SENATE BILL NO. 69

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY SENATORS TAYLOR, Duncan

Introduced: 1/27/93
Referred: L&C, JUD

A BILL

FOR AN ACT ENTITLED

"An Act prohibiting employers from discriminating against individuals who use legal products in a legal manner outside of work."

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

*** Section 1.** AS 23.10 is amended by adding a new section to article 7 to read:

Sec. 23.10.445. NONDISCRIMINATION FOR LAWFUL USE OF PRODUCTS. (a) An employer may not refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, privileges, terms, or conditions of employment because the individual uses a lawful product in a lawful manner during nonworking hours and for the individual's personal consumption when not wearing or carrying clothing or other items that identify the individual as an employee of the employer and when in places other than the premises or vehicles of the employer.

(b) It is not a violation of this section for an employer to

(1) discharge an individual or otherwise disadvantage an individual with

respect to compensation, terms, conditions, or privileges of employment if that decision is based on the individual's failure to meet job performance standards; or when there is a disorder

(2) offer, impose, or have in effect a health, disability, or life insurance policy that makes distinctions between employees for the type of coverage or the coverage based upon the employees' use of legal products; if differential premium rates apply,

(A) the differential premium rates charged employees must reflect a differential cost to the employer; and

(B) the employer shall provide employees with a written statement setting out the differential rates used by the insurance carriers.

(c) This section does not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals who perform work connected with the carrying on, by the religious entity, of its activities.

(d) In this section,

(1) "employee" means a person employed by an employer;

(2) "employer" means a person, including the state and political subdivisions of the state, that employs 10 or more persons in the state.

INDIVIDUAL PRIVACY AND EMPLOYMENT RIGHTS IN ALASKA

A Survey by
Penn + Schoen Associates, Inc.
Conducted for the National Consumers League
January 2, 1992

INTRODUCTION

Interviews were held in December 1991 with 609 residents of Alaska for the purposes of determining citizens' attitudes toward privacy, their knowledge of employment rights, and the extent to which employers have acted to limit these rights. All respondents were 18 years of age or older. The survey was commissioned by the National Consumers League.

Interviewing was done by telephone from the central telephone facilities of Penn + Schoen Associates at the headquarters in New York City. The margin of error for the entire sample is +/- 4.0%, but is higher for sub-groups.

EXECUTIVE SUMMARY

Summary of Key Finding

Despite the fact that the vast majority of respondents in Alaska believe that employers do not have the right to ask questions about, make job decisions based on, or take actions that infringe upon an individual's right to privacy, up to two out of ten people -- and in some cases more -- report that an employer has done such things to either them or someone they know. This finding supports the notion that while most Alaskans believe in the right of privacy in employment, a significant number of employers are not fully respecting these rights.

Purpose and Format of Study

The purpose of the study is to determine the attitudes and knowledge of the general public concerning individual rights of privacy in employment and measure the extent to which these rights have been limited by employers. Specifically, this survey seeks to assess how the public feels

about certain actions employers might take and questions employers might ask as determinants of prospective or continued employment.

The public was first asked a general question concerning individual privacy in employment. This was followed by three series of questions.

The first set (Section I) were questions prospective employers might ask a job applicant. The second set of questions (Section II) concerned things employees might do and asked whether or not it was appropriate to deny a job to or fire someone for doing these things. The last set of questions (Section III) asked whether or not employers have the right to take certain actions against employees. For each set of questions, people were first asked whether or not employers should have the right to ask these questions or behave in this manner, and secondly, if such a question has ever been asked or such an action has ever been taken against either the respondent personally or someone the respondent knows.

At the end of the questionnaire (Section IV), respondents were asked whether or not businesses in Alaska should be allowed to refuse to hire a person who has a worker compensation claim. In addition, they were asked whether or not they worked outside the home or if they smoked. They were also asked their age, political party affiliation, income, race,

senatorial district, the job title of the head of the household, and whether or not they were registered to vote.

SUMMARY OF FINDINGS

Section I: Questions Posed to Job Applicants

Generally speaking, 69% of Alasakan residents say prospective employers *should not* be allowed to ask questions about the private lives of job applicants. At the same time, two out of three (67%) people report that either they or someone they know has been asked such questions by a potential employer.

As for specific questions, a majority believe employers should not have the right to ask prospective employees about their living arrangements, religion, outside activities, marital status, plans for children, age of parents, or smoking behavior.

Residents of the Northwestern district, Hispanics, and women are all more likely to believe that employers should not have the right to ask these specific questions. On the other hand, people 65 and over,

executives, high-level professionals, former smokers, and men are more likely to think employers should have this right.

Occasional smokers, people aged 25 to 34, those earning between $20,000 and $31,000, African-Americans, and Hispanics are more likely to report that either they or someone they know has been asked some of these specific questions.

These findings are reported in detail in Section I, beginning on page nine.

Section II: Employee Behavior Outside of Work

The public was then asked whether or not they thought it is appropriate for employers to deny a job to or fire someone for specific activities. At least 91% say it is inappropriate for employers to deny a job to someone or fire an employee for dating a person of a different race, driving a motorcycle, participating in political demonstrations, gambling at a racetrack, supporting or opposing abortion, or smoking away from the workplace. More than four out of five (84%) think it is not appropriate to deny a job to someone or fire an employee for being overweight, and 74% say it is inappropriate to deny a job or fire someone who holds an unusual second job.

At the same time, almost two out of ten people (19%) report that an employer has denied a job to or fired either them or someone they know for one of these reasons.

High-level professionals and semi/unskilled laborers are more likely to feel it is appropriate for employers to deny someone a job or fire them for some of these behaviors. Executives, high-level professionals, salespeople, former smokers, people aged 35 to 49, Republicans, Hispanics, and African-Americans are all more likely to report that either they or someone they know has been denied a job or fired for exhibiting one of these behaviors.

These findings are explained in detail in Section II, beginning on page seventeen.

Section III: Actions Taken by Employers

People also were asked whether they believe employers have the right to take certain actions concerning an individual's privacy. At least three out of four (77%) say employers do not have the right to monitor personal telephone conversations, forbid an employee from dating someone from a rival firm, refuse to hire someone who is overweight or a smoker, or require an employee to quit smoking or change diets. More than two out of

three people (67%) say employers do not have the right to require an employee to quit a second job or to do a credit check on a prospective employee. People aged 50 to 64 are far more likely than any other sub-group to say that employers *do* have the right to take such actions.

In spite of these opinions, more than one out of three respondents (37%) reports that an employer has taken at least one of these actions against either the respondent or someone the respondent knows. Former smokers, Republicans, residents of the Central district, people aged 50 to 64, high-level professionals, salespeople, and Hispanics are all more likely to report these things occurring.

These findings are explored in detail in Section III, beginning on page twenty-two.

Section IV: Worker Compensation Claim

Nearly three out of four respondents (73%) oppose allowing businesses in Alaska to refuse to hire a person who has a worker compensation claim, while 17% favor allowing them to do so.

This finding is examined in Section IV, on page twenty-seven.