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3. The trial court did not err by admitting evidence of Laidlaws wealth.

The trial court denied Laidlaws pretrial motion to exclude all evidence of the company's financial resources, reasoning that Laidlaws financial wealth was relevant to the punitive damages question. Laidlaw challenges this ruling, arguing that evidence of corporate wealth is irrelevant when, as here, a company commits no direct wrong but is subject to punitive damages solely on the theory that it is vicariously liable for acts of a non-managerial employee. Except perhaps in situations involving managerial employees, Laidlaw reasons, a vicariously liable employer is not a wrongdoer, and financial evidence therefore must be limited to the employees resources.

We have previously recognized that a defendants wealth is usually relevant to the issue of punitive damages.17 But we have not yet considered the narrower issue raised here: whether a corporate employers financial resources are relevant to punitive damages when the employer is only vicariously liable for an employees conduct. The rationale behind the course of employment rule we adopted in Alaskan Village v. Smalley requires an affirmative answer.18

The course of employment rule holds corporate employers vicariously liable for punitive damages on the theory that corporations can act only through their employees and agents; hence, when employees act in the course of employment, their acts are indistinguishable from corporate actions. An early opinion of the Maine Supreme Court exemplifies this theory:

> A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense.[19]

Under the course of employment rule, then, an employee acting within the course and scope of employment essentially is a corporate actor; and when the employee acts wrongfully, the corporation becomes the wrongdoer: [T]he tortious act of the servant done in the course of his employment is ordinarily the legal act of the master, and in this sense, the employer is not free of fault. 20 Because the law treats the employer and employee alike as wrongdoers, it is proper for the jury to consider what amount of punitive damages will suffice to punish and motivate the vicariously liable employer; as other jurisdictions have held in applying the course of employment rule, evidence of the employers financial wealth is relevant and admissible in these circumstances.21 The trial court did not abuse its discretion in admitting evidence of Laidlaws financial wealth.

4. The trial court did not err by admitting the testimony of Dr. Tennant.

Laidlaw next contends that the trial court erred in allowing Crouses medical expert witness, Dr. Forest Tennant, to state his opinion that, at the time of the accident, Finitz was under the influence of marijuana she had smoked earlier the same morning. But Laidlaw did not object to the challenged testimony and therefore failed to preserve this issue for appeal.22

Laidlaw did file a pretrial motion to prevent Dr. Tennant from expressing his expert opinion concerning a different theory of impairment: that Finitz was a long-term, heavy user of

marijuana; that such use can cause residual physiological effects; and that Finitzs driving was probably impaired by these residual effects on the morning of the accident. But despite the trial courts pretrial ruling allowing testimony on this theory of impairment, Dr. Tennant did not rely on the theory at trial. He testified instead that, in his opinion, Finitz had likely smoked marijuana on the morning of the accident and was impaired by the effects of that mornings consumption.

Laidlaw voiced no objection to this testimony, instead choosing to cross-examine Dr. Tennant about his reasons for failing to mention this theory earlier. The doctor had acknowledged that he had just reached his conclusion the night before testifying, after examining emergency room records that he had not previously reviewed and that disclosed Finitzs post- accident pulse rate and blood pressure. According to Dr. Tennant, this information enabled him to form his new opinion; before seeing the emergency room records, he had relied on information indicating that Finitzs most recent marijuana use had occurred at least several days before the accident.

As can be seen, Dr. Tennant's trial testimony addressed a different theory than the theory he developed during pretrial discovery, and the new testimony obviously fell outside the scope of both Laidlaws pretrial motion to preclude Dr. Tennant's expert testimony concerning residual effects and the superior courts pretrial order denying that motion.23 The record provides no basis, then, for concluding that the court had already ruled the new line of testimony admissible or that a contemporaneous objection would have been futile. Given these circumstances, Laidlaw cannot reasonably rely on its pretrial motion as a timely objection; nor can it plausibly invoke the superior courts pretrial ruling as an excuse for failing to make a contemporaneous objection.

5. The trial court did not err by admitting evidence of Finitzs general drug habit.

Laidlaw argues that the trial court erred in admitting evidence of Finitzs general drug use, particularly certain post- accident treatment records from the Alaska Womens Resource Center indicating that Finitz had used marijuana on a daily basis. Laidlaw insists that evidence of Finitzs general drug use was inadmissible because Crouse presented no admissible evidence tending to prove that Finitz was actually impaired by drugs at the time of the accident.24

But as explained above, Dr. Tennant testified that Finitz was impaired by marijuana when the accident occurred. The challenged treatment records directly supported this testimony: they reflected Finitzs own admissions that she engaged in daily marijuana use around the time the accident occurred. The Centers client intake form states that Finitz had been taking 6 hits of marijuana twice a day. Because Finitzs admission of daily use had case-specific relevance by discrediting her claim of occasional recreational use and by indicating that she smoked marijuana on the day she drove the school bus off the road, we find no error in failing to exclude the records as general propensity evidence.

D. The Trial Court Did Not Abuse Its Discretion by Ordering a Remittitur of the Punitive Damages Award.

On cross-appeal, Crouse challenges the trial courts remittitur of the punitive damages award from $3.5 million to $500,000. A trial court may remit a jury's punitive damages award as excessive when the court determines that the award is manifestly unreasonable; factors relevant to this determination include the compensatory damage amount, magnitude of the offense, importance of the policy violated, and the defendants wealth.25 Also relevant are the nine factors listed in the Model Punitive Damages Act:26

(1) the nature of the defendants wrongful conduct and its effect on the claimant and others;
(2) the amount of compensatory damages;
(3) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;
(4) the defendants present and future financial condition and the effect of an award on each condition;
(5) any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this and any other actions against the defendant for compensatory damages or restitution;
(6) any adverse effect of the award on innocent persons;
(7) any remedial measures taken or not taken by the defendant since the wrongful conduct;
(8) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function is to
establish standards; and
(9) any other aggravating or mitigating factors relevant to the amount of the award.[27]

When a trial court applies these factors and concludes that an award is excessive, the amount remitted should reflect the maximum that the jury could have awarded without being excessive.28

The offensive conduct in this case was Finitzs act of driving a school bus off the road while Finitz was impaired by marijuana. In its original order of remittitur, the trial court focused on several relevant factors: (1) the relationship between the punitive and compensatory damages awards; (2) the offenses magnitude; (3) the importance of the policy violated; (4) the
defendants wealth; and (5) any fines, penalties, damages, or restitution paid or to be paid by Laidlaw. While recognizing that Laidlaw had over $1 billion in annual revenues nationwide, the court emphasized that the jury's award of punitive damages exceeded its award of compensatory damages by 182 times; moreover, the court noted, although Finitz violated a serious policy by driving under the influence of a controlled substance, her wrongful conduct was not especially egregious, consisting of an isolated act that caused only minor injuries. This analysis initially led the court to reduce the jury's $3.5 million punitive damages award to $375,000, a figure that, in the courts view, represented the maximum punitive damages award supported by the evidence.

After Crouse moved for reconsideration, the trial court increased the remitted award to $500,000 based on a reevaluation of two factors: the offenses magnitude and Laidlaws wealth. In reassessing these factors, the court found Finitzs conduct to be more serious than it originally believed, noting that, despite Shawn Crouses relatively minor injuries, an out of control school bus, full of school children on an icy road, with an impaired driver posed a very high degree of hazard to the occupants of the school bus and to the public. At the same time, however, the court tempered its original estimate of Laidlaws corporate wealth, pointing out that, although the company's nationwide annual revenues exceeded $1 billion, its annual revenues in Alaska totaled only $5 million. Finding statewide revenues relevant, the court reasoned that a $3.5 million award might seem de minimis compared to Laidlaws nationwide revenues but was obviously excessive in relation to the company's Alaska revenues. Because this second factor largely offset the first, the court decided on reconsideration to raise the original remitted award by only a modest amount, to $500,000.

In challenging the remittitur, Crouses cross-appeal advances three arguments. First, Crouse argues, the remittitur is inconsistent with the trial courts finding on reconsideration that the jury's punitive damages award is de minimis compared to Laidlaws nationwide revenues. But this argument misreads the courts reconsideration decision, which acknowledged Laidlaws nationwide earnings but essentially found the company's much smaller Alaska revenues to be a more realistic point of reference for assessing the excessiveness of the punitive damages verdict. Punitive damages are meant to punish the wrongdoer and to deter similar conduct.29 Given the localized nature of the misconduct at issue, the limited scope of the resulting harm, and the absence of any direct liability, the trial court did not abuse its discretion in selecting Laidlaws statewide operations as the most appropriate measure to use in determining the need for deterrence and punishment.

Second, Crouse argues that, given the courts findings on reconsideration concerning the magnitude of Finitzs misconduct, its ultimate decision overemphasized the mathematical ratio of punitive damages to compensatory damages a measure that should not alone be dispositive. But again, Crouse misreads the trial courts order on reconsideration. Although the trial courts findings on reconsideration acknowledged that Finitzs misconduct was more serious than the court originally thought, these findings neither said nor suggested that the misconduct was so serious as to support the original $3.5 million punitive damages verdict. Instead, the courts reconsideration decision simply recognized that the enhanced seriousness of the misconduct supported an award larger than the $375,000 total that the court had awarded in its original remittitur order. As the trial court specifically noted, even though it originally underestimated the potential hazard posed by Finitzs conduct, the overall seriousness of the misconduct continued to be mitigated by several significant considerations: to a large extent the potential harm from Finitzs conduct did not materialize; Shawn Crouse suffered only minor injuries; and Laidlaw itself neither contributed to Finitzs misconduct nor directly engaged in any other wrongdoing. Moreover, Crouses argument on this point mistakenly posits that the trial courts order on reconsideration found the ratio of punitive to compensatory damages to be the only mitigating factor calling for a remittitur. As already indicated, the court independently emphasized that the income and size of [Laidlaws] Alaska operations must temper [the amount awarded].

Last, Crouse attempts to establish the appropriateness of the jury's punitive damages verdict through a detailed discussion of economic efficiency theory. But Crouse failed to present any evidence at trial supporting this theory, failed to argue the point to the jury or to request supporting instructions, and failed to argue this point before the superior court either in its opposition to Laidlaws motion for remittitur or in its motion for reconsideration. Because a party may not present new issues or advance new theories to secure a reversal of a trial court decision, we decline to consider Crouses economic efficiency theory.30

We thus reject Crouses principal claim on cross-appeal, holding that the trial court did not abuse its discretion in ordering a remittitur of the punitive damages award from $3.5 million to $500,000.31

IV. CONCLUSION

We AFFIRM the superior courts final judgment.

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1 971 P.2d 158 (Alaska 1999).

2 Municipality of Anchorage v. Repasky, 34 P.3d 302, 305 (Alaska 2001).

3 Dobos v. Ingersoll, 9 P.3d 1020, 1023 (Alaska 2000) (admissibility of evidence); State v. Coon, 974 P.2d 386, 398 (Alaska 1999) (expert testimony).

4 See Landers v. Municipality of Anchorage, 915 P.2d 614, 616 n.1 (Alaska 1996).

5 Intl Bhd. of Elec. Workers, Local 1547 v. Alaska Util. Constr., Inc., 976 P.2d 852, 857 (Alaska 1999).

6 720 P.2d 945, 948-49 (Alaska 1986) ([I]f a tort by an employee renders the employer liable for compensatory damages and the employees actions justify a punitive damage award, then the employer is liable for punitive damages, whether or not the employer authorized or ratified the tortious conduct.) (citing with approval the rule adopted by the Oregon Supreme Court in Stroud v. Dennys Rest., Inc., 532 P.2d 790, 793 (Or. 1975)); see also VECO, Inc. v. Rosebrock, 970 P.2d 906, 911 (Alaska 1999) (noting that Alaska case law generally follows the Restatement (Second) of Agency but has eliminated the requirement in subsection (c) that the employee be managerial).

7 See Stroud v. Dennys Rest., Inc., 532 P.2d 790, 792-93 (Or. 1975).

8 The complicity rule is expressed by the Restatement (Second) of Torts 909 (1979) and the nearly identical Restatement (Second) of Agency 217C (1958), which states:

> Punitive damages can properly be awarded against a master or other principal because
> of an act by an agent if, but only if:
> (a) the principal authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal was reckless in employing him, or
> (c) the agent was employed in a managerial capacity and was acting within the scope of employment, or
> (d) the principal or a managerial agent of the principal ratified or approved the act.

9 See, e.g., Nenana City Sch. Dist. v. Coghill, 898 P.2d 929, 934 (Alaska 1995) (declining to consider an argument raised for the first time on appeal). Laidlaw suggests that this court recently adopted the complicity rule in VECO, Inc. v. Rosebrock, 970 P.2d 906 (Alaska 1999) a case decided after trial ended in the present case and that the newly created conflict between
VECO and Alaskan Village must be resolved. But Laidlaw misreads VECO, which expressly reaffirmed Alaskan Village as establishing the appropriate vicarious liability test for cases involving conduct within the course and scope of employment but adopted the complicity rule for cases involving employee conduct outside the course and scope of employment. VECO, 970 P.2d at 923 & n.34. After our decision in Alaskan Village, the legislature undertook to regulate and narrow the circumstances in which punitive damages may be awarded and to limit the amount of such awards. See AS 09.17.020. Further, the Supreme Court of the United States has indicated that punitive damages are subject to review for excessiveness under the due process clause of the fourteenth amendment to the United States Constitution. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001). In light of these developments, the Alaskan Village rule may be anachronistic. If and when the point is properly preserved and raised, this court may consider adopting the narrower complicity rule.

10 See Stephenson v. United States, 771 F.2d 1105, 1107 (7th Cir. 1985) (relying on Wisconsin law to say that it is the employees conduct at the time of the accident that determines whether he is acting within the scope of his employment).

11 Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 346 (Alaska 1990).

12 Id. at 347; accord Williams v. Alyeska Pipeline Serv. Co., 650 P.2d 343, 349 (Alaska 1982); Luth v. Rogers & Babler Constr. Co., 507 P.2d 761, 764 & n.14 (Alaska 1973) (rejecting
proposition that must satisfy each factor).

13 See Gutierrez de Martinez v. Drug Enforcement Admin., 111 F.3d 1148, 1158 (4th Cir. 1997) (applying Virginia law and concluding that drinking alcohol by itself does not remove the
employee from the scope of his employment); Stephenson, 771 F.2d at 1107-08 ([T]he fact that [the employee] was intoxicated when driving does not mean that he was acting outside the scope of his employment, but only that he failed to use reasonable care under the circumstances.).

14 Ortiz v. Clinton, 928 P.2d 718, 723 (Ariz. App. 1996); accord Stephenson, 771 F.2d at 1108 (The [employer] cannot insulate itself from liability . . . by promulgating regulations prohibiting employees from drinking and driving.); Pyne v. Witmer, 512 N.E.2d 993, 999 (Ill. App. 1987) (holding that employees violation of his employers policy against drinking on the job does not preclude liability under respondeat superior).

15 791 P.2d 344, 348 (Alaska 1990), clarified by VECO, Inc. v. Rosebrock, 970 P.2d 906, 924 n.36 (Alaska 1999) (disapproving of possible broad interpretation and requiring employees act to have at least some motivation to serve corporation).

16 Alaskan Village, Inc. v. Smalley, 720 P.2d 945, 948 (Alaska 1986).

17 Norcon, Inc. v. Kotowski, 971 P.2d 158, 175 (Alaska 1999).

18 720 P.2d at 948-49.

19 Goddard v. Grand Trunk Rwy., 575 Me. 202, 222-23 (1869), as quoted in Embrey v. Holly, 442 A.2d 966, 970 (Md. 1982) (quoting this language as justification for following the
course of employment approach); see also Miller v. Blanton, 210 S.W.2d 293, 297 (Ark. 1948) (Having, by the constitution of their being, to act solely by agents or servants, [corporations] must, as matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrongs while performing the masters business, and in the scope of their employment; and this to the extent of liability for punitive damages in proper cases.).

20 Embrey, 442 A.2d at 970; see also, e.g., Goddard, 575 Me. at 222-23; Thorne v. Contee, 565 A.2d 102, 110 (Md. Spec. App. 1989) ([T]he tortious act of the servant done in the course of his employment is ordinarily the legal act of the master.); Gifford v. Evans, 192 N.W.2d 525, 529 (Mich. App. 1971) (Respondeat superior provides in essence that the act of an employee during the course of his employment is legally the act of the employer.).

21 See Embrey, 442 A.2d at 973 (holding that it was appropriate for trial court to award separate punitive damages awards against an employee and his vicariously liable employer

because this would enable each award to be based on the two defendants differing financial status); see also Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn, 907 P.2d 506, 521 (Ariz. App. 1995) (holding that punitive damages award against vicariously liable law firm was not excessive in part because [t]he award is proportionate to [the law firms] financial position).

22 See Alaska Evidence Rule 103(a)(1); see also Norcon, Inc., 971 P.2d at 170 (holding that employer waived issue on appeal of whether employees testimony was unduly prejudicial by failing to object when testimony was offered at trial).

23 At trial Laidlaw did not object to Dr. Tennants new theory as beyond the scope of the expert disclosures or report and Laidlaw does not complain of such a discovery violation on
appeal.

24 Laidlaw cites other courts for support. See, e.g., Coleman v. Williams, 356 N.E.2d 394, 397 (Ill. App. 1976) (denying reference to partys alcohol consumption earlier in day when no evidence existed that at time of accident party was actually intoxicated); Gustavson v. Gaynor, 503 A.2d 340, 342-43 (N.J. Super. 1985) (same).

25 ve Damages Act (U.L.A.) 7(a), quoted in Norcon, Inc ., 971 P.2d at 176.Norcon, Inc., 971 P.2d at 175.20 P.2d 945, 949 (Alaska 1986)).

26 Id. at 176.

27 Model Punitive Damages Act (U.L.A.) 7(a), quoted in Norcon, Inc., 971 P.2d at 176.

28 Norcon, Inc., 971 P.2d at 175.

29 Alaskan Village, 720 P.2d at 948.

30 See Nenana City Sch. Dist. v. Coghill, 898 P.2d 929, 934 (Alaska 1995) ([A]n argument not raised in a suit before the trial court will not be considered on appeal.); see also Zeman v.
Lufthansa German Airlines, 699 P.2d 1274, 1280 (Alaska 1985) (noting that court may review an issue if new argument is closely related to trial court arguments so that they could have been gleaned from the pleadings).

31 Crouse also raises several other cross-appeal issues for consideration only if we grant Laidlaws request for a new trial. Our decision rejecting Laidlaws arguments on appeal makes it unnecessary to consider Crouses contingent cross-appeal issues.

Supreme Court of Alaska.

The ALASKAN VILLAGE, INC., Appellant,
v.
Mary SMALLEY, for and on Behalf of Monica SMALLEY, an infant, Appellee.

No. S-928.

June 13, 1986.
Rehearing Denied July 11, 1986.

An unemancipated minor child brought suit against a mobile home park owner seeking to recover damages for injuries sustained when she was attacked by a tenant's dogs. The Superior Court, Third Judicial District, Anchorage, Milton M. Souter, J., entered judgment in favor of the child, and the owner appealed. The Supreme Court, Burke, J., held that: (1) owner of mobile home park, which undertook to control pets on the trailer park premises by the lease provision prohibiting tenants from keeping vicious dogs and requiring tenant to immediately remove annoying pets, had a duty to protect others from injury from tenant's dogs, and (2) acts of mobile home park's managers were attributable to the park owner and therefore the park owner was liable for punitive damages where the managers, who disregarded numerous complaints by other tenants, acted with reckless indifference to safety of a child.

Affirmed.

West Headnotes

[1] Animals ⚖72
28k72

Owner of mobile home park, which undertook to control pets on the trailer park premises by the lease provision prohibiting tenants from keeping vicious dogs and requiring tenant to immediately remove annoying pets, had a duty to protect others from injury from tenant's dogs.

[2] Damages ⚖91(1)
115k91(1)

Jury may award punitive damages if a defendant acts with reckless indifference to a plaintiff's safety.

[3] Appeal and Error ⚖1004(11)
30k1004(11)
(Formerly 30k1004.1(10))

Award of punitive damages will be reversed only if reviewing court has a firm conviction based on the record as a whole that trial court erred and that it must intervene to prevent a miscarriage of justice.

[4] Principal and Agent ⚖159(1)
308k159(1)

Acts of mobile home park's managers were attributable to the park owner and therefore the park owner was liable for punitive damages where the managers, who disregarded numerous complaints by other tenants, acted with reckless indifference to safety of a child tenant who sustained injuries when she was attacked by a tenant's dogs.

[5] Courts ⚖100(1)
106k100(1)

Absent special circumstances, a new rule of law will apply in the case before the court and in all subsequent cases; however, rule may apply purely prospectively if the rule is one of first impression, or overrules prior law and was not foreshadowed by prior decisions, defendant justifiably relied on prior interpretations, undue hardship would result, and the purpose and effect of the holding is best served by a purely prospective application.

[6] Courts ⚖100(1)
106k100(1)

Rule of prospectivity did not invalidate punitive damages award assessed against mobile home park's owner for failure to protect child from injury from a tenant's dogs where the imposition of a duty on the owner was foreshadowed by a prior decision, the decision imposing the duty did not overrule established precedent or prior interpretations upon which the owner justifiably relied and where the owner failed to demonstrate undue hardship.

[7] Damages ⚖94
115k94

Punitive damage award is excessive if it is

manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law; relevant factors include compensatory damage amount, magnitude of defense, importance of the policy violated, and defendant's wealth.

[8] Animals ⚖74(6)
28k74(6)

Punitive damage award of $550,000 was not excessive in suit in which child recovered $235,000 in compensatory damages for injuries sustained as a result of violation of mobile home park owner's duty to protect her from injury from a tenant's dogs.

[9] Infants ⚖72(2)
211k72(2)

[9] Parent and Child ⚖7(1)
285k7(1)

As a rule, a parent has primary right of action for past medical expenses incurred on behalf of an unemancipated minor child; however, parent may impliedly waive her right to recover in favor of the child by failing to object when child sues for those expenses or by testifying on child's behalf.

[10] Parent and Child ⚖7(1)
285k7(1)

Mother impliedly waived her right to recover past medical expenses incurred on behalf of unemancipated minor child by allowing the child to assert the claim and by testifying on her behalf.

[11] Judgment ⚖306
228k306

Errors in prejudgment interest and cost award were clerical and therefore trial court did not abuse its discretion in changing those amounts. Rules Civ.Proc., Rule 60(a).

[12] Judgment ⚖386(1)
228k386(1)

Motion to relieve a party from judgment for an error of law must be brought within 30 days after entry of judgment; however, court may relax that time limit in interest of justice. Rules Civ.Proc., Rules 60(b), 94.

[13] Judgment ⚖304
228k304

[13] Judgment ⚖321
228k321

Trial court's failure to include exemplary award in its computation of attorney fees was a legal error and trial court did not abuse its discretion in relaxing the time limit in the interests of justice to amend the judgment to grant attorney fees on the award. Rules Civ.Proc., Rules 60(b), 82(a), 94.

*946 Paul W. Waggoner, Paul W. Waggoner, Inc., Anchorage, for appellant.

L. Ames Luce, Jeri D. Byers, Law Offices of L. Ames Luce, Anchorage, for appellee.

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

OPINION

BURKE, Justice.

The primary issue in this appeal is the extent of a mobile home park owner's duty to protect others from injury from a tenant's dogs. The jury returned a verdict for Monica Smalley, who was injured by a tenant's dogs, holding the park owner liable for compensatory and punitive damages. The park owner appeals, claiming that it owed no duty of care to Smalley and challenging the damage award and several evidentiary rulings. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Monica Smalley, a six-year-old child, and Henry Scepurek were neighboring tenants of The Alaskan Village, Inc. (Village), an Anchorage trailer park. Scepurek's rental agreement with Village includes a comprehensive set of rules and regulations. Paragraph 1 of these rules states that the tenancy is terminable on thirty-days notice. Paragraph 4 prohibits the tenant from keeping vicious dogs or more than one dog. Paragraph 23 states that a renter's failure to obey the rules is grounds to cancel the rental agreement.

When Scepurek moved in, he obtained a pet permit

from Village allowing him to keep two chihuahuas. In the permit, Scepurek promised to remove the pets from the premises immediately upon notice that they annoyed other tenants.

*947 At some point, subsequent to obtaining the permit, Scepurek acquired two Staffordshire terriers, commonly called pit bulls. On June 12, 1983, these dogs climbed out of their pen in Scepurek's yard, pulled Smalley from a swing set, and mauled her. She was severely bitten on her face, neck and arm.

Smalley sued Village for compensatory and punitive damages for their negligence. [FN1] Following trial, the jury returned a special verdict finding that Village's negligence was a proximate cause of Smalley's injury and that Smalley suffered $235,000 in compensatory damages. The jury also found that Village was guilty of reckless indifference to the safety of others and assessed $550,000 punitive damages. Judge Milton M. Souter entered final judgment against Village according to the special verdict. The court later amended its judgment due to errors in the original judgment. [FN2]

FN1. Smalley also sued Scepurek, Sandra Zartmann (who owned the dogs), the Municipality of Anchorage, and Stanley Smith Security, Inc.

FN2. The errors involved mistakes in computing statutory prejudgment interest and attorney's fees.

Village appeals, arguing (1) it had no duty to protect Smalley, (2) punitive damages and past medical expenses should not have been awarded, and (3) the court erred in amending its original judgment. [FN3]

FN3. Village also challenged the admission and exclusion of certain evidence. Its evidentiary arguments are meritless.

II. VILLAGE'S DUTY TO PROTECT SMALLEY

Village argues that it had no duty to Smalley because the attack occurred in Scepurek's yard, an area over which Village had no control, and because Scepurek acquired the dogs after he moved in. Smalley contends that Village had a duty to use reasonable care to enforce its rules, and a duty to exercise reasonable care under these circumstances.

The Restatement (Second) of Torts § 323 (1965) imposes liability on a defendant that 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 the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

We have relied on this principle to establish a duty of care in a variety of factual situations. For example, a city which undertakes to provide police protection to its residents has a duty to exercise reasonable care in providing those services. *City of Kotzebue v. McLean,* 702 P.2d 1309, 1312-13 (Alaska 1985). Similarly, a defendant that voluntarily supplies a ladder for access between a tugboat and a dock is under a duty to exercise some degree of care toward those using the ladder. *Williams v. Municipality of Anchorage,* 633 P.2d 248, 251 (Alaska 1981). Finally, if the state voluntarily conducts building fire safety inspections, it must exercise reasonable care in conducting the inspection and abating known fire hazards. *Adams v. State,* 555 P.2d 235, 240-41 (Alaska 1976). However, evidence that the undertaking is for the plaintiff's benefit is a prerequisite to liability; a plaintiff who does not produce such evidence is not entitled to a jury instruction on this theory. *McLinn v. Kodiak Electric Ass'n,* 546 P.2d 1305, 1309 n.8 (Alaska 1976).

In *City of Kotzebue v. McLean,* 702 P.2d at 1313-15, we relied on the analytical factors adopted in *D.S.W. v. Fairbanks North Star Borough School District,* 628 P.2d 554 (Alaska 1981): (1) the foreseeability of harm to plaintiff, (2) the degree of certainty that plaintiff suffered injury, (3) the connection between defendant's conduct *948 and plaintiff's injury, (4) the moral blame attached to defendant's conduct, (5) the policy of preventing future harm, (6) the burden on the defendant and consequences to the community of imposing the duty, and (7) the availability, cost and prevalence of insurance for the risk. *Id.* at 555. We consider

these factors to determine whether an actionable duty of care exists under the particular circumstances.

[1] Applying these principles to the instant case, we conclude that Village had a duty to exercise reasonable care to enforce its rules and regulations. (1) There was ample evidence that Village had actual knowledge of prior incidents involving Scepurek's dogs, and therefore it was clearly foreseeable that a person such as Smalley might be harmed; (2) Smalley suffered injury; (3) her injuries are closely related to Village's failure to take any action to enforce its rules; (4) Village's blatant disregard of its tenants' safety is morally blameworthy; (5) our policy is to encourage owners to enforce their rules to prevent harm to others lawfully on the premises; (6) the burden on owners of enforcing their own rules is not onerous; and (7) owners may obtain insurance or require tenants who own vicious animals to do so.

Village undertook to control pets on the trailer park premises by the lease provision prohibiting tenants from keeping vicious dogs and requiring Scepurek to immediately remove annoying pets. One of the trailer park managers agreed that he had "an obligation to enforce the rules ... concerning pets for the safety and well-being of the tenants in that park." [Tr. 465] Smalley was entitled to rely on Village to perform its duty.

The court instructed the jury that Village

> is under a duty to exercise ordinary care in the enforcement of its rules and regulations providing for effective animal control in order to avoid exposing persons in the park to an unreasonable risk of harm. A failure to fulfull this duty, resulting in exposing persons to an unreasonable risk of harm, would be negligence.

This instruction is a correct statement of the law.

Given our conclusion that Village undertook the obligation to control vicious dogs in its trailer park, we do not reach Smalley's argument that a landlord has a more general duty of reasonable care under the circumstances presented here. *See Uccello v. Laudenslayer*, 118 Cal.Rptr. 741, 746-47, 44 Cal.App.3d 628, 118 Cal.Rptr. 741 (1975); *Strunk v. Zoltanski*, 62 N.Y.2d 572, 479 N.Y.S.2d 175, 176-178, 468 N.E.2d 13, 14-15 (1984); *Palermo v. Nails*, 334 Pa.Super. 544, 483 A.2d 871 (1984).

III. EXEMPLARY DAMAGES

Village argues that, even if compensatory damages were justified, it is not liable for punitive damages resulting from the conduct of others, it did not violate a clear duty, and the award was excessive. Smalley contends that the $550,000 award was justified. The court instructed the jury that it could assess punitive damages if it found Village guilty of reckless indifference.

[2][3] A jury may award punitive damages if a defendant acts with reckless indifference to a plaintiff's safety; the purpose of punitive damages is to punish the wrongdoer and prevent similar conduct in the future. *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46-48 (Alaska 1979), *modified*, 615 P.2d 621 (Alaska 1980), *modified*, 627 P.2d 204 (Alaska 1981), *cert. denied*, 454 U.S. 894, 102 S.Ct. 391, 70 L.Ed.2d 209 (1981), *overruled on other grounds, Dura Corp. v. Harned*, 703 P.2d 396, 405 n.5 (Alaska 1985). We will reverse the award only if we have a firm conviction based on the record as a whole that the trial court erred and we must intervene to prevent a miscarriage of justice. *Id.*

[4] Village can be held liable for punitive damages based on the actions of its employees. The Oregon Supreme Court recently adopted the majority rule that if a tort by an employee renders the employer liable for compensatory damages and the employee's actions justify a punitive damage *949 award, then the employer is liable for punitive damages, whether or not the employer authorized or ratified the tortious conduct. *Stroud v. Denny's Restaurant*, 271 Or. 430, 532 P.2d 790, 793 (1975). Under the reasoning of this rule, Village is liable for punitive damages if (1) the actions of its managers subject Village to liability for compensatory damages and (2) the managers acted with reckless indifference to Smalley's safety.

We conclude that the trial court correctly instructed the jury that the acts of Elaine Seegers, Curtis Johnson and Jean Bailey, the park managers, are attributable to Village as a matter of law, therefore their actions may subject Village to liability for compensatory damages. [FN4] The jury specifically found that Village acted with reckless indifference to the safety of others. Therefore, Village is liable for

punitive damages under the majority rule as stated by the Oregon Supreme Court.

> FN4. Village argues that it is liable for the acts of its managers only if an agency relationship exists, and that this presents a question of fact. The trial court ruled, as a matter of law, that the acts of Seegers, Johnson and Bailey are the acts of Village.
> Seegers, Johnson and Bailey were employees of Olympic, Inc. Olympic is the major shareholder of Village. There is testimony in the record that Bailey, Johnson and Seegers were hired to manage Village at different times. The question whether they acted outside the scope of their employment was not raised at trial.

Village also argues that it should not be liable for punitive damages because it did not violate an unambiguous duty to Smalley. Therefore, it contends, punitive damages would only be appropriate in later cases.

[5] Absent special circumstances, a new rule of law will apply in the case before the court and in all subsequent cases. *Plumley v. Hale*, 594 P.2d 497, 502-03 (Alaska 1979). However, the rule may apply purely prospectively if (1) the rule is one of first impression, or overrules prior law and was not foreshadowed by prior decisions, (2) defendant justifiably relied on prior interpretations, (3) undue hardship would result, and (4) the purpose and effect of the holding is best served by a purely prospective application. *Id.* In *State v. Haley*, 687 P.2d 305, 320 (Alaska 1984), we held that the trial court did not err in refusing to submit the question of punitive damages to the jury where plaintiff's constitutional right to free expression was not so clearly defined that her employer was recklessly indifferent to her constitutional rights when he terminated her employment.

[6] We conclude that the rule of prospectivity does not invalidate the exemplary award in this case. The imposition of a duty on Village was foreshadowed by our decisions applying Section 323 of the Restatement (Second) of Torts and the *D.S.W.* factors, 628 P.2d at 555. Today's decision does not overrule established precedent or prior interpretations upon which Village justifiably relied. Village has demonstrated no undue hardship and the purpose of our holding is best served by application in the instant case. Smalley's right to personal safety is very clearly defined; Village's disregard of numerous complaints by other tenants supports the jury's finding of reckless indifference.

[7] In addition, Village argues that the amount of punitive damages was excessive. A punitive damage award is excessive if it is manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law. *American National Watermattress v. Manville*, 642 P.2d 1330, 1340 (Alaska 1982). Relevant factors include the compensatory damage amount, magnitude of the offense, importance of the policy violated, and the defendant's wealth. *Sturm, Ruger & Co.*, 594 P.2d at 47-48.

[8] We do not believe that the $550,000 exemplary award is excessive. Compensatory damages were $235,000, so there is a reasonable relation between compensatory and punitive damages.

IV. PAST MEDICAL EXPENSES

Village argues that an unemancipated minor has no right to recover compensatory *950 damages for past medical expenses, and therefore Smalley's compensatory award should be reduced.

[9] As a rule, a parent has the primary right of action for past medical expenses incurred on behalf of an unemancipated minor child. *Lasselle v. Special Products Co.*, 677 P.2d 483, 486-87 (Idaho 1983); *Palmore v. Kirkman Laboratories*, 527 P.2d 391, 396-97 (Or.1974). However, the parent may impliedly waive her right to recover in favor of the child by failing to object when the child sues for those expenses or by testifying on the child's behalf. *Lasselle*, 677 P.2d at 486-87. *See also* Annot., 32 A.L.R.2d 1060 (1953).

[10] Mary Smalley (Monica's mother) initially asserted a claim on her own behalf for negligent infliction of emotional distress which did not mention past medical expenses. However, *Monica* claimed she incurred past medical expenses. The parties later stipulated that Mary's claim for emotional distress would be dismissed with prejudice.

We conclude that Monica is entitled to recover past medical expenses. Although Mary had the primary right to recover those expenses, she impliedly

waived her right in favor of Monica by allowing Monica to assert the claim and by testifying on her behalf. The only damages barred by the stipulated dismissal are those for Mary's emotional distress, the only claim asserted by Mary.

V. AMENDING THE ORIGINAL JUDGMENT

Judge Souter signed the final judgment on January 25; it was mailed to Smalley's counsel on February 26 and received on March 1. Village appealed on March 20. Smalley's counsel discovered several errors around March 25 and moved to modify the judgment on April 8. Judge Souter signed an amended judgment on June 27.

The amended judgment (1) decreased the prejudgment interest awarded from December 1984 to January 1985 from $4,200 to $2,071.08, (2) decreased the cost award by one cent, and (3) increased the attorney's fee award from $24,994.76 to $79,781.88. The original judgment contains an arithmetical error and the total is erroneously stated as $586,581.22; the original awards actually total $828,028.83. The amended judgment totals $880,687.01.

Village contends that Judge Souter erred by amending the judgment to correct an error of law more than thirty days after it was distributed. Smalley argues that relaxation of the rules was proper to avoid injustice.

[11] Clerical mistakes in judgments may be corrected by the court at any time. Civil Rule 60(a) . [FN5] We believe that the errors in the prejudgment interest and cost award were clerical, therefore the trial court did not abuse its discretion in changing those amounts.

> FN5. Alaska R.Civ.P. 60(a) provides in part:
> Clerical mistakes in judgments ... and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party....

[12] Civil Rule 60(b) permits the court to relieve a party from judgment for an error of law. [FN6] *See Cleary Diving Service v. Thomas, Head and Greisen*, 688 P.2d 940, 942 (Alaska 1984); *Alaska Truck Transport v. Berman Packing*, 469 P.2d 697, 699 (Alaska 1970). Such a motion must be brought within thirty days after entry of judgment, so that Civil Rule 60(b) is not used to circumvent the thirty day *951 time limit for filing an appeal. *Alaska Truck Transport*, 469 P.2d at 699-700. However, the court may relax this time limit in the interests of justice. *Id.*; Alaska R.Civ.P. 94. The standard of review is abuse of discretion. *Cleary Diving Service*, 688 P.2d at 942.

> FN6. Alaska R.Civ.P. 60(b) provides in part:
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment ... for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect;
> ....
> (6) any other reason justifying relief from the operation of the judgment.
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the date of notice of the judgment....

[13] The trial court's failure to include the exemplary award in its computation of attorney's fees under the Civil Rule 82(a) schedule was a legal error. *Sturm, Ruger & Co. v. Day*, 627 P.2d 204, 205 (Alaska 1981), *cert. denied*, 454 U.S. 894, 102 S.Ct. 391, 70 L.Ed.2d 209 (1981). Smalley's request to modify the judgment occurred more than thirty days after entry of judgment, so the trial judge had discretion to relax the time limit in the interests of justice. We conclude that the trial court did not abuse its discretion by amending the judgment to grant attorney's fees on the punitive damage award.

AFFIRMED.

720 P.2d 945

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LEXSEE 970 p.2d 906

VECO, INC., Appellant and Cross-Appellee, v. CONSTANCE I. ROSEBROCK, Appellee and Cross-Appellant.

Supreme Court Nos. S-7080, S-7120, No. 5084

SUPREME COURT OF ALASKA

970 P.2d 906; 1999 Alas. LEXIS 24

February 19, 1999, Decided

PRIOR HISTORY:
[**1] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Joan M. Woodward, Judge. Superior Court No. 3AN-92-10614 CI.

This Opinion of Substituted by the Court for Withdrawn Opinion of December 18, 1998, Previously Reported at: *1998 Alas. LEXIS 173.*

DISPOSITION:
AFFIRMED AND REVERSED.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of a decision from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, awarding judgment to appellee employee in her sexual harassment and wrongful termination claims.

OVERVIEW: Plaintiff employee was subjected to sexual harassment arising to the level of a hostile work environment from her direct supervisor and another employee. Plaintiff complained to another of her supervisors and then went on a scheduled leave. Prior to her return to work, however, she was informed that she was laid off. Plaintiff sued and won a judgment including punitive damages. Defendant employer appealed and argued that punitive damages could not be awarded for acts of a supervisor outside the scope of the supervisor's employment. The court agreed, reversing the judgment as it pertained to the awarding of punitive damages. However, the court upheld the judgment in all other aspects and specifically remanded the issue of punitive damages for a new trial to determine whether punitive damages should have been awarded.

OUTCOME: Judgment for plaintiff was affirmed as to compensatory damages, but reversed and remanded for a new trial for a determination whether punitive damages could be assessed against defendant employer for the actions of its employee done outside the scope of employment.

CORE TERMS: supervisor, sexual harassment, punitive damages, wrongful termination, harassment, hostile, vicarious liability, severe, hostile work environment, pervasive, vicariously liable, sexual assault, new trial, retaliation, mixed-motive, supervisory, terminating, termination, remedial action, managerial, servant, pretext, scope of employment, employment decision, motive, employer liability, discriminatory, management-level, terminated, subjected

LexisNexis(TM) HEADNOTES - Core Concepts

Labor & Employment Law > Discrimination > Title VII
[HN1] A section of Alaska's anti-discrimination statute makes it unlawful for an employer to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's sex when the reasonable demands of the position do not require distinction on the basis of sex. *Alaska Stat. § 18.80.220(a)(1).* This section prohibits sexual harassment.

Labor & Employment Law > Discrimination > Sexual Harassment > Quid Pro Quo
[HN2] Quid pro quo gender harassment occurs when an employer conditions employment benefits on sexual favors. It arises when an employer relies upon his or her authority to extort sexual consideration from an employee.

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN3] In hostile work environment cases, employees work in offensive or abusive environments. Conduct which unreasonably interferes with work performance can alter a condition of employment and create an abusive working environment. Discriminatory behavior sufficiently severe or pervasive to alter the conditions of the victim's employment and to create a discriminatory hostile work environment violates *Alaska Stat. § 18.80.220.*

Labor & Employment Law > Discrimination > Sexual Harassment > Quid Pro Quo
[HN4] Quid pro quo harassment requires proof that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demand.

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN5] Unfulfilled threats or offensive conduct in general may fall within the hostile work environment classification.

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN6] Often a hostile work environment is created by co-employees or supervisors acting beyond the scope of their employment. They are acting for personal reasons and not, even in part, to serve their employer. However, in the case of supervisors, harassment, though beyond the scope of their employment, may be facilitated by their position with the employer.

Labor & Employment Law > Employer Liability > Tort Liability > Scope of Employment
[HN7] Scope of employment is defined as follows: Conduct of a servant is within the scope of employment if, but only if: it is of the kind he is employed to perform; it occurs substantially within the authorized time and space limits; it is actuated, at least in part, by a purpose to serve the master, and if force is intentionally used by the servant against another, the use of force is not unexpectable by the master. Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Labor & Employment Law > Employer Liability > Tort Liability > Direct & Vicarious Liability
Labor & Employment Law > Employer Liability > Tort Liability > Scope of Employment
[HN8] An employer is generally vicariously liable only for acts of employees acting within the scope of their employment. However, vicarious liability may also be imposed based on apparent authority or where an employee is aided in accomplishing a tort by the employee's position with the employer. But an employer's vicarious liability for punitive damages is limited to acts of managerial employees while acting within the scope of their employment. Alaska case law has eliminated the requirement that the employees be managerial, but not the requirement that their acts be within the scope of their employment.

Labor & Employment Law > Employer Liability > Tort Liability > Direct & Vicarious Liability
Labor & Employment Law > Employer Liability > Tort Liability > Scope of Employment
[HN9] A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Labor & Employment Law > Employer Liability > Tort Liability > Scope of Employment
Torts > Damages > Punitive Damages

[HN10] Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, the principal authorized the doing and the manner of the act, or the agent was unfit and the principal was reckless in employing him, or the agent was employed in a managerial capacity and was acting in the scope of employment, or the principal or a managerial agent of the principal ratified or approved the act.

Civil Procedure > Jury Trials > Jury Instructions
[HN11] Jury instructions involve questions of law, which this court reviews using its independent judgment. An erroneous statement of law in jury instructions will not be reversed unless prejudice is shown.

Labor & Employment Law > Discrimination > Disparate Treatment
Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN12] Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. *42 U.S.C.S. § 2000e-2*(a) (1). The United States Supreme Court held that Title VII prohibits hostile environment sexual harassment.

Labor & Employment Law > Employer Liability > Tort Liability > Direct & Vicarious Liability
Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN13] Harassment by supervisors is facilitated, made more serious, and is less apt to be reported because supervisors are understood to be clothed with the employer's authority.

Labor & Employment Law > Employer Liability > Tort Liability > Direct & Vicarious Liability
Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN14] Even where the employer has issued a policy prohibiting sexual harassment, and where the employer has established procedures for the receipt of employee complaints, the employer will still have aided the supervisor in committing the harassment. Therefore, an employer is vicariously liable for the hostile work environment created by its supervisors regardless of whether management-level employees knew or should have known about the harassment, and regardless of whether the supervisors were acting within the scope of their employment.

Labor & Employment Law > Employer Liability > Tort Liability > Direct & Vicarious Liability
Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN15] An employer will only be vicariously liable for the acts of the complainant's supervisor, because only then will the supervisor be using his position with the employer to alter the conditions of the complainant's employment. A supervisor who does not oversee the complainant should be treated as a co-worker. In that situation, the supervisor does not have authority over the complainant and may not be aided by his position in the workplace. Furthermore, when a co-worker or supervisor with no control over the complainant creates a hostile environment, the complainant should be less hesitant to report the situation, since the harasser could not retaliate by changing the conditions of the complainant's employment. Thus, employers are only vicariously liable for hostile environment sexual harassment committed by the complainant's supervisor.

Labor & Employment Law > Employer Liability > Tort Liability > Direct & Vicarious Liability
Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN16] There is no basis for distinguishing between supervisors' acts of harassment and their failure to remedy known harassment. Supervisors who allow other employees to sexually harass employees they supervise have used their delegated authority to allow the harassment to continue.

Civil Procedure > Trials > Judgment as Matter of Law
[HN17] When reviewing a motion for a judgment notwithstanding the verdict, the court determines whether evidence, when viewed in the light most favorable to the non-movant, is such that reasonable persons could not differ in their judgment. The court neither weighs the evidence nor judges the credibility of witnesses. Rather, it employs an objective test: If there is room for diversity of opinion among reasonable people, then a jury question exists.

Civil Procedure > Relief From Judgment > Motions for New Trial
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN18] The court reviews the superior court's denial of a motion for a new trial for an abuse of discretion. An abuse of discretion occurs only if the evidence supporting the jury's verdict was either completely lacking or slight and unconvincing, so that the verdict was manifestly unreasonable and unjust. The court will draw all inferences from the facts in the light most favorable to the non-movant.

Governments > Legislation > Interpretation
Civil Procedure > Jury Trials > Province of Court & Jury
[HN19] Statutory interpretation is a question of law which this court reviews using its independent judgment.

Torts > Damages > Compensatory Damages
[HN20] *Alaska Stat. § 22.10.020(i)* authorizes a court finding a violation of any of the provisions of *Alaska Stat. § 18.80* to award any other relief including the payment of money, that is appropriate. This includes an award of compensatory damages.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings
[HN21] The superior court is accorded wide discretion in ruling on motions to amend pleadings.

Labor & Employment Law > Wrongful Termination
Labor & Employment Law > Discrimination > Retaliation
[HN22] *Alaska Stat. § 18.80.220(a)(4)* provides that it is an unlawful employment practice for an employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against a person because the person has opposed any practices forbidden under *Alaska Stat. § § 18.80.200-18.80.280* or because the person has filed a complaint, testified, or assisted in a proceeding under this chapter.

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN23] In determining whether an employer has violated *Alaska Stat. § 18.80.220* when there is no direct evidence of discriminatory intent, the court has adopted the three-part framework used in Title VII cases. This test also governs actions for retaliatory discharge.

Labor & Employment Law > Discrimination > Retaliation
[HN24] To establish a prima facie case of discriminatory retaliation, a plaintiff must show that: she engaged in an activity protected under Title VII; her employer subjected her to adverse employment action; there was a causal link between the protected activity and the employer's action. Causation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge. Once a plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-retaliatory explanation for the action. To satisfy this burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. If the employer successfully rebuts the inference of retaliation that arises from establishment of a prima facie case, then the burden shifts once again to the plaintiff to show that the defendant's proffered explanation is merely a pretext for discrimination.

Labor & Employment Law > Discrimination > Retaliation
[HN25] The question of whether a mixed-motive theory applies to wrongful termination depends on the interpretation of the term "because" in *Alaska Stat. § 18.20.220.* In interpreting Title VII, the United States Supreme Court held that the words "because of sex" mean that gender must be irrelevant to employment decisions. It emphasized that the words "because of" do not mean "solely because of," and held that Title VII prohibited decisions based on a mixture of legitimate and illegitimate considerations. The Court then held that if the plaintiff shows that gender was a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.

Labor & Employment Law > Discrimination > Retaliation
[HN26] The broad language of *Alaska Stat. § 22.10.020(c)* indicates a legislative intent to authorize an award of compensatory and punitive damages for violations of *Alaska Stat. § 18.80*, in addition to the equitable remedies such as enjoining illegal employment activities and ordering back pay as a form of restitution.

Torts > Damages > Punitive Damages

[HN27] The plain language of *Alaska Stat. § 22.10.020(i)* authorizes the superior court to award any other relief, including the payment of money. Further, punitive damages are recoverable in discrimination cases. Moreover, under the common law, Alaska's superior courts possess the authority to award punitive damages for outrageous conduct. Allowing punitive damages under *Alaska Stat. § 18.80.220* does not reach beyond settled expectations. Punitive damages are authorized under § 18.80.220 and § 22.10.020(i).

Labor & Employment Law > Employer Liability > Tort Liability > Scope of Employment
[HN28] When an employee commits a wrongful act which would subject him personally to punitive damages, the essential inquiry must be whether the act was committed while the employee was acting within the scope of his employment. If the employee was acting within the scope of his employment, the corporation will be liable for punitive damages regardless of whether that employee may be classified as menial.

Labor & Employment Law > Employer Liability > Tort Liability > Scope of Employment
Torts > Damages > Punitive Damages
[HN29] If an employee is acting outside the scope of his employment, he is not acting in any way to further the goals of the employer. The interest of preventing sexual harassment is served by holding an employer vicariously liable for its supervisors' sexual harassment, regardless of whether they are acting within the scope of their employment, because the employer may be deterred from delegating authority to untrained or incompetent supervisors. However, this does not mean that an innocent employer should be punished by an award of punitive damages when its supervisors are acting outside the scope of their employment. Punitive damages are disfavored and are allowed only within narrow limits.

Civil Procedure > Relief From Judgment > Motions for New Trial
[HN30] When a jury award may be based on any one of several theories, one of which has been erroneously submitted to the jury, a new trial is required.

Civil Procedure > Appeals > Reviewability > Preservation for Review
[HN31] Alaska R. Civ. P. 51(a) provides that no party may assign as error the giving or the failure to give an instruction unless the party objects thereto stating distinctly the matter to which the party objects and the grounds of the objection.

COUNSEL:
Donna C. Willard, Law Offices of Donna C. Willard, Anchorage, for Appellant and Cross-Appellee.

Robert P. Owens, Copeland, Landye, Bennett and Wolf, Anchorage, and Timothy D. Dooley, Anchorage, for Appellee and Cross-Appellant.

JUDGES:
Before: Rabinowitz, Matthews, Eastaugh, and Fabe, Justices. [Compton, Chief Justice, not participating.]

OPINIONBY:
MATTHEWS

OPINION:

[*908] OPINION

MATTHEWS, Justice.

I. INTRODUCTION

Many issues are presented in this sexual harassment and wrongful termination case. The two most important are:

(1) Can an employer be liable for acts of a supervisor [**2] which create a hostile work environment even though the supervisor is acting outside the scope of his employment?

(2) Can punitive damages be imposed for a supervisor's acts outside the scope of his employment?

We answer "yes" to the first question because the supervisor is enabled by his position with the employer to impose unwelcome sexual conduct on the employee. We answer "no" to the second question because it is unfair to punish an employer for acts committed by employees who are in no sense pursuing objectives of the employer.

II. FACTS AND PROCEEDINGS

Constance Rosebrock began working for VECO in Anchorage in April 1991. In September she transferred to Arctic Rentals, a VECO subsidiary located on the North Slope. n1 Rosebrock worked for Arctic Rentals on the North Slope for approximately six weeks, from September 11 until September 26, and from October 3 until October 26. On October 30 or 31 she was notified that she had been laid off.

----------Footnotes----------

n1 VECO admits that Arctic Rentals is merely a division of VECO, and does not argue that it is a separate corporate entity.

----------End Footnotes----------[**3]

Rosebrock claims that during her employment with VECO on the North Slope, Rick Rorick, the supervisor in charge of Arctic Rentals, subjected her to hostile environment sexual harassment. In addition, she claims that she was sexually assaulted by a VECO employee toward the end of her second tour of duty. She claims that VECO wrongfully terminated her when she complained about the assault.

In December 1991 Rosebrock filed a complaint with the Alaska Human Rights Commission. She also filed suit in superior court [*909] against VECO and Bill Dropps, the employee who allegedly sexually assaulted her. After settlement negotiations in which Rosebrock agreed to dismiss Dropps as a party, Rosebrock's claims of hostile environment sexual harassment and wrongful termination proceeded to a jury trial. n2

----------Footnotes----------

n2 While Rosebrock originally alleged both quid pro quo and hostile environment sexual harassment claims, the jury only decided the hostile environment sexual harassment claim.

----------End Footnotes----------

At trial, Rosebrock testified that Rorick had sexually [**4] propositioned her on several occasions. She also testified that Rorick made several explicit comments about the size of her breasts. Furthermore, Rosebrock testified that she, Bobby Clark, and Bill Dropps gathered in Dropps's room on October 23 to watch the World Series game. n3 She testified that when Clark left the room, Dropps grabbed her by her arms and legs and threw her onto the bed. They struggled, and he hit her in the ribs. After more struggling, however, he released her and begged her to not tell anyone.

----------Footnotes----------

n3 Rosebrock testified that Clark was her supervisor when Rorick was not on the slope. Dropps was also a supervisor, but he was not Rosebrock's supervisor and did not have any authority over her.

----------End Footnotes----------

Rosebrock also testified that early the next morning she reported the assault to Clark, who was her supervisor on duty at that time. She also claimed that she showed her bruises to a co-worker, Peggy Gerhardson, who assured her that she and Clark would take care of the problem.

Rosebrock went on leave two [**5] or three days later. She testified that before she left, the administrator, Norm Denison, approved her work schedule for the next five months. On October 30 or 31, however, Denison called her at home to tell her that she had been "laid off." Rosebrock testified that she then called Denison several times to see what

VECO was doing about her complaints of sexual assault. Rosebrock claimed that Denison told her VECO had taken care of the problem. Rosebrock stated that when she asked him what had been done, he told her, "you're gone."

The jury found VECO liable for Rosebrock's hostile environment sexual harassment claim and her wrongful termination claim. It awarded her $ 27,500 for emotional distress damages, $ 75,000 for lost wages, and $ 1,500,000 for punitive damages. VECO then moved for a judgment notwithstanding the verdict, for a new trial, and for a remittitur. The superior court granted a partial remittitur, reducing the award for lost wages to $ 4,000. It denied VECO's other motions.

VECO appeals this judgment. n4 Rosebrock cross-appeals on discovery sanction issues, in the event this court remands for a new trial.

----------Footnotes----------

n4 Counsel for VECO on appeal did not serve as its trial counsel.

----------End Footnotes---------- [**6]

III. DISCUSSION

We discuss the following issues in this case:

A. Sexual Harassment

1. Did the superior court properly instruct the jury as to whether VECO could be held liable for hostile environment sexual harassment committed by a supervisor acting outside the scope of his employment?

2. Did the superior court err in denying VECO's motions for JNOV and for a new trial on Rosebrock's hostile environment sexual harassment claim?

a. Was the evidence sufficient to support a finding that the harassment was severe or pervasive?

b. Was the harassment committed by a supervisor whose actions can be imputed to VECO?

3. Are damages for emotional distress caused by sexual harassment barred by the exclusive remedy provision of the Alaska Workers' Compensation Act?

B. Wrongful Termination

1. Did the superior court err by permitting Rosebrock to amend her complaint after the trial had concluded?

2. Did the superior court properly instruct the jury as to whether VECO [*910] could be held liable for the alleged wrongful termination of Rosebrock?

3. Did the superior court properly instruct the jury on mixed motives?

4. Did the superior [**7] court err in denying VECO's motions for JNOV and for a new trial on Rosebrock's wrongful termination claim?

C. Punitive Damages

1. Are punitive damages authorized under *AS 18.80.220* and *AS 22.10.020(i)*?

2. Did the jury instructions err in permitting the jury to award punitive damages against VECO for acts of a supervisor beyond the scope of the supervisor's employment?

3. Did VECO properly object to the punitive damage instruction?

The parties have also briefed additional issues which do not require discussion for reasons set out in footnote 37, pages 44-45.

A. Sexual Harassment

[HN1] A section of Alaska's anti-discrimination statute makes it unlawful for an employer "to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's . . . sex . . . when the reasonable demands of the position do not require distinction on the basis of . . . sex . . . ." *AS 18.80.220(a) (1).* In *French v. Jadon, Inc., 911 P.2d 20 (Alaska 1996),* we held that this section prohibited sexual harassment. Further, we accepted the customary division of sexual harassment claims into those involving a quid pro quo [**8] and those which merely involve a hostile work environment.

Concerning the former, we noted that "[HN2] quid pro quo gender harassment occurs when an employer conditions employment benefits on sexual favors. It arises when an employer relies upon his or her authority 'to extort sexual consideration from an employee.'" *Id. at 26* (citation omitted) (quoting *Canada v. Boyd Group, Inc., 809 F. Supp. 771, 777 (D. Nev. 1992).* With respect to the latter we noted that [HN3] in

hostile work environment cases, "employees work in offensive or abusive environments. Conduct which unreasonably interferes with work performance can alter a condition of employment and create an abusive working environment." . . .

. . . Discriminatory behavior sufficiently severe or pervasive to alter the conditions of the victim's employment and to create a discriminatory hostile work environment violates *AS 18.80.220.*

911 P.2d at 28 (citations and footnote omitted) (quoting *Ellison v. Brady, 924 F.2d 872, 875, 877 (9th Cir. 1991)).*

[HN4] Quid pro quo harassment requires proof that "a tangible employment action resulted from a refusal to submit to a supervisor's sexual demand." n5 [HN5] "Unfulfilled threats" or [**9] "offensive conduct in general" may fall within the hostile work environment classification. n6

----------Footnotes----------

n5 *Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).*

n6 Id.

----------End Footnotes----------

[HN6] Often a hostile work environment is created by co-employees or supervisors acting beyond the scope of their employment. They are acting for personal reasons and not, even in part, to serve their employer. n7 However, in the case of supervisors, harassment, though beyond the scope of their employment, may be facilitated by their position with the employer.

----------Footnotes----------

n7 [HN7] Restatement (Second) of Agency § 228 defines scope of employment as follows:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

----------End Footnotes----------[**10] [HN8]

[*911] An employer is generally vicariously liable only for acts of employees acting within the scope of their employment. However, vicarious liability may also be imposed based on apparent authority or where an employee is aided in accomplishing a tort by the employee's position with the employer. n8 But an employer's vicarious liability for punitive damages is limited by the Restatement (Second) of Agency to acts of (1) managerial employees (2) while acting within the scope of their employment. n9 Alaska case law has eliminated the requirement that the employees be managerial, n10 but not the requirement that their acts be within the scope of their employment.

----------Footnotes----------

n8 [HN9] Section 219 of the Restatement (Second) of Agency provides in relevant part:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

. . . .

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.
[**11]

n9 [HN10] Section 217C of the Restatement (Second) of Agency provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

n10 See *Alaskan Village, Inc. v. Smalley, 720 P.2d 945, 948-49 (Alaska 1986).*

----------End Footnotes----------

These principles are dispositive of the present case.

1. Did the superior court properly instruct the jury as to whether VECO could be held liable for hostile environment sexual harassment committed by a supervisor acting outside the scope of his employment? n11

----------Footnotes----------

n11 [HN11] Jury instructions involve questions of law, which this court reviews using its independent judgment. See *Aviation Assocs., Ltd. v. Temsco Helicopters, Inc., 881 P.2d 1127, 1130 n.4 (Alaska 1994).* An erroneous statement of law in jury instructions will not be reversed unless prejudice is shown. Id.

----------End Footnotes----------[**12]

VECO claims that the superior court's instructions on liability were erroneous because they allowed the jury to impose "strict liability" on it if a low-level supervisor subjected Rosebrock to hostile environment sexual harassment, or if a low-level supervisor knew about the harassment, but failed to take remedial action. It argues that it should only be

liable for a supervisor's hostile environment sexual harassment if a management-level employee knew or should have known about the harassment and failed to take proper and effective remedial action. n12 Rosebrock, however, argues that an employer should always be liable for hostile environment sexual harassment if it is committed by its supervisors or if its supervisors had knowledge and failed to take remedial action.

----------Footnotes----------

n12 A management-level employee has been defined as one who has the "stature and authority of the agent to exercise control, discretion and independent judgment over a certain area of a business with some power to set policy for the company." *Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1263 (10th Cir. 1995);* see also *Albuquerque Concrete Coring Co. v. Pan Am World Servs., Inc., 118 N.M. 140, 879 P.2d 772, 777 (N.M. 1994)* (defining managerial employee "as one who 'formulates, determines and effectuates his employer's policies, one with discretion or authority to make ultimate determinations independent of company consideration and approval of whether a policy should be adopted.'") (quoting *Kemner v. Monsanto Co., 217 Ill. App. 3d 188, 576 N.E.2d 1146, 1157, 160 Ill. Dec. 192 (Ill. App. 1991)).*

----------End Footnotes----------[**13]

The superior court instructed the jury on liability as follows in Instruction No. 16:

If you find that VECO employees subjected Rosebrock to a sexually hostile working environment as previously defined, you must decide whether VECO itself is liable for its employees' conduct.

You must first consider the role of VECO supervisory employees. You shall find VECO liable for the conduct of its [*912] supervisory employees if you find that it is more likely than not that:

1. One or more of VECO's supervisory employees encouraged, caused, permitted, ratified, or participated in the conduct; or

2. One or more of VECO's supervisory employees, knowing of the conduct, excused it or failed to take remedial action reasonably calculated to end the harassment. Such remedial action must be immediate and must remedy the conduct without adversely affecting the terms or conditions of the complaining party's employment.

You shall find VECO liable for the conduct of its non-supervisory employees if you find that it is more likely than not that such employees were acting within the scope of their employment and if VECO knew or should have known of the harassment and failed to take remedial action as discussed [**14] above.

The first paragraph of the instruction directs the jury to proceed if "VECO employees," supervisors or otherwise, subjected Rosebrock to a hostile work environment. The second paragraph defines when VECO will be liable for the acts or omissions of its "supervisory employees." The subparagraph numbered one allowed the jury to impose liability on VECO if its supervisory employees "encouraged, caused, permitted, ratified, or participated" in the harassment. It did not require the jury to find that those supervisors had acted within the scope of their employment or used their delegated authority to carry out the harassment. In addition, it did not require the jury to find that a management-level employee knew or should have known about the harassment. Thus this subparagraph allowed the jury to impose liability on VECO for the sexual harassment by a low-level supervisor, acting outside the scope of his employment, even if VECO management-level employees did not know or have constructive knowledge of the harassment.

Subparagraph number two allowed the jury to impose liability on VECO if a supervisor knew about the harassment, but did not take proper remedial action. It did not [**15] limit VECO's liability to an omission by a management-level employee, but allowed the jury to impose liability on VECO for a low-level supervisor's failure to take proper remedial action. n13

----------Footnotes----------

n13 Paragraph three imposes liability on VECO for hostile environment sexual harassment by non-supervisors who acted within the scope of their employment, as long as VECO knew or should have known about the harassment. VECO does not challenge this part of the instruction.

----------End Footnotes----------

Instruction 17 defined "supervisor" as follows:

A supervisor is one who serves in a supervisory position and has corporate authority to affect the terms and conditions of the employees he supervises. In other words a person is a supervisor if he has the authority to hire, fire, promote, discipline, or in any other manner affect the terms or conditions of an employee's employment.

Taken together these instructions allowed the jury to impose liability on VECO for the acts or omissions of Rosebrock's immediate supervisors, regardless of whether [**16] they were acting within the scope of their employment, and regardless of whether management-level employees knew or should have known about the harassment.

The scope of an employer's liability for its employees' hostile environment sexual harassment is an issue of first impression in Alaska. In interpreting Alaska's anti-discrimination laws, we have looked to federal Title VII cases for guidance. n14 See *French, 911 P.2d at 28 n.8.* We have observed, however, that *AS 18.80.220* "is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination." [*913] *Wondzell v. Alaska Wood Prods., Inc., 601 P.2d 584, 585 (Alaska 1979).*

----------Footnotes----------

n14 [HN12] Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *42 U.S.C. § 2000e-2*(a) (1). In *Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986),* the United States Supreme Court held that Title VII prohibits hostile environment sexual harassment.

----------End Footnotes----------[**17]

The United States Supreme Court addressed the issue of employer liability in *Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986).* n15 Because the factual record had not been fully developed in the trial court, the majority opinion refused to "issue a definitive rule on employer liability," but stated that

we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, *42 U.S.C. § 2000e*(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency § § 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.

Id. at 72. The Court stated that the court of appeals was "wrong to entirely disregard [**18] agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." n16 *Id. at 73.*

----------Footnotes----------

n15 In Meritor, a female bank employee alleged that her supervisor, who was a bank vice-president and branch manager, had sexually harassed her. *477 U.S. at 59-60.* In dicta, the district court held that the bank could not be held liable because it did not have any knowledge of the alleged harassment. *Meritor, 477 U.S. at 61-62.* The Court of Appeals for the District of Columbia reversed, holding that the bank was liable for sexual harassment by its supervisory personnel, regardless of whether or not it knew or should have known about the conduct. *Vinson v. Taylor, 243 U.S. App. D.C. 323, 753 F.2d 141, 150 (D.C. Cir. 1985).* It held that a supervisor is an agent of his employer and, even if he lacks authority to hire, fire, or promote, "the mere existence -- or even the appearance -- of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." Id. (footnote omitted).

n16 Meritor does not prohibit courts from imposing vicarious liability on employers for hostile environment sexual harassment committed by their supervisors. Rather, it only prohibits federal courts from "concluding that employers are always automatically liable for sexual harassment by their supervisors." *477 U.S. at 72* (emphasis added). Thus, Meritor allows federal courts to impose vicarious liability in some instances.

----------End Footnotes---------- [**19]

Justice Marshall, concurring with three other justices in Meritor, reached the issue of employer liability, and stated that employers should be held liable for a supervisor's hostile environment sexual harassment of an employee under his supervision, regardless of notice. See *477 U.S. at 74, 76-77* (Marshall, J., concurring). He stated:

It is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied only in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Meritor, 477 U.S. at 76-77 (first and third emphasis added). He emphasized that a supervisor's authority is not limited to changing employees' status by hiring, firing, or disciplining them; instead, a supervisor also [**20] has the responsibility to supervise the daily work environment and to ensure a safe, productive work environment. See *Meritor, 477 U.S. at 76.* n17

----------Footnotes----------

n17 In response to Meritor, lower federal courts fashioned confusing and even contradictory rules for when employers can be held vicariously liable for sexual harassment committed by their supervisors. See Frederick J. Lewis & Thomas L. Henderson, Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard, *25 U. Mem. L. Rev. 667 (1995)* (providing a survey of the standards which the various federal circuits have employed).

----------End Footnotes----------

[*914] We agree with Justice Marshall's view. [HN13] Harassment by supervisors is facilitated, made more serious, and is less apt to be reported because supervisors are "understood to be clothed with the employer's authority." *477 U.S. at 77.* The Restatement (Second) of Agency § 219(2) (d) supports imposing vicarious liability in such circumstances. It provides:

(2) A master is not [**21] subject to liability for the torts of his servants acting outside the scope of their employment, unless:

. . . .

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

(Emphasis added.)

The Massachusetts Supreme Court has employed this theory to hold employers vicariously liable for hostile environment sexual harassment by their supervisors:

Harassment by a supervisor carries an implied threat that the supervisor will punish resistance through exercising supervisory powers, which may range from discharge to assignment of work, particularly exacting scrutiny, or refusal to protect the employee from coworker harassment. Quid pro quo harassment may be easier to identify as an abuse of the authority vested in a supervisor because of the effect on tangible job conditions, but it does not define the limit of a

supervisor's authority. Although coworkers or even outsiders may also be capable of creating a sexually harassing work environment, it is the authority conferred upon a supervisor by the employer that makes the [**22] supervisor particularly able to force subordinates to submit to sexual harassment.

College-Town v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 508 N.E.2d 587, 593 (Mass. 1987) (emphasis added) (citation omitted).

[HN14] Even where the employer has issued a policy prohibiting sexual harassment, and where the employer has established procedures for the receipt of employee complaints, the employer will still have aided the supervisor in committing the harassment. See *Meritor, 477 U.S. at 76-77* (Marshall, J., concurring). Therefore, we hold that an employer is vicariously liable for the hostile work environment created by its supervisors regardless of whether management-level employees knew or should have known about the harassment, and regardless of whether the supervisors were acting within the scope of their employment. n18

----------Footnotes----------

n18 In *Burlington Industries v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998),* and *Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998),* both decided after this case was briefed and argued, the United States Supreme Court revisited the subject of hostile work environment sexual harassment cases and made a number of observations relevant to this case. The Court noted that for sexual harassment to be actionable it must be "severe or pervasive," that the non-statutory terms "quid pro quo" and "hostile work environment" illustrate the distinction between cases which involve a threat which is carried out and generally offensive conduct, but are not in themselves controlling as to the imposition of vicarious liability, and that generally "sexual harassment by a supervisor is not conduct within the scope of employment." Burlington at 2265, 2267. The Court endorsed the application of the "aided in agency" theory expressed in the Restatement (Second) of Agency § 219(2)(d). However, where no tangible employment action has been taken, the Court devised an affirmative defense for the employer. The defense consists of two elements:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Burlington at 2270, Faragher at 2293. While these recent cases are thus in several respects supportive of the views we express herein as to the liability of an employer for the harassive acts of a supervisor, we have no occasion to consider whether the affirmative defense which they announce should be adopted as a feature of Alaska anti-discrimination law. Understandably, the issue of the adoption of such a defense was not raised below or on appeal.

----------End Footnotes---------- [**23]

[*915] Agency principles also provide an important limitation on employer liability, however. [HN15] An employer will only be vicariously liable for the acts of the complainant's supervisor, because only then will the supervisor be using his position with the employer to alter the conditions of the complainant's employment. See *French, 911 P.2d at 28* (defining hostile work environment as "discriminatory behavior sufficiently severe or pervasive to alter the conditions of the victim's employment"). As Justice Marshall stated, a supervisor who does not oversee the complainant should be treated as a co-worker. See *Meritor, 477 U.S. at 77* (Marshall, J., concurring). In that situation, the supervisor does not have authority over the complainant and may not be aided by his position in the workplace. Furthermore, when a co-worker or supervisor with no control over the complainant creates a hostile environment, the complainant should be less hesitant to report the situation, since the harasser could not retaliate by changing the conditions of the complainant's employment. Thus, employers are only vicariously liable for hostile environment sexual harassment committed by the complainant's supervisor. [**24] n19

----------Footnotes----------

n19 The parties have used the term "strict liability" to describe holding the employer liable for the acts of its supervisors. Since our analysis is based on agency principles, the liability is more accurately defined as "vicarious liability."

----------End Footnotes----------

These same principles apply to determine the scope of an employer's liability when its supervisors know about sexual harassment by a co-worker or by a supervisor who does not have authority over the complainant, but fail to take appropriate remedial action. [HN16] There is no basis for distinguishing between supervisors' acts of harassment and their failure to remedy known harassment. Supervisors who allow other employees to sexually harass employees they supervise have used their delegated authority to allow the harassment to continue.

For the above reasons we conclude that the trial court correctly instructed the jury on VECO's liability for hostile environment sexual harassment by a supervisor acting outside the scope of his employment.

2. Did the superior court err [**25] in denying VECO's motions for JNOV and for a new trial on Rosebrock's hostile environment sexual harassment claim? n20

----------Footnotes----------

n20 As stated in *Diamond v. Wagstaff, 873 P.2d 1286, 1290 (Alaska 1994):*

[HN17] When reviewing a motion for a judgment n.o.v., we determine whether evidence, when viewed in the light most favorable to the non-movant, is such that reasonable persons could not differ in their judgment. We neither weigh the evidence nor judge the credibility of witnesses. Rather, we employ an objective test: If there is room for diversity of opinion among reasonable people, then a jury question exists.

[HN18] We review the superior court's denial of a motion for a new trial for an abuse of discretion. An abuse of discretion occurs only if the evidence supporting the jury's verdict was either completely lacking or slight and unconvincing, so that the verdict was manifestly unreasonable and unjust. Again, we draw all inferences from the facts in the light most favorable to the non-movant.

When reviewing a jury verdict under these standards, this court necessarily considers hypothetical explanations for the jury's determination. Otherwise, we would not be able to review verdicts at all.

(Citations omitted.)

----------End Footnotes---------- [**26]

VECO filed motions for judgment notwithstanding the verdict (JNOV) and for a new trial, alleging that the evidence was insufficient to support a finding of liability for hostile environment sexual harassment. VECO claims that the evidence did not support the jury's implied findings that the alleged harassment was severe or pervasive or that the alleged harassers were supervisors whose actions could be imputed to VECO.

a. Was the evidence sufficient to support a finding that the harassment was severe or pervasive? n21

----------Footnotes----------

n21 The trial in this case was held before we decided French. However, the superior court used the same standard called for in French, and VECO does not challenge the superior court's employment of the severe or pervasive standard. The superior court also instructed the jury that, in evaluating whether the behavior complained of was severe or pervasive, "You should consider this question from the perspective of a reasonable woman: would a reasonable woman consider the conduct sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment?" In French, we specifically declined to decide whether to adopt the "reasonable woman" standard. *French, 911 P.2d at 28 n.10.* VECO does not appeal this instruction, so we have no occasion to review it.

----------End Footnotes---------- [**27]

In French, we held that "discriminatory behavior sufficiently severe or pervasive [*916] to alter the conditions of the victim's employment and to create a discriminatory hostile work environment violates *AS 18.80.220.*" *911 P.2d at 28.* VECO argues that the evidence at trial does not support the jury's verdict, because the evidence consisted of name-calling and insults, which was not severe or pervasive harassment. Viewing all the evidence in the light most favorable to Rosebrock, we disagree.

The evidence of sexual harassment, in part, is as follows. Rosebrock testified that on her first tour of duty, when she was introduced to her supervisor, Rick Rorick, he stated, "Let's get down to business. Are you married, and do you fool around?" Rosebrock also testified that Rorick told her that strange things happened to women in the middle of the night. In addition, Rorick would say to her, on occasion, "You're in a good mood. Who are you doing?" He would ask her if her back ached, or why she did not fall over, apparently referring to the size of her breasts.

Rosebrock also testified that when she approached Rorick to complain about not receiving a room assignment, he asked her to come to [**28] his room later that night. She stated that when she did go to talk with him, for the purpose of receiving a room assignment, he said, "I knew you from [another job on] rig 9. You were the redhead with the big tits." He also said that she could stay with him in his room, so long as no one saw her leave in the morning.

Also, Rosebrock testified that soon after she started her second tour of duty, Rorick pointed to her in public and shouted, "Boone and Crocket." Rosebrock discovered that the comment referred to her breasts. She claimed that it became common for people at VECO to call her by that name, and that to avoid hearing it, she would refrain from entering the dining hall for two meals every day and would go there late for dinner.

Viewing all of the evidence in the light most favorable to Rosebrock, reasonable jurors could have concluded that Rorick's behavior was severe or pervasive enough to alter the conditions of Rosebrock's employment and create a hostile work environment. The sexualized name-calling, in particular, was recurrent. While any single incident of name-calling might not have been severe, taken together, these incidents constitute a pattern of harassment which [**29] might reasonably be regarded as severe or pervasive. See, e.g., *Ellison v. Brady, 924 F.2d 872, 876-81 (9th Cir. 1991)* (indicating that the required showing of severity varies inversely with the pervasiveness of the conduct).

b. Was the harassment committed by a supervisor whose actions can be imputed to VECO?

VECO claims that the alleged harassment was not committed by a supervisor whose actions can be imputed to VECO. We have held that VECO may be vicariously liable if Rosebrock's supervisors subjected her to hostile environment sexual harassment. VECO offered the jury instruction which defined supervisor as follows:

A supervisor is one who serves in a supervisory position and has corporate authority to affect the terms and conditions of the employees he supervises. In other words a person is a supervisor if he has the authority to hire, fire, promote, discipline, or in any other manner affect the terms or conditions of an employee's employment.

Therefore, the only question is whether the evidence, taken in the light most favorable to Rosebrock, could lead reasonable jurors to infer that the harasser, Rorick, was Rosebrock's supervisor. The evidence supports [**30] such a conclusion.

First, and most persuasive, Rorick admitted that he had the authority to fire Rosebrock, and that he had the power to discipline [*917] and sanction employees. Rorick also testified that he would expect Rosebrock to complain to him about room assignments.

We thus hold that the evidence was sufficient to support the jury's verdict that VECO was liable for hostile environment sexual harassment, because Rosebrock's supervisor subjected her to severe or pervasive sexual harassment. The superior court did not err in denying VECO's motions for a new trial or JNOV on Rosebrock's hostile environment sexual harassment claim.

3. Are damages for emotional distress caused by sexual harassment barred by the exclusive remedy provision of the Alaska Workers' Compensation Act? n22

----------Footnotes----------

n22 [HN19] Statutory interpretation is a question of law which this court reviews using its independent judgment. See *Huf v. Arctic Alaska Drilling Co., 890 P.2d 579, 580 n.2 (Alaska 1995).*

----------End Footnotes----------

VECO argues that Rosebrock should not have [**31] been able to obtain emotional distress damages. It contends that these were barred by the exclusive remedy provision of the Workers' Compensation Act. n23

----------Footnotes----------

n23 *AS 23.30.055.*

----------End Footnotes----------

[HN20] *Alaska Statute 22.10.020(i)* authorizes a court finding a violation of any of the provisions of AS 18.80 to award "any other relief including the payment of money, that is appropriate." We have held that this includes an award of compensatory damages. See *Loomis Elec. Protection, Inc. v. Schaefer, 549 P.2d 1341, 1343 (Alaska 1976).*

In Loomis we observed that the objective of the antidiscrimination law was to afford complete relief to parties injured by discrimination.

The language of the statute is clearly intended to provide a litigant complete relief in an appropriate case. In view of the strong statement of purpose in enacting AS 18.80, and its avowed determination to protect the civil rights of all Alaska citizens, we believe that the legislature intended to put as many "teeth" into this law as possible. We fail to see [**32] how, consistent with that purpose and intent, the legislature could have contemplated a statutory scheme that would not have included the right to recover damages. Otherwise, there would be many cases in which no meaningful relief would be available to the injured party, the one whose civil rights have been violated and whom the law seeks to protect.

Id. at 1343 (footnotes omitted).

The Alaska Workers' Compensation Act does not provide compensation for emotional distress which does not result in permanent or partial disability. It would be inconsistent with the legislative purpose of affording complete relief to those injured by discrimination to hold that nonduplicative damages are barred by the exclusive remedy provision of the Workers' Compensation Act.

In declining to so hold we join the courts of many other states which have held that the exclusive remedy provisions of their workers' compensation laws do not bar intangible injury claims resulting from sexual harassment. See *Hart v. National Mortgage & Land Co., 189 Cal. App. 3d 1420, 235 Cal. Rptr. 68, 75 (Cal. App. 1987); Cox v. Brazo, 165 Ga. App. 888, 303 S.E.2d 71, 73 (Ga. App. 1983); O'Connell v. Chasdi, 400 Mass. 686, 511 N.E.2d 349, 351-52 (Mass. 1987);* [**33] *Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116, 120-21 (N.C. App. 1986); Palmer v. Bi-Mart Co., 92 Ore. App. 470, 758 P.2d 888, 891 (Or. App. 1988).*

B. Wrongful Termination

1. Did the superior court err by permitting Rosebrock to amend her complaint after the trial had concluded? n24

----------Footnotes----------

n24 [HN21] The superior court is accorded wide discretion in ruling on motions to amend pleadings. See *Rodriguez v. Rodriguez, 908 P.2d 1007, 1011 (Alaska 1995).*

----------End Footnotes----------

Rosebrock's pleadings did not explicitly allege that her wrongful termination claim was brought pursuant to *AS 18.80.220(a)(4).* n25 Rather, the complaint stated:

[*918] 20. Plaintiff's termination was wrongful in that she was discharged for asserting her right as an employee to be free from sexual assault and harassment, a right that is of important public interest as reflected in both federal and state statutes and case law.

. . . .

22. Defendant VECO's action in discharging plaintiff for this reason was willful, wanton and malicious and beyond the bounds of socially tolerable [**34] conduct, warranting the assessment of punitive damages against defendant VECO.

----------Footnotes----------

n25 [HN22] *AS 18.80.220(a)(4)* provides that it is an unlawful employment practice for "an employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against a person because the person has opposed any practices forbidden under *AS 18.80.200*-18.80.280 or because the person has filed a complaint, testified, or assisted in a proceeding under this chapter . . . ."

----------End Footnotes----------

In response to VECO's summary judgment motion, the superior court ruled that Rosebrock's wrongful termination claim could proceed to trial. It stated that if she prevailed, Rosebrock would be entitled to "damages for emotional distress and punitive damages, since wrongful termination in violation of public policy constitutes a tort." Thus, the superior court permitted the wrongful termination claim to proceed as a public policy tort. At trial, however, the claim was presented to the jury as a retaliation claim in conformance with the elements [**35] that would be necessary for a wrongful termination claim under *AS 18.80.220*. Then, after the trial concluded, the superior court permitted a retroactive amendment of Rosebrock's complaint to include a wrongful termination claim under *AS 18.80.220*. VECO argues that it was unfairly prejudiced by the retroactive amendment of Rosebrock's complaint.

We believe that Rosebrock's pleadings sufficiently placed VECO on notice that it was being sued for wrongful termination, and that punitive damages would be sought. n26 While the superior court did state, in ruling on a summary judgment motion, that the wrongful termination claim would proceed as a public policy tort, the trial, in fact, conformed to a retaliation claim under *AS 18.80.220*. Additionally, VECO has not established that it was prejudiced by the retroactive amended pleading -- that is, it did not suggest how it might have tried the case differently if it had known throughout the lawsuit that Rosebrock would prosecute her wrongful termination claim under *AS 18.80.220*. n27 Therefore, we hold that the superior court did not abuse its discretion by allowing the post-trial amendment of Rosebrock's complaint. n28

----------Footnotes----------

n26 See *Knight v. American Guard & Alert, Inc., 714 P.2d 788, 791 (Alaska 1986)* (stating that pleadings should be construed liberally). [**36]

n27 VECO does claim that it would have pursued a different tactic. However, we are unable to distinguish between the trial tactic that VECO actually used and the tactic that it claims it would have used.

n28 VECO also argues that it was prejudiced if this court rules that *AS 18.80.220* does not support punitive damages, since Alaska does not recognize a public policy tort that would serve as an alternative grounds for imposing punitive damages. Since we hold that this statute does authorize awards of punitive damages, see infra III.C.1., VECO was not prejudiced. We do not reach the issue of whether a public policy tort should be recognized in the circumstances of this case or whether such a claim would support an award of punitive damages.

----------End Footnotes----------

2. Did the superior court properly instruct the jury as to whether VECO could be held liable for the alleged wrongful termination of Rosebrock?

Quoting only a portion of Jury Instruction Number 21, VECO claims that it is erroneous because it allowed the jury to rule in favor of Rosebrock on her wrongful termination claim by finding only that Rosebrock [**37] demonstrated

that VECO's stated reason for her termination was pretextual. VECO argues that the jury was not required to find that its reason for terminating Rosebrock was retaliatory.

[HN23] In determining whether an employer has violated *AS 18.80.220* when there is no direct evidence of discriminatory intent, we have adopted the three-part framework used in Title VII cases. See *Haroldsen v. Omni Enterprises, Inc., 901 P.2d 426, 430 (Alaska 1995)* (citing *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973))*. This test also governs actions for retaliatory discharge. See *Miller* [*919] *v. Fairchild Industries, Inc., 797 F.2d 727, 730-31 (9th Cir. 1986)*.

The Miller court stated:

[HN24]

To establish a prima facie case of discriminatory retaliation, a plaintiff must show that: (1) she engaged in an activity protected under Title VII; (2) her employer subjected her to adverse employment action; (3) there was a causal link between the protected activity and the employer's action. Causation sufficient to establish a prima facie case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge. . . .

Once [**38] a plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-retaliatory explanation for the action. . . . To satisfy this burden, the employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."

If the employer successfully rebuts the inference of retaliation that arises from establishment of a prima facie case, then the burden shifts once again to the plaintiff to show that the defendant's proffered explanation is merely a pretext for discrimination.

Id. at 731 (citations and footnote omitted) (quoting *Texas, Dep't of Community Affairs v. Burdine, 450 U.S. 248, 257, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981))*.

Instruction Number 21, read in its entirety, properly instructed the jury on Rosebrock's wrongful termination claim. n29 The [*920] jury was instructed that Rosebrock first had to prove facts that gave rise to an inference of wrongful termination -- that "she complained to VECO supervisory or management employees about sexual harassment and/or sexual assault," and that "after she complained of sexual harassment and/or [**39] assault, she was terminated." Next, the instruction informed the jury that VECO had alleged a legitimate, non-discriminatory reason for terminating Rosebrock. Finally, the instruction placed the burden of persuasion on Rosebrock to prove that "it is more likely than not that VECO's real reason for terminating her was the fact that she complained of sexual harassment and/or sexual assault."

----------Footnotes----------

n29 The superior court's instructions in their entirety as they pertain to Rosebrock's wrongful termination claim provide:

Rosebrock's second claim is for wrongful termination. Rosebrock claims that she was terminated in retaliation for complaining of sexual harassment and/or sexual assault. In order to find that Rosebrock was wrongfully terminated, you must find that it is more likely than not that:

1) Rosebrock complained about sexual harassment and/or sexual assault;

2) VECO terminated Rosebrock; and

3) There was a causal connection between Rosebrock's complaints and the termination.

There are two ways that Rosebrock can show that there was a causal connection between her complaints and her lay-off. She may show, first, that VECO's only reason for terminating her was retaliatory. In such case, she must demonstrate that any reason stated by VECO for its actions was merely pretextual, and not true. This is called a "pretext" claim. Second, she may show that even if VECO had a legitimate motive for terminating her, retaliation was also a causal factor in the lay-off. This is called a "mixed motive" claim.

To prevail on either of these claims, Rosebrock must first prove two things. First, she must prove that she complained to VECO supervisory or management employees about sexual harassment and/or sexual assault.

Second, Rosebrock must prove that after she complained of sexual harassment and/or assault, she was terminated.

To prevail on her pretext claim, Rosebrock must next establish that it is more likely than not that VECO's real reason for terminating her was the fact that she complained of sexual harassment and/or sexual assault. VECO claims that it laid Rosebrock off as part of company-wide cost-cutting reductions in force. In managing its affairs, a business is entitled to exercise managerial discretion. This means that even though you think a particular decision is wrong and you would have acted differently had it been up to you, as long as complaints of sexual harassment or sexual assault were not a causal factor in the decision, it is lawful.

You must decide whether VECO's stated reason for Rosebrock's lay-off was "pretextual," or not the true reason for Rosebrock's termination. If you decide that it is more likely than not that VECO's stated reason was pretextual, you must find that Rosebrock has established her claim for wrongful termination.

To prevail on her mixed motive claim, Rosebrock need not establish that her complaints constituted the sole motivation or even the primary motivation for VECO's action. Plaintiff must prove that it is more likely than not that her complaints were a causal factor in her termination, even though VECO may also have been motivated by other factors.

If you find that Rosebrock has proved that her sexual harassment and/or sexual assault complaint was/were motivating factor(s) in her termination, then you must find for Rosebrock on her mixed motive wrongful termination claim, unless you also find that VECO has proved that it is more likely than not that it would have made the same decision, if Rosebrock had not complained of sexual harassment and/or sexual assault. If you find that VECO would have made the same employment decision if Rosebrock had not made her complaint, then you must find for VECO on the mixed motive wrongful termination claim.

The fact that Rosebrock was an "at will" employee who could be terminated without cause does not mean that VECO could terminate Rosebrock because she complained of sexual harassment or sexual assault.

----------End Footnotes---------- [**40]

Contrary to VECO's claim, the instruction did not allow the jury to impose liability based solely on its disbelief of VECO's stated reason for terminating Rosebrock. We therefore hold that when the text of Instruction Number 21 is considered in its entirety, the instruction is not erroneous.

3. Did the superior court properly instruct the jury on mixed motives?

VECO claims that Jury Instruction Number 21, as it relates to mixed-motive sexual harassment, is incorrect. Specifically, VECO claims that mixed-motive causation does not apply to cases of retaliation, and also claims that Rosebrock had to choose either a pretext claim or a mixed-motive claim, but could not pursue both simultaneously.

VECO cites no authority for the proposition that consideration of mixed motives is impermissible in wrongful termination retaliation cases. Authority does support the opposite proposition, however. See, e.g., *Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 185 (2d Cir. 1992)* ("We reject the district court's view that a claim of retaliation necessarily presents only a pretext case and cannot be a mixed-motives case."); see also *Heroldsen, 901 P.2d at 432 n.12* (noting that [**41] our anti-discrimination laws condemn employment decisions based on a mixture of legitimate and illegitimate considerations).

[HN25] The question of whether a mixed-motive theory applies to wrongful termination depends on the interpretation of the term "because" in *AS 18.20.220.* n30 In interpreting Title VII, the United States Supreme Court, in *Price Waterhouse v. Hopkins, 490 U.S. 228, 240, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989),* held that the words "because of . . . sex" mean that "gender must be irrelevant to employment decisions." It emphasized that the words "because of" do not mean "solely because of," and held that Title VII prohibited decisions "based on a mixture of legitimate and illegitimate considerations." *Id. at 241.* The Court then held that if the plaintiff shows that gender was a "motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." *Hopkins, 490 U.S. at 244-45* (footnote omitted).

----------Footnotes----------

n30 *AS 18.80.220(a)(4)* provides that it is unlawful for an employer to "discharge, expel, or otherwise discriminate against a person because the person has opposed any practices forbidden under *AS 18.80.200*-18.80.280 or because the person has filed a complaint, testified, or assisted in a proceeding under this chapter . . . ." (Emphasis added.)

----------End Footnotes---------- [**42]

The analysis that the Supreme Court applied to Title VII sexual discrimination is equally applicable to a wrongful termination claim pursuant to *AS 18.20.220(a)(4)*. In both situations, the employer is prohibited from making an employment decision where an illegitimate consideration is a motivating factor in the decision. Requiring plaintiffs in wrongful termination cases to prove that their termination was caused solely by their protected actions would unnecessarily restrict the term "because," and would hinder achieving the purpose of *AS 18.80.220*, eradicating discrimination. We therefore hold that a wrongful termination claim pursuant to *AS 18.20.220(a)(4)* can be based on mixed-motive causation.

We also reject VECO's argument that the plaintiff must choose between pursuing a mixed-motive theory and a pretext theory. The Supreme Court in Price Waterhouse held that a plaintiff can assert a mixed-motive [*921] claim when the employer considered both legitimate and illegitimate reasons in making its employment decision. See *490 U.S. at 241*. However, "if the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the [**43] employment decision, then she may prevail only if she proves . . . that the employer's stated reason for its decision is pretextual." *Id. at 247 n.12*.

Thus, Price Waterhouse does explicitly contemplate that a plaintiff can pursue a mixed-motive claim and a pretext claim simultaneously. There is no reason to make the plaintiff elect which theory to present to the jury. If the jury finds that there is direct evidence that the employer considered a forbidden characteristic in terminating the plaintiff, it will apply the mixed-motive framework. However, if the jury does not find direct evidence, the plaintiff can still prevail by using the pretextual framework. We thus hold that a plaintiff can present both mixed-motive and pretext claims to the jury, and reject VECO's argument that Rosebrock had a forbidden "second bite at the apple."

4. Did the superior court err in denying VECO's motions for JNOV and for a new trial on Rosebrock's wrongful termination claim?

VECO claims that Rosebrock failed to offer evidence which would prove the elements of her wrongful termination claim. Specifically, VECO argues that Rosebrock failed to establish a prima facie case of retaliation [**44] because she failed to show: (1) that she engaged in a protected activity; (2) that an adverse employment decision was made; and (3) that there was a causal connection between the two.

First, Rosebrock testified that she complained to a supervisor, Bobby Clark, that she was sexually assaulted by another VECO employee. n31 VECO offers no support for the proposition that VECO would have been justified for terminating her for complaining about such an assault. Nor does VECO claim or offer any support for the proposition that such a report was not a protected activity. Therefore, Rosebrock offered sufficient evidence to demonstrate that she engaged in a protected activity.

----------Footnotes----------

n31 Bobby Clark served as the alternate equipment manager when Rick Rorick was away from the North Slope.

----------End Footnotes----------

Second, VECO claims that it did not take adverse employment action against Rosebrock. However, Rosebrock was laid off. Therefore, there is no real dispute that VECO made an adverse employment decision against Rosebrock.

Finally, VECO claims [**45] that there was no causal connection between Rosebrock's complaint and her termination, and that Rosebrock was laid off as part of a general reduction in force because she was a junior office worker. However, Rosebrock testified that, following her termination, she spoke to a VECO employee who told her that VECO had "taken care of the problem" because "you're gone." Also, Rosebrock was laid off about six days after she

complained, which in context of Rosebrock's "you're gone" testimony, is inferential evidence of a causal connection. See *Miller, 797 F.2d at 731* (stating that causation can be proved by inference from a close proximity in time between the protected activity and the allegedly retaliatory discharge); see also Mack A. Player, Employment Discrimination Law § 5.48, at 404 n.284 (1988).

Reviewing this evidence in the light most favorable to Rosebrock, we find that the jury could reasonably have found that Rosebrock's complaint about the sexual assault was a cause of her termination. We thus affirm the superior court's denial of VECO's motions for JNOV and a new trial as to Rosebrock's wrongful termination claim.

C. Punitive Damages

1. Are punitive damages [**46] authorized under *AS 18.80.220* and *AS 22.10.020(i)*? n32

----------Footnotes----------

n32 Statutory interpretation is a question of law which this court reviews using its independent judgment. See *Huf v. Arctic Alaska Drilling Co., 890 P.2d 579, 580 n.2 (Alaska 1995).*

----------End Footnotes----------

VECO claims that Rosebrock cannot recover punitive damages under Alaska's [*922] anti-discrimination statute, *AS 18.80.220.* However, in *Loomis Electronic Protection, Inc. v. Schaefer, 549 P.2d 1341, 1343 (Alaska 1976),* this court stated that plaintiffs may recover punitive damages under AS 18.80. We stated that

[HN26]

the broad language of *AS 22.10.020(c)* indicates a legislative intent to authorize an award of compensatory and punitive damages for violations of AS 18.80, in addition to the equitable remedies such as enjoining illegal employment activities and ordering back pay as a form of restitution. n33

Id.; see also *Johnson v. Alaska State Dept. of Fish & Game, 836 P.2d 896, 906 (Alaska 1991)* (citing Loomis for the proposition that *AS 22.10.020(c)* [**47] authorizes punitive damages for violations of AS 18.80, but holding that the statute did not specifically allow punitive damages against the state).

----------Footnotes----------

n33 *AS 22.10.020(c)* was subsequently codified as *AS 22.10.020(i).* It provides in relevant part:

The [superior] court may enjoin any act, practice, or policy which is illegal under AS 18.80. and may order any other relief, including the payment of money, that is appropriate.

----------End Footnotes----------

Nevertheless, VECO claims that this court's statements in Loomis and Johnson were merely dicta, and that we should reconsider the question of punitive damages. Specifically, VECO claims that the issue in Loomis concerned whether a prospective employee was entitled to a jury trial, and that the language regarding punitive damages is therefore superfluous. It also argues that in Johnson, we simply assumed that punitive damages were recoverable, but never decided the propriety of such damages.

While VECO accurately summarizes the question presented in Loomis, we [**48] think that VECO is incorrect in claiming that the punitive damage reference is mere dicta. Dicta is defined as "opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent." Black's Law Dictionary 454 (6th ed. 1990). In Loomis, this court's discussion of the relief afforded by Alaska's civil rights statute was necessary for our holding that the prospective employee was entitled to a jury trial. See *549 P.2d at 1343.* The language was not superfluous to the "specific case before the court," and did not "go beyond the facts." Similarly, in Johnson, we necessarily accepted the holding in Loomis that punitive damages were recoverable pursuant to AS 18.80 before reaching the issue of whether punitive damages could be assessed against the state. See *836 P.2d at 906.*

[HN27] The plain language of *AS 22.10.020(i)* authorizes the superior court to award "any other relief, including the payment of money." Further, in a consistent line of decisions, [**49] this court has held that punitive damages are recoverable in discrimination cases. See *Loomis, 549 P.2d at 1343; Johnson, 836 P.2d at 906;* cf. *McDaniel v. Cory, 631 P.2d 82, 87 (Alaska 1981)* (affirming holding in Loomis that punitive damages are available in civil action, but distinguishing administrative action where punitive damages are not available). Moreover, under the common law, Alaska's superior courts possess the authority to award punitive damages for outrageous conduct. See *Bridges v. Alaska Hous. Auth., 375 P.2d 696, 702 (Alaska 1962).* Allowing punitive damages under *AS 18.80.220* does not reach beyond settled expectations. We therefore follow our prior holdings that punitive damages are authorized under *AS 18.80.220* and *AS 22.10.020(i).*

2. Did the jury instructions err in permitting the jury to award punitive damages against VECO for acts of a supervisor beyond the scope of the supervisor's employment?

VECO claims that the superior court's instruction on punitive damages was erroneous because it allowed the jury to award punitive damages based on vicarious liability. Citing Restatement (Second) of Agency § 217C (1958), it argues that this court [**50] should apply agency principles to limit the award of punitive damages to instances where the employer has committed a wrong.

[*923] The jury instructions allowed the jury to award punitive damages against VECO based on four different theories of employer liability: (1) wrongfully terminating Rosebrock; (2) sexual harassment by an employee acting within the scope of his employment if VECO knew about the harassment and failed to take corrective action; (3) sexual harassment by a co-worker or supervisor who did not have authority over Rosebrock, if Rosebrock's supervisor knew about the harassment and failed to take corrective action; and (4) vicarious liability for sexual harassment by Rosebrock's supervisor, unlimited by the scope of the supervisor's employment.

The jury found that VECO was liable for both wrongful termination and sexual harassment and awarded punitive damages. No special verdict answer specified whether punitive damages were awarded for the wrongful termination or the sexual harassment claims, or for both. Thus, it is possible that the jury's award of punitive damages could have been based solely on VECO's vicarious liability for actions of Rorick outside the scope of his [**51] employment.

We must now determine whether an employer can be liable for punitive damages based solely on vicarious liability for its employees' actions outside the scope of their employment. n34

----------Footnotes----------

n34 We have indicated that an employer is vicariously liable for punitive damages for acts of employees within the scope of their employment. See *Alaskan Village, Inc. v. Smalley, 720 P.2d 945, 948-49 (Alaska 1986)* (holding owner of mobile home park liable for punitive damages for acts of managers within the scope of their employment) (citing *Stroud v. Denny's Restaurant, 271 Ore. 430, 532 P.2d 790, 793 (Or. 1975)*); cf. *Murray v. Feight, 741 P.2d 1148, 1158-59 (Alaska 1987)* (holding defendant liable for punitive damages for act of partner in the ordinary course of partnership business). Our holding today concerns vicarious liability for acts of employees outside of the scope of their employment.

----------End Footnotes----------

Restatement (Second) of Agency § 217C provides:

Punitive damages can properly be awarded against a master or other principal [**52] because of an act by an agent if, but only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

The comments to section 909 of the Restatement (Second) of Torts, which is identical to section 217C of the Restatement (Second) of Agency, provide:

The rule stated in this Section results from the reasons for awarding punitive damages, which make it improper ordinarily to award punitive damages against one who him self is personally innocent and therefore liable only vicariously. It is, however, within the general spirit of the rule to make liable an employer who has recklessly employed or retained a servant or employee . . . . Nor is it unjust that a person on whose account another has acted should be responsible for an outrageous act for which he otherwise would not be if, with full knowledge of the act and the way in which it was done, he ratifies it, or, in cases in which he would be liable for the [**53] act but not subject to punitive damages, he expresses approval of it. In these cases, punitive damages are granted primarily because of the principal's own wrongful conduct.

Although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions.

Restatement (Second) of Torts § 909 cmt. b (1979) (emphasis added) (illustrations omitted).

We generally agree with VECO that the Restatement properly balances the interests in imposing vicarious liability while precluding punitive damages when the employer has not acted wrongfully. Other courts which have used agency principles to impose vicarious [*924] liability on an employer for its supervisor's hostile environment sexual harassment have also limited the employer's punitive damage liability based on the agency principles enunciated in § 217C of the Restatement (Second) of Agency. See, e.g., *Kelly-Zurian v. Wohl Shoe Co., 22 Cal. App. 4th 397, 27 Cal. Rptr. 2d 457, 468-69 (Cal. App. 1994)* [**54] (holding that employer is not liable for punitive damages based on supervisor's sexual harassment unless the employer acted wrongfully, as defined by Restatement (Second) of Torts § 909); Lehmann v. Toys ' *R' Us, Inc., 132 N.J. 587, 626 A.2d 445, 464 (N.J. 1993)* (applying agency principles to hold employer vicariously liable for supervisor's hostile environment sexual harassment, but limiting liability for punitive damages to situations of actual participation by upper management or willful indifference).

We have indicated that liability for punitive damages might be imposed in one situation where the Restatement would not impose them -- where an employee who is not necessarily employed in a managerial capacity acts within the scope of his employment. See *Alaskan Village, Inc. v. Smalley, 720 P.2d 945, 948-49 (Alaska 1986);* cf. *Murray v. Feight, 741 P.2d 1148, 1158-59 (Alaska 1987).* We decline, however, to extend this exception and allow vicarious liability for punitive damages when the employee is acting outside the scope of his employment. n35

----------Footnotes----------

n35 In Smalley we adopted the majority rule for an employer's vicarious liability for punitive damages, relying on *Stroud v. Denny's Restaurant, Inc., 271 Ore. 430, 532 P.2d 790, 793 (Oregon 1975).* The rule as expressed in Stroud requires that the employee be acting within the scope of his employment:
[HN28]
When an employee commits a wrongful act which would subject him personally to punitive damages, the essential inquiry must be whether the act was committed while the employee was acting within the scope of his employment . . . . If the employee was acting within the scope of his employment, the corporation will be liable for punitive damages regardless of whether that employee may be classified as "menial."

----------End Footnotes----------[**55] [HN29]

If an employee is acting outside the scope of his employment, he is not acting in any way to further the goals of the employer. See Restatement (Second) of Agency § 228(1)(c) (providing that employee is not acting within the scope of his employment unless his actions are "actuated, at least in part, by a purpose to serve the master"). n36 The interest of preventing sexual harassment is served by holding an employer vicariously liable for its supervisors' sexual harassment, regardless of whether they are acting within the scope of their employment, because the employer may be deterred from delegating authority to untrained or incompetent supervisors. However, this does not mean that an innocent employer should be punished by an award of punitive damages when its supervisors are acting outside the scope of their employment. Punitive damages are disfavored and are allowed only within narrow limits. See *Chizmar v. Mackie, 896*

P.2d 196, 210 (Alaska 1995). The instructions given in this case went beyond those limits in permitting punitive damages to be awarded based on vicarious liability for acts of employees outside the scope of their employment.

----------Footnotes----------

n36 In *Doe v. Samaritan Counseling Center, 791 P.2d 344, 348 (Alaska 1990),* we stated the "motivation to serve" test would be satisfied "where tortious conduct arises out of and is reasonably incidental to the employee's legitimate work activities". To the extent that this language suggests that the employee's act need not be motivated in fact at least to some degree to serve the master's business we disapprove of it. Doe was a patient whose counselor had consensual sex with her. The question was whether the employer of the counselor could be vicariously liable for the abuse of the patient-counselor relationship. We held that there was a question of fact as to whether the counselor had acted within the scope of his employment. We did not mention the possibility of vicarious liability under an aided in agency theory like that contained in section 219(2)(d) of the Restatement (Second) of Agency which would be applicable regardless of scope of employment considerations. On reflection, vicarious liability under such a theory would seem to be justified. And imposing vicarious liability under a scope of employment theory absent at least a partial purpose on the part of the employee to serve the employer seems unjustified.

----------End Footnotes---------- [**56] [HN30]

When a jury award may be based on any one of several theories, one of which has been erroneously submitted to the jury, a new trial is required. See *Matomco Oil Co. v. Arctic Mechanical, Inc., 796 P.2d 1336, 1343-44 (Alaska 1990).* This rule applies here, for there is no means for determining [*925] whether the punitive damage award was based on the direct liability theories which would support the award or on the vicarious liability theory which would not support the award.

3. Did VECO properly object to the punitive damage instruction?

[HN31] Civil Rule 51(a) provides that "no party may assign as error the giving or the failure to give an instruction unless the party objects thereto . . . stating distinctly the matter to which the party objects and the grounds of the objection." We now address whether VECO satisfied this rule with respect to punitive damages for vicarious liability.

The superior court gave a substantially similar instruction on punitive damages as that submitted by VECO. n37 This instruction did not inform the jury that it could not impose punitive damages based on vicarious liability for acts of supervisors beyond the scope of their employment. However, VECO objected [**57] to the instruction which stated that it could be held vicariously liable for the acts of its supervisors. VECO's counsel referred to its "running objection", referring to its prior arguments on this point.

----------Footnotes----------

n37 Instruction No. 31 states:

Rosebrock has requested that you award a separate amount of money in order to punish VECO and to deter VECO and others from repeating similar acts. You may award such an amount of money only if you have decided that VECO is liable on one or more of Rosebrock's claims, and if you decide that VECO's conduct which forms the basis of your verdict was outrageous. VECO's conduct was outrageous if it was the result of maliciousness, bad motive, or was undertaken with a reckless indifference to Rosebrock's interests and rights.

Rosebrock must prove the outrageousness of VECO's conduct by clear and convincing evidence. An alleged fact is established by clear and convincing evidence if the evidence induces belief in your minds that the alleged fact is highly probable. It is not necessary that the alleged fact be certainly true or true beyond a reasonable doubt or conclusively true. However, it is not enough to show that the alleged fact is more likely than not true.

----------End Footnotes---------- [**58]

VECO clearly asserted its position that it could not be vicariously liable for sexual harassment. But it did not state that this objection applied to punitive damages. In our view, such a statement was not necessary in order to preserve its

appellate rights. VECO's objection to vicarious liability was inclusive of all forms of damages. Liability for punitive damages was subsumed within its objection.

IV. CONCLUSION

The judgment of the superior court is AFFIRMED as to compensatory damages, REVERSED as to punitive damages, and REMANDED for a new trial where the issues will be whether punitive damages should be assessed against VECO and, if so, the amount of such damages. n38

----------Footnotes----------

n38 VECO has raised numerous evidentiary objections. We have reviewed each of them and find that the rulings complained of were either correct or, if erroneous, harmless in that they did not affect VECO's substantial rights. VECO also claims that Rose-brock's attorney violated professional standards in his closing argument. However, as no objection was made to this conduct, we regard it as waived. We have reviewed the conduct under a plain error standard and find that plain error does not exist. Finally, VECO claims that it was entitled to exercise a peremptory challenge to the trial judge under Civil Rule 42(c) after a co-defendant had already made a Rule 42(c) challenge. VECO argues that its interests were hostile to those of the co-defendant, but it did not make this argument below. We therefore consider the point to be waived.

Rosebrock's cross-appeal was based on a discovery sanction issue which was relevant only to proving liability for wrongful termination. Since we affirm the judgment of liability, we do not reach the cross-appeal.

----------End Footnotes---------- [**59]

HB

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IN TO OFFICE:_____

or and Commerce Committee considered HOUSE BILL NO. 232

HB 232 HOMER MERCURY CLASSIC

Act relating to mercury classics; and providing for an effective date."

recommends:

Senate Bill:
[ ] same title
[ ] new title
House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR #_____

be **replaced** with _____ **CS** _____ (_____)

adopt **previous** _____ **CS** _____ (_____)

attached amendment(s)

adopt Letter of Intent by _____ Committee

] further referral to _____ Committee

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
Ralph Seekins			✓	
	✓			
CHAIR: O Biende	—			

ALASKA STATE LEGISLATURE

Chair
FISHERIES

Vice-Chair
EDUCATION

Member
HEALTH, EDUCATION AND SOCIAL SERVICES

Member
STATE AFFAIRS

Session:
State Capitol Building
Juneau, Alaska 99801
Phone 907-465-2689
Fax 907-465-3472
1-800-665-2689
Rep.Paul.Seaton@legis.state.ak.us

Interim:
345 W. Sterling Highway
Suite 102B
Homer, Alaska 99603
Phone 907-235-2921
Fax 907-235-4008

REPRESENTATIVE PAUL SEATON
House District 35

Sponsor Statement

HB 232

"An Act relating to mercury classics; and providing for an effective date."

House Bill 232 will allow the Homer Chapter of the Kenai Peninsula Boys and Girls Club to operate and implement the "Homer Mercury Classic." As you may know, classics are not permitted under a gaming permit without legislation allowing a specific group or area to conduct one. There are many classics in Alaskan Statute, ranging from ice classics to a canned salmon classic. Currently, the Greater Fairbanks Chamber of Commerce is the only organization allowed under Alaskan law to conduct a "mercury classic."

The "Homer Mercury Classic" will be held bi-annually, with winnings awarded in the spring to the person who most accurately guesses when the temperature reaches 55 degrees Fahrenheit. The other cash prize will be given to the person who most closely guesses the time and date that the mercury drops to 15 degrees Fahrenheit each fall. Each entry into the classic will cost $2. The proceeds from the classic will be divided evenly between the Boys and Girls Club of Homer and the classic winner.

Members of the Boys and Girls Club, who already have the necessary equipment and expertise to manage the operation, will monitor the temperature hourly through a weather station at the Homer Clubhouse. The program that inspired this classic is called GLOBE, which stands for Global Learning and Observation to Benefit the Environment. GLOBE is an international program in association with the National Aeronautics and Space Administration, National Science Foundation, U.S. Environmental Protection Agency and the U.S. State Department. The data collected from schools and other groups around the world are deposited into a database that is accessed by the aforementioned organizations to assist atmospheric scientists in their work. This program allows children to participate in scientific processes, while earning money for their program in a fun, non-competitive and educational way.

Three hundred, primarily seven to twelve year-olds, are involved in the Homer Chapter of the Boys and Girls Club. The "Clubhouse" provides an excellent place for kids to "hang-out" in a safe and learning friendly environment. In light of dwindling State revenues, this will be a valuable fundraiser when other sources of monetary support cannot be guaranteed. The "Homer Mercury Classic" will help to ensure funds that will allow the Club to stay open and fully staffed for years to come.

ALASKA STATE LEGISLATURE

Chair
FISHERIES

Vice-Chair
EDUCATION

Member
HEALTH, EDUCATION AND SOCIAL SERVICES

Member
STATE AFFAIRS

REPRESENTATIVE PAUL SEATON
House District 35

Session:
State Capitol Building
Juneau, Alaska 99801
Phone 907-465-2689
Fax 907-465-3472
1-800-665-2689
Rep.Paul.Seaton@legis.state.ak.us

Interim:
345 W. Sterling Highway
Suite 102B
Homer, Alaska 99603
Phone 907-235-2921
Fax 907-235-4008

Sectional Analysis

HB 232

"An Act relating to mercury classics; and providing for an effective date."

***Section 1.**

(a) Amends Alaska Statute (AS) 05.15.690(27). by expanding the statute to allow the Boys and Girls Club of the Kenai Peninsula to conduct a mercury classic under their existing gaming permit.
(b) This mercury classic will be called the "Homer Mercury Classic."

***Section 2.**

Provides the effective date of January 1, 2004 for the act to take effect under AS 01.10.070(c).

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 232
(H) Publish Date: 4/28/2003

Revision Date/Time (Note if correction):
Dept. Affected: Revenue
Title: Homer Mercury Classic
BRU: Revenue Operations
Component:
Sponsor: Representative Seaton
Requester: House Labor & Commerce
Component No.:

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This legislation has no fiscal impact on state spending.

Prepared by: Representative Tom Anderson
Phone:
Division: Chair, House Labor & Commerce Committee
Date/Time: 4/28/03 11:42 AM
Approved by: Representative Tom Anderson
Date: 4/28/2003
Agency: House Labor & Commerce Committee

Office of the Mayor

Jack Cushing

(907) 235-8121
Fax 235-3140

Homer City Hall 491 E. Pioneer Avenue • Homer, Alaska 99603-7624

April 7, 2003

Honorable Representative Paul Seaton
State Capital Room 428
Juneau, AK 99802

Honorable Representative Seaton:

Thank you for sponsoring House Bill 232 for the Homer Mercury Classic.

On behalf of the City of Homer, Homer City Council and Homer's citizenry. I submit this letter in support of House Bill 232 authorizing the Homer Mercury Classic. which will be operated and administered by the Boys and Girls Club of the Kenai Peninsula.

The City of Homer and greater Homer Community is very supportive of the Homer Boys and Girls Club as well as the Kenai Peninsula Boys and Girls Club.

The Homer City Council has continually voiced their support of the Boys and Girls Club and authorized a lease for use of one of the City Facilities.

Sincerely,

CITY OF HOMER

Jack Cushing

Jack Cushing, Mayor of the City of Homer

BOYS & GIRLS CLUBS
of the Kenai Peninsula, Kenai Unit
705 Frontage Road, Suite B
Kenai, Alaska 99611
e-mail: info@positiveplaceforkids.com
Website: positiveplaceforkids.com
(907) 283-2682
(907) 283-8190 fax

April 9, 2003

Representative Paul Seaton
Alaska State Legislature
State Capitol, Room 428
Juneau, Alaska 99802

Dear Representative Seaton:

The Board of Directors of the Boys & Girls Club of the Kenai Peninsula strongly supports the staff of our Homer Unit in their efforts to hold Mercury Classic fundraisers at their Club site. Our Homer Unit has a weather station and all the equipment necessary to measure the exact time and date the temperature reaches a certain temperature. Homer Club members of all ages will be actively involved in accurately recording the time and temperature changes. This educational component of the Classic was the main reason this fundraiser was chosen by the Homer Club staff over other fundraising activities.

At the December 4, 2002 Boys & Girls Club of the Kenai Peninsula Board of Directors' Meeting, our Board of Directors voted unanimously to support the motion "to allow the Homer Unit staff to proceed with the steps necessary to hold a Mercury Classic." Therefore, we respectfully request that you support House Bill No. 232 and allow the Boys & Girls Club of the Kenai Peninsula's Homer Unit to conduct a Mercury Classic.

Thank you for your assistance.

Sincerely,

Mike Navarre
Immediate Past President
Boys & Girls Club Board of Directors

Peter Micciche
Board President
Boys & Girls Club Board of Directors

MN/PM:kwl

BOYS & GIRLS CLUBS
of the Kenai Peninsula - Homer
PO Box 2570
Homer, AK 99603 907-235-2772 fax 907-235-2956

For 140 years, the Boys & Girls Clubs of America have existed "To inspire and enable all young people, especially those from disadvantaged circumstances, to realize their full potential as productive, responsible and caring citizens."

The Boys & Girls Clubs of the Kenai Peninsula opened the doors of its Homer Unit just over 3 years ago. Since that time we have grown to accommodate over 300 members, and support a staff of nine part time employees. This is an expensive stretch for a non-profit budget that has six clubs to support within the Kenai Peninsula.

To assist in the financing of the overall budget, and specifically our local Club, the Homer Unit is seeking to create a fundraising program that would generate a continual influx of income. After two years of speculation and research, it was decided that holding a bi-annual "Mercury Classic" was a good choice for the Boys & Girls Club of Homer because the Club members themselves could become an integral part of the process, including monitoring the weather station, collecting and downloading data onto the computer, and graphing ongoing temperature fluctuations. The Homer Clubhouse Director has completed the required training for "GLOBE," which is an organization that collects, records, and posts weather data on an international level. In addition, the Homer Clubhouse already has the equipment necessary to support the scientifically accurate collection of data required.

Logistically, temperatures will be automatically recorded every hour of every day, and downloaded into the database. For the Autumn Mercury Classic, participants will pay $2 to guess when the temperature will first reach +15 degrees. For the Spring Mercury Classic, the $2 will buy the chance to guess when the temperature will first reach +55 degrees.

The prize money, after expenses, will be split 50-50 between the winning participant(s) and the Club. All aspects of the contest will be run in a responsible and professional manner, and all financial records and scientific data will be available for public access and review.

We propose that the existing permit belonging to the Boys & Girls Clubs of the Kenai Peninsula be amended to include a Mercury Classic. It is understood that this permit would allow ANY of the Boys & Girls Clubs of the Kenai Peninsula to hold a Mercury Classic. The Homer Unit may merely be the first.

Supporting the Boys & Girls Clubs is an investment in the future of our children, our families and our community. Please help us attain this important funding source.

Thank you for your time and consideration,

DeWaine Tollefsrud

DeWaine Tollefsrud – Clubhouse Director
Boys and Girls Club of the Kenai Peninsula – Homer Unit

BOYS & GIRLS CLUBS
of the Kenai Peninsula, Homer Unit
PO Box 2570 Homer, AK 99603
e-mail: bgclub@xyz.net
Phone: 907-235-2772
Fax: 907-235-2956

SUPPLEMENTAL DETAILS FOR THE HOMER MERCURY CLASSIC 5/8/03

The Homer Mercury Classic will be a run as an ongoing bi-annual fund-raising event benefiting the Boys and Girls Clubs of the Kenai Peninsula. Participants will buy tickets at $2 each to enter their guess of the day and hour they believe the temperature will reach a certain degree. The Homer Spring Mercury Classic winner will be the person who correctly guesses, or comes the closest to guessing the first time the temperature reaches + 55 degrees Fahrenheit. The Homer Autumn Mercury Classic winner will be the person who correctly guesses, or comes the closest to guessing the first time the temperature reaches +15 degrees Fahrenheit.

The temperature will be collected and determined by the "Official Computerized Data Logger" in the weather station that will be mounted on the grounds of the Boys and Girls Clubhouse in Homer. Data will be automatically recorded every hour on the hour. Hard copy records will be kept, and available for public viewing. Temperatures will be rounded to the nearest whole number.

If there are multiple winners, the prize money will be split evenly between them.

Should the temperature reach the designated degree between hours, and there is a contestant on either of the bracketed hours, that person shall win the prize money. If there are contestants on each of the bracketed hours, the prize money will be split among them. If there are multiple winners on each of the bracketed hours, the prize money will be split evenly among them. Example: If, for the Autumn Classic, the 2:00AM reading is +16 degrees F and the 3:00AM reading is +14 degrees F, and there is only one contestant who has chosen either 2 or 3 o'clock, they would receive the prize money. If there is one contestant at 2:00 and one at 3:00, the money would be split 50/50. If there is one at 2:00 and 4 at 3:00, each contestant would receive 20% of the prize money.

If the temperature does not reach the designated temperature during the designated period of time the contestant(s) who comes nearest to that temperature will be deemed the winner(s).

If the designated temperature is reached before the end of the ticket purchasing window, only the tickets processed and/or postmarked prior to the time will be eligible.

Tickets for each Classic will only be available at designated periods of time. The ticket buying window for the "Autumn Classic" will be between June 1 and September 30. The ticket buying window for the "Spring Classic" will be between December 1 and March 31. No entries will be accepted outside these periods.

HB

234

SILVER GULCH
Brewing & Bottling Co.
FAIRBANKS, ALASKA

Silver Gulch Brewing and Bottling, Inc.
PO Box 82125
Fairbanks, Alaska 99708

Tel (907) 452-2739 Fax (907) 452-2774

e-mail : glenn@silvergulch.com

May 12, 2003

To: Senate Labor & Commerce Committee

Subject: Simplified Brewpub Legislation, re: HB234

Dear Senators,

I have been in discussion with other brewery and brewpub owners in the past several days, in an effort to 'resolve' many of the past issues surrounding regulation of brewpubs. Following is my rendition of what a 'fair and equitable' modification to the brewpub statute should look like;

Sec. 04.11.135. Brewpub license.

(a) A brewpub license authorizes the holder of a beverage dispensary license to

(1) manufacture not more than 150,000 gallons of beer in a calendar year on premises licensed under the brewpub license;

(2) provide a small sample of the manufactured beer free of charge at the location the beer is manufactured unless prohibited by AS 04.16.030; and

(3) sell the beer authorized to be manufactured under this subsection

(A) for consumption on the premises licensed under the beverage dispensary license;

(B) to a wholesaler licensed under AS 04.11.160 ; sales under this subparagraph may not exceed 5,000 gallons in a calendar year; or

(C) to an individual who is present on the premises described under (A) of this paragraph, or where the beer is manufactured in quantities of not more than 5 gallons per day.

(b) Except as provided under AS 04.11.360 (10), the brewpub license is not transferable, shall remain the property of the state, and is not subject to any form of alienation.

(c) The biennial brewpub license fee is $500.

Not only does this fit on one page (!!), it addresses the concerns of Brewery licensees and *most* small brewpubs. It also removes all of the 'grandfather' clauses without

undermining the 'privileges' granted to existing brewpubs that were formerly licensed under the "Brewery/Restaurant combination license" section, which had been previously deleted.

Is this a 'perfect' solution? Probably not... But I (and many other interested parties) believe that this will address the industry's concerns regarding "level playing fields" and protection of the consumer through maintaining the integrity of the 'three-tier' system of regulation of the production, distribution and sale of beer.

I propose that the aforementioned modifications be made to existing legislation as soon as possible, and that we (interested and affected parties) work together over the course of the coming break in the 23rd legislature to hammer out any 'substantial differences'. During the next half of the session, those 'differences' (if any) can be resolved in [yet another] piece of brewpub legislation. I believe that you will find that [as usual] there are only two parties that will object to this approach.

With that in mind, I ask you to consider EXACTLY how those two parties will be adversely affected by these proposed modifications, and the motivations behind their objection to any reversals of the long string of 'special privileges' granted to their specific operations. These proposed modifications will not 'hurt' the viability of a small (or large) brewpub operation.

One proposal that I will offer in advance for that effort, is the creation of a 'limited brewpub license', that allows for many of the provisions of a "full brewpub license", but with the removal of the wholesale provision, a production cap of 75,000 gallons/yr and utilization of a "restaurant/eating place license" in lieu of a beverage dispensary license. Again, this is only offered as 'food for thought' in light of past concerns raised.

I firmly believe that by modifying current statutes as described, that you will open the door for a revival of the craft-brewing industry in Alaska, by creating a firm, stable foundation of well-reasoned legislation from which a small-business owner can develop a viable business model and thrive, to the betterment of the communities in which they operate.

I appreciate your consideration in this small, but significant matter. As always, please do not hesitate to contact me with any questions or concerns

Sincerely,

Glenn Brady
President, Silver Gulch Brewing and Bottling, Inc.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

May 12, 2003

Senator Con Bundy
Senate Labor & Commerce Committee Chair
Alaska State Legislature
Juneau, AK

Greetings Senator Bunde,

I am writing in opposition to the portion of HB 234 that favors Brewpub licensees. As owner of Homer Brewing Company, a production Brewery license holder, this bill is unfair and further widens the gap between Brewpub licenses and Brewery licenses even further. This will hurt present and future breweries, making it even more difficult to compete with a Brewpub in our state's limited market. This legislation is written for the benefit of but two current license holders and this is the 3rd, possibly 4th year of special legislation written to benefit these two licenses, without regard to the Breweries of this state. It is also safe to assume, you will hear again from these special interests next year in order to amend the state laws to their benefit.

Please consider removing the verbiage regarding Brewpubs from HB 234 when it comes before you in the Labor and Commerce meeting scheduled for Tuesday, May 13th.

Thank you for your attention to this matter.

Karen E. Berger

Karen Berger / Stephen McCasland
Homer Brewing Company
1411 Lake Shore Dr.
Homer, AK 99603

A special BREWPUB bill – AGAIN!!??? How many times do you want to see a brewpub bill? This is #4…

And it still won't be enough.

- Please cut the brewpub section from HB234. The ABC Board bill should not be another special brewpub bill.

- The brewpub portion of HB 234 loosens the law AGAIN for brewpubs, and this time allows a brewpub to sell growlers (beer to go) in multiple locations AWAY from the brewing premises.

- This is only because the brewpubs lobbying for this do NOT make their beer at their establishments. If they did, they would NOT NEED this bill…

- This legislation further widens the growing economic gulf between brewpubs and small breweries. (Small breweries cannot sell a single pint at their establishment, nor can they open pubs.)

- Please cut out the special brewpub section from HB234!

ALASKAN BREWING CO.

Marcy Larson

5429 Shaune Dr. • Juneau, Alaska 99801-9540
Ph: 907.780.5866 • Fx: 907.780.4514

SENATE COMMITTEE REPORT

DATE: 5/7/03

FURTHER: Finance

DATE TURNED
IN TO OFFICE:_____

Labor and Commerce Committee considered CS FOR HOUSE BILL NO. 234(RLS) am

HB 234 BREWPUBS; ABC BOARD

"An Act extending the termination date of the Alcoholic Beverage Control Board; relating to the sale of beer manufactured at a brewpub; and providing for an effective date."

and recommends:

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR #_____

[ ] be **replaced** with_____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
Bettye Davis			✓	
[illegible]	✓			
Kelly Fields				
[illegible]			✓	
CHAIR: [illegible]	✓			

Amendment

TO: CS for HB 234 (RLS) am

Offered by: Dept. of Public Safety

***Section .** AS 04.06.010 is amended to read:

Sec. 04.06.010. Establishment of board. **There is established in the Department of Public Safety the** [THE] Alcoholic Beverage Control Board [IS ESTABLISHED] as a regulatory and quasi-judicial agency. [THE BOARD IS IN THE DEPARTMENT OF REVENUE, BUT FOR ADMINISTRATIVE PURPOSES ONLY.]

23-LS0862\B
Ford
5/10/03

SENATE CS FOR CS FOR HOUSE BILL NO. 234( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MCGUIRE, Crawford, Croft, Gara, Lynn

A BILL

FOR AN ACT ENTITLED

"An Act relocating the Alcoholic Beverage Control Board from the Department of Revenue to the Department of Public Safety; extending the termination date of the Alcoholic Beverage Control Board; relating to the sale of beer manufactured at a brewpub; and providing for an effective date."

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

*** Section 1.** AS 04.06.010 is amended to read:

Sec. 04.06.010. Establishment of board. **There is established in the Department of Public Safety the** [THE] Alcoholic Beverage Control Board [IS ESTABLISHED] as a regulatory and quasi-judicial agency. The Board is in the Department of **Public Safety** [REVENUE], but for administrative purposes only.

*** Sec. 2.** AS 04.11.135(d) is amended to read:

(d) Notwithstanding (a) of this section, the holder of a brewpub license who under the provisions of AS 04.11.450(b) formerly held a brewery license and a restaurant or eating place license and who, under the former brewery license,

manufactured beer at a location other than the premises licensed under the former restaurant or eating place license may

(1) manufacture not more than 150,000 gallons of beer in a calendar year on premises other than the premises licensed under the beverage dispensary license;

(2) provide a small sample of the manufactured beer free of charge at the location the beer is manufactured unless prohibited by AS 04.16.030; and

(3) sell the beer authorized to be manufactured under this subsection

(A) on the premises licensed under the beverage dispensary license or other licensed premises of the beverage dispensary licensee that are also licensed as a beverage dispensary;

(B) to a wholesaler licensed under AS 04.11.160; sales under this subparagraph may not exceed 15,000 gallons or the amount sold under this subparagraph in calendar year 2001, plus 10 percent, whichever amount is greater; or

(C) to an individual who is present on the premises **described under (A) of this paragraph, or** where the beer is manufactured, in quantities of not more than five gallons per day.

*** Sec. 3.** AS 44.66.010(a)(1) is amended to read:

(1) Alcoholic Beverage Control Board (AS 04.06.010) - June 30, **2007** [2003];

*** Sec. 4.** This Act takes effect July 1, 2003.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 234(FIN)
(H) Publish Date: 4/28/03

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: Brewpubs; ABC Board
BRU: Statewide Support
Component: Alcohol Beverage Control Board
Sponsor: Representative McGuire
Requester: House Finance
Component No.: 2690

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	*	*	*	*	*	*
Travel	*	*	*	*	*	*
Contractual	*	*	*	*	*	*
Supplies	*	*	*	*	*	*
Equipment	*	*	*	*	*	*
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: X

POSITIONS

Full-time	*	*	*	*	*	*
Part-time						
Temporary						

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

CSHB 234(FIN) extends the repeal of the ABC Board to FY2007. FY2004 funding for the ABC Board in the Department of Public Safety is as follows:

$755.0 of GF and $157.5 of I/A in the following line items: PS, $672.2; Travel, $28.3; Contractual, $192.1; Supplies, $6.6; and Equipment, $13.3.

Prepared by: Karen Morgan, Director
Phone: 465-5488
Division: Administrative Services
Date/Time: 4/24/03 9:57 AM
Approved by: Commissioner William Tandeske
Date: 4/24/2003
Agency: Department of Public Safety

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 234(L&C)
(H) Publish Date: 4/14/03

Revision Date/Time (Note if correction):
Dept. Affected: Revenue
Title: Brewpubs; ABC Board
BRU: ABC Board
Component: ABC Board
Sponsor: Representative McGuire
Requester: House Labor and Commerce
Component No.: 100

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This legislation would remove the statutory limitation on the volume of beer that a brewpub can sell to a licensed wholesaler. This change would not effect the operating expenses of the ABC Board.

This legislation also would extend the sunset date of the ABC Board from June 30, 2003 to June 30, 2006.

Prepared by: Douglas B. Griffin, Executive Director
Phone: 269-0350
Division: Alcoholic Beverage Control Board
Date/Time: 4/8/03 7:28 AM
Approved by: Larry Persily, Deputy Commissioner
Date: 4/8/2003
Agency: Department of Revenue

(Revised 9/2002 OMB)

Alaska State Legislature

Session:
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716 W 4th Avenue, Suite 300
Anchorage, AK 99501-2133
Phone: (907) 269-0250
Fax: (907) 269-0249

Representative Lesil McGuire

Chair, Judiciary Committee

CSHB 234 (RLS)

23-LS0862/X

"An Act relating to the Alcoholic Beverage Control Board; relating to the sale of beer manufactured at a brewpub; and providing for an effective date."

AMENDED TITLE

Sponsor Statement

Committee Substitute for House Bill 234 contains three primary components. First, this version establishes the Alcoholic Beverage Control Board under the Department of Public Safety. Because the ABC Board is a quasi-judicial agency under statute and investigators of the board have significant investigative responsibilities, the Department of Public Safety believes this reorganization to be in the public interest to establish uniform investigative procedures among all agencies and board under its charge.

Second, CSHB 234 addresses current inconsistencies under AS 04.11.135(d) regarding sales of beer by brewpubs in quantities of not more than 5 gallons per day (so-called "growlers"). Under current statutory language, sales of these growlers are limited to brewpubs that brew their beer on their premises but this restriction unfairly disadvantages Alaskan brewpub operators who may brew their product in one location in the state and dispense their product at another. Although most brewpub operators in Alaska are not hindered by this restriction, brewing and dispensing their product in the same location, this amendment will lift this arbitrary restriction for any current and future operators who brew and dispense in two different locations within the state of Alaska.

Lastly, CSHB 234 extends the life of the Alcoholic Beverage Control Board until June 30, 2007.

Alaska State Legislature

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Juneau, AK 99801
Phone: (907) 465-2995
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Fax: (907) 269-0249

Representative Lesil McGuire

Chair, Judiciary Committee

CSHB 234 (FIN)

23-LS0862/W

"An Act relating to the Alcoholic Beverage Control Board; relating to peace officer powers of the director and employees of the Alcoholic Beverage Control Board; relating to the sale of beer manufactured at a brewpub; and providing for an effective date."

Sponsor Statement

Committee Substitute for House Bill 234 contains three primary components. First, this version establishes the Alcoholic Beverage Control Board under the Department of Public Safety. Because the ABC Board is a quasi-judicial agency under statute and investigators of the board have significant investigative responsibilities, the Department of Public Safety believes this reorganization to be in the public interest to establish uniform investigative procedures among all agencies and board under its charge.

Second, CSHB 234 addresses current inconsistencies under AS 04.11.135(d) regarding sales of beer by brewpubs in quantities of not more than 5 gallons per day (so-called "growlers"). Under current statutory language, sales of these growlers are limited to brewpubs that brew their beer on their premises but this restriction unfairly disadvantages Alaskan brewpub operators who may brew their product in one location in the state and dispense their product at another. Although most brewpub operators in Alaska are not hindered by this restriction, brewing and dispensing their product in the same location, this amendment will lift this arbitrary restriction for any current and future operators who brew and dispense in two different locations within the state of Alaska.

Lastly, CSHB 234 extends the life of the Alcoholic Beverage Control Board until June 30, 2007.

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Representative Lesil McGuire

Chair, Judiciary Committee

CSHB 234 (RLS) am

23-LS0862/X.A

"An Act extending the termination date of the Alcoholic Beverage Control Board; relating to the sale of beer manufactured at a brewpub; and providing for an effective date."

AMENDED TITLE

Sectional Analysis

Section 1 – Amends AS 04.06.010 by establishing the Alcoholic Beverage Control Board within the Department of Public Safety. The floor amendment to the original Rules committee substitute reinserts the language "for administrative purposes only." ***Section 2 in CSHB 234 (FIN) removing peace officer powers from ABC Board investigators for the purposes of investigating prostitution and gambling related offenses has been removed.***

Section 2 – Amends AS 04.11.135 (d) by removing the same language as found in AS 04.11.135 (a) regarding the amount of beer that maybe sold to a wholesaler and amends AS 04.11.135 (d)(3)(C) by adding language that will allow brewpub licensees to sell beer to an individual present on the premises, in quantities of 5 gallons a day or less, at the same location where that brewpub licensee also is the holder of beverage dispensary license[1]

Section 3 – Amends AS 44.66.010(a)(1) by extended the date of existence for the Alcoholic Beverage Control Board from June 30, 2003 to June 30, 2007.

Section 4 – Provides for an effective date for provisions of this Act of July 1, 2003.

[1] This corrects the arbitrary restriction on Alaska's brewpub licensees who may manufacture their beer in one location in the state, and dispense it in another.

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Representative Lesil McGuire

Chair, Judiciary Committee

CSHB 234 (RLS)

23-LS0862/X

"An Act relating to the Alcoholic Beverage Control Board; relating to the sale of beer manufactured at a brewpub; and providing for an effective date."

AMENDED TITLE

Sectional Analysis

Section 1 – Amends AS 04.06.010 by establishing the Alcoholic Beverage Control Board within the Department of Public Safety and removing language that makes this inclusion "for administrative purposes only." ***Section 2 in CSHB 234 (FIN) removing peace officer powers from ABC Board investigators for the purposes of investigating prostitution and gambling related offenses has been removed.***

Section 2 – Amends AS 04.11.135 (d) by removing the same language as found in AS 04.11.135 (a) regarding the amount of beer that maybe sold to a wholesaler and amends AS 04.11.135 (d)(3)(C) by adding language that will allow brewpub licensees to sell beer to an individual present on the premises, in quantities of 5 gallons a day or less, at the same location where that brewpub licensee also is the holder of beverage dispensary license[1]

Section 3 – Amends AS 44.66.010(a)(1) by extended the date of existence for the Alcoholic Beverage Control Board from June 30, 2003 to June 30, 2007.

Section 4 – Provides for an effective date for provisions of this Act of July 1, 2003.

[1] This corrects the arbitrary restriction on Alaska's brewpub licensees who may manufacture their beer in one location in the state, and dispense it in another.

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Representative Lesil McGuire

Chair, Judiciary Committee

CSHB 234 (FIN)

23-LS0862/W

"An Act relating to the Alcoholic Beverage Control Board; relating to peace officer powers of the director and employees of the Alcoholic Beverage Control Board; relating to the sale of beer manufactured at a brewpub; and providing for an effective date."

Sectional Analysis

Section 1 – Amends AS 04.06.010 by establishing the Alcoholic Beverage Control Board within the Department of Public Safety (Pg 1, Ln. 6-7) and removing language that makes this inclusion "for administrative purposes only." (Pg. 1, Ln. 8-9)

Section 2 – Amends AS 04.06.110 by removing language that authorizes ABC Board investigators to investigate violations of laws pertaining to gambling, prostitution, and other related offenses. (Pg. 2, Ln. 3-9)

Section 3 – Amends AS 04.11.135 (d) by removing the same language as found in AS 04.11.135 (a) regarding the amount of beer that maybe sold to a wholesaler (Pg. 2, Ln. 26-28) and amends AS 04.11.135 (d)(3)(C) by adding language that will allow brewpub licensees to sell beer to an individual present on the premises, in quantities of 5 gallons a day or less, at the same location where that brewpub licensee also is the holder of beverage dispensary license[1] (Pg.2, Ln. 29-30).

Section 4 – Amends AS 44.66.010(a)(1) by extended the date of existence for the Alcoholic Beverage Control Board from June 30, 2003 to June 30, 2007 (Pg. 3, Ln. 2).

Section 5 – Provides for an effective date for provisions of this Act of July 1, 2003.

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[1] This corrects the arbitrary restriction on Alaska's brewpub licensees who may manufacture their beer in one location in the state, and dispense it in another.

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Representative Lesil McGuire

Chair, Judiciary Committee

CSHB 234 (L&C)

23-LS0862\V
Ford
4/10/03

"An Act relating to the sale of beer manufactured at a brewpub; continuing the existence of the Alcoholic Beverage Control Board; and providing for an effective date."
TITLE CHANGE

Sectional Analysis

Section 1* – Amends AS 04.11.135(a) by removing language that defines the number of gallons a beverage dispensary licensee can sell to a wholesaler (Pg. 2, Ln. 6-8).

Section 2 – Amends AS 04.11.135(d)(3)(C) by adding language that will allow brewpub licensees to sell beer to an individual present on the premises, in quantities of 5 gallons a day or less, at the same location where that brewpub licensee also is the holder of beverage dispensary license[1]

Section 3 – Amends AS 44.66.010(a)(1) by extended the date of existence for the Alcoholic Beverage Control Board from June 30, 2003 to June 30, 2006 (Pg. 2, Ln. 13-14).

Section 4 – Provides for an effective date for provisions of this Act of July 1, 2003.

*Explanatory Note: The removal of this language was a drafting error. The bracketed language found on Pg. 2, lines 6-8 and Pg. 2, lines 25-27 should be reinserted. This will maintain existing statutory language. With the reinsertion of the bracketed language in Section 1, the section becomes unnecessary and the remaining sections can be appropriately renumbered.

[1] This corrects the arbitrary restriction on Alaska's brewpub licensees who may manufacture their beer in one location in the state, and dispense it in another.

HB

242

SENATE COMMITTEE REPORT

DATE: 5/6/03

FURTHER:

DATE TURNED
IN TO OFFICE:_____

Labor and Commerce Committee considered CS FOR HOUSE BILL NO. 242(L&C)

HB 242 EXAM FOR CPA'S

"An Act relating to licensing of certified public accountants; and providing for an effective date."

and recommends:

Senate Bill:
[ ] same title
[ ] new title

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR #_____

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
Betty Davis			✓	
			✓	
	X			
CHAIR:	—			

Representative Mike Hawker
Alaska State Legislature

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Member:
House Finance Committee
Legislative Budget
& Audit Committee

House District 32:
Eagle River
Anchorage
Rainbow
Indian
Bird
Girdwood
Portage
Whittier
Sunrise
Hope

Committee Substitute for House Bill 242(L&C)-Exam for CPA's
Sponsor Statement

House Bill 242 updates Alaska Statute to recognize changes in the standardized testing procedures for Certified Public Accountants (CPA) adopted by the American Institute of Certified Public Accountants (AICPA).

The Alaska Board of Public Accountancy has been administering the Uniform CPA Examination prepared and graded by the AICPA since the 1960's. All US jurisdictions require CPA's to pass the Uniform CPA Examination. The examination format will change from paper and pencil to computer based in May 2004. Current Alaska statute requires a "written" examination. HB 242 makes acceptable any form of the Uniform Certified Public Accounting Examination of the AICPA.

HB 242 further requires the Alaska Board of Public Accountancy to establish by regulation what constitutes a passing grade. The Alaska Board is adopting AICPA prepared model exam regulations. These regulations provide national uniformity of scheduling, credits and passing requirements. HB 242 repeals statute sections on the frequency of examination, reexamination and standards for passing the examination that have become inconsistent with the new computerized examination and grading system being implemented by the AICPA.

HB242 also includes an AICPA suggested transitional provision to facilitate completion of the CPA examination by persons who began, but had not completed, the CPA examination process under the old format and grading system.

A detailed history with specifics on the CPA examination and the proposed changes prepared by the Alaska Division of Occupational Licensing is attached to this sponsor statement. HB 242 was drafted in cooperation with the Department of Community and Economic Development, Division of Occupational Licensing and the Alaska Board of Public Accountancy. It has their full support.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 242(L&C)
(H) Publish Date: 4/28/03

Revision Date/Time (Note if correction):
Title: Exam for CPA's
Sponsor: Representative Hawker
Requester: House Labor and Commerce

Dept. Affected: DCED
BRU: Occupational Licensing (117)
Component: Occupational Licensing
Component No.: 2360

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other 1156 - Receipt Supported Services						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

HB 242 specifies in statute the examination required for CPA licensure. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Manager
Phone 907-465-2144
Division: Occupational Licensing
Date/Time 4/24/03 2:39 PM
Approved by: Edgar Blatchford, Commissioner
Date 4/24/2003
Agency: Department of Community & Economic Development

Representative Mike Hawker
Alaska State Legislature

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Member:
House Finance Committee
Legislative Budget
& Audit Committee

House District 32:
Eagle River
Anchorage
Rainbow
Indian
Bird
Girdwood
Portage
Whittier
Sunrise
Hope

Sectional Analysis
Committee Substitute to House Bill 242 (L&C)-Exam for CPA's

Section 1.

Amends AS 08.04.130-Examination

Requires an applicant to pass an examination designated by the board. The board shall use the Uniform Certified Public Accountant Examination of the American Institute of Certified Public Accountants and their grading service. The board will decide what constitutes a passing grade.

Section 2.

Amends AS 08.04.195 – Reciprocity with other jurisdictions

(a) The board may issue a certificate to an applicant who holds a certificate issued in another jurisdiction if the applicant

(1) passed the Uniform Certified Public Accountant Examination of the American Institute of Certified Public Accountants

Section 3.

Repeals AS 08.04.140, 08.04.160, and 08.04.170

Section 4.

Amends the uncodified law by adding a section providing various conditions for transition.

Section 5.

Provides an effective date.

House Bill 242-Exam for CPA's Effected Statutes

Sec. »08.04.130«. Examination.

An applicant shall pass a written examination in accounting and reporting, in auditing, and in other related subjects that the board determines appropriate. The examination shall be designated in advance by the board as an examination for the certificate of certified public accountant. The board shall use the uniform certified public accountant examination and advisory grading service, if available.

Sec. »08.04.140«. Frequency of examination.
The examination shall be held by the board as often as it determines desirable but not more than three times each year. If the uniform certified public accountants' examination is available less frequently, an examination shall be held not less than twice each year.

Sec. 08.04.160. Re-examination.

An applicant who fails an examination may take as many examinations as the applicant chooses. An applicant who receives a passing grade in at least two subjects or who has received a passing grade in accounting practice before May 1, 1994, has the right to be reexamined in only the remaining subjects at succeeding examinations within five years after the first examination if the applicant takes an examination in the remaining subjects at least once each calendar year unless excused by the board for good cause. An applicant who receives a passing grade in the remaining subjects has passed the entire examination. An applicant must attain a minimum grade of 50 percent on each subject required to be written but not passed at an examination sitting to receive credit for passing subjects on which a grade of at least 75 percent was attained at that sitting.

Sec. 08.04.170. Examination standards.

(a) An applicant passes the examination by attaining a grade of at least 75 percent in each subject in which the applicant is examined. The board may give credit to an applicant who has passed all or part of the examination in another state if the board determines that the standards under which the examination was held are as high as the standards established for the examination in this state.

(b) A candidate must, at each examination taken, be examined or reexamined in all subjects for which conditional credit has not been given.

(c) The board may in particular cases waive or defer any of the requirements of AS 08.04.160 - 08.04.170 regarding the circumstances in which the various subjects of the examination must be passed upon a showing that, by reason of circumstances beyond the applicant's control, the applicant was unable to meet the requirement.

(d) The applicant must attain a minimum grade of 50 percent on each part not passed at that examination sitting to receive credit for passing subjects on which a grade of at least 75 percent was attained at that sitting.

Sec. »08.04.195«. Reciprocity with other jurisdictions.

(a) Notwithstanding AS 08.04.100 - 08.04.130, the board may issue a certificate to an applicant who holds a certificate, or its equivalent, issued by another jurisdiction if the applicant.

(1) passed the uniform certified public accountant examination given by the other jurisdiction in order to receive the applicant's initial certificate from the jurisdiction;

Frank H. Murkowski, Governor

Alaska Department of Community and Economic Development

Division of Occupational Licensing
P.O. Box 110806, Juneau, AK 99811-0806
Telephone: (907) 465-2534 • Fax: (907) 465-2974 • Text Telephone: (907) 465-5437
Email: License@dced.state.ak.us • Website: www.dced.state.ak.us/occ/

April 23, 2003

HB 242 "An Act relating to licensing of certified public accountants."

The Department supports this bill.

The Alaska State Board of Public Accountancy has administered the paper-pencil Uniform CPA Examination prepared by the American Institute of Certified Public Accountants (AICPA) since the 1960s. The AICPA is responsible for preparing and grading the Uniform CPA Examination and establishing appropriate passing standards with input from the Psychometric Oversight and Content Committees. According to examination information provided by the AICPA, the Uniform CPA Examination was first administered in 1917 and by the 1960s, all jurisdictions in the United States required CPAs to have passed the Uniform CPA Examination. (Licensing applications for CPAs licensed in the early 1960s verify that the Alaska board asked applicants whether they had passed the Uniform CPA Examination.) The Boards of Accountancy of all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands now use the Uniform CPA Examination, which is given twice a year; once in May and once in November.

Over the past several years, the AICPA, in conjunction with all State Boards of Public Accountancy, have been implementing plans to convert the current paper-pencil examination to a computerized version. The computerized version will not change the basic content of the examination, but rather the method in which it will be administered to the CPA examination candidate. The anticipated start date for the computerized examination is no later than May 2004. The final paper-pencil examination is scheduled for November 2003.

The AICPA has provided State Boards of Public Accountancy with model exam regulations that would allow for uniformity of examination credits and time afforded for exam candidates to pass all sections of the examination. The computerized examination will be offered during two months of each calendar quarter. Candidates will be able to schedule times to take exam sections at their convenience. The model regulations will permit candidates to sit for each section of the exam individually, and in any order. A passing score on any one section will remain valid for 18 months; all remaining sections must be passed within 18 months of passing the first section(s) in order for a candidate to retain credit for the first section(s) passed. In the event all four sections of the exam are not passed within the 18-month period, credit for any section(s) passed outside the 18-month period will expire and that section(s) must be retaken.

The Alaska Board of Public Accountancy has expressed its desire to adopt the recommendations as provided in the model exam regulations and ensure Alaska candidates are examined and afforded the same conditions for examination recognition, as will be provided in the majority of other licensing jurisdictions. It is expected that essentially all licensing jurisdictions will adopt the model exam regulations.

Barbara Gabier for

Rick Urion, Director
Division of Occupational Licensing

Barb-FYI

Computer-Based Uniform CPA Examination

The final paper-and-pencil based Uniform CPA Exam will be administered in November 2003. The computer-based Uniform CPA Exam (CBT) is scheduled for implementation in April 2004.

Here are some of the anticipated changes that will become effective upon implementation of the CBT:

Test Sites
Prometric will administer the CBT **only** at authorized CPA Exam testing sites throughout the United States, Guam, Puerto Rico, the Virgin Islands, and the District of Columbia. Alaska will have one testing center located in Anchorage. After receiving an application and nonrefundable application fee, and upon approval by the Alaska Board of Public Accountancy and submitting the required fees to NASBA, the candidate will be authorized by NASBA to contact Prometric to schedule a specific testing date and time.

Structure
The CPA Exam will continue to be comprised of four-sections. The four CBT sections will correspond to the paper-and-pencil exam sections as follows:

Paper-and-Pencil	**Examination Computer-Based Test**
Auditing (4.5 Hours)	Auditing & Attestation (4.5 Hours)
Financial Accounting & Reporting (4.5 Hours)	Financial Accounting & Reporting (4 Hours)
Accounting & Reporting (3.5 Hours)	Regulation (3 Hours)
Business Law & Professional Responsibilities (3 Hours)	Business Environment & Concepts (2.5 Hours)

For additional information on structure and content, visit *www.cpa-exam.org*.

Credit Status
The CBT will utilize a "rolling" 18-month credit status system to replace the conditional credit system of the paper-and-pencil exam. Credit status is established by passing one section of the examination. The credit is valid for 18 months from the specific date that the section was passed. As other sections of the CPA Exam are passed, those sections will also have an established credit status date, each of which is valid 18 months from the specific date that the section was passed. A candidate passes the CPA Exam when, within an 18-month period, the candidate attains status credits for all four sections of the CPA Exam.

Conditional Credit Transitioning
Candidates who have established conditional credit under the paper-and–pencil exam will have their conditional credit transitioned into the CBT as demonstrated above under Structure. These candidates must pass all remaining portions of the Exam in no more than six examination opportunities and no later than May 2007.

CPA Exam and other backup

Passing Scores
The AICPA will continue to use 75% as the minimum score for passing a section of the exam. Applicants may sit for each section of the exam individually, and in any order, up to four times a year within the testing windows. (The testing facility will be closed every third month for maintenance). There will be no minimum score requirement on failed sections, and it is no longer required that applicant's pass at least two sections simultaneously to attain conditional credit.

Application Deadlines
There will be no need for application deadlines.

Fees
Proposed Fees for the CBT are as follows:
Fees to be Paid to the Alaska Board of Public Accountancy
First-time Candidate: $ 50 for Initial Application and Authorization to Test (ATT)
Reexam Candidate: $ 25 for Authorization to Test (re-exam)

Fees to be Paid to NASBA:

Auditing and Attestation	$134.50
Financial Accounting and Reporting	$126.00
Regulation	$109.00
Business Environment and Concepts	$100.50
Total fees paid to NASBA for ALL four sections	$470.00

Fees to be Paid to Prometric Testing Center:

First year of CBT – per test section hour	$17.00

Additional Information
- Visit the AICPA Web site at *www.cpa-exam.org/global/latestnews.html.*
- Visit the NASBA Web site at *www.nasba.org.*

Department of Community and Economic Development
Division of Occupational Licensing
Alaska State Board of Public Accountancy
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E-mail: license@dced.state.ak.us
Website: www.dced.state.ak.us/occ

CERTIFIED PUBLIC ACCOUNTANT PROCEDURE SHEET FOR CERTIFICATION

GENERAL INSTRUCTIONS. Your application and supporting documents may be returned if they are not completed and in proper form. Applicants should read the application and these instructions carefully, as failure to do so may cause additional correspondence and delay in the processing of your application.

After you have successfully completed all parts of the Uniform CPA examination as prescribed by the State Board of Public Accountancy, you will be required to provide the following additional items when applying for certification:

1. **Official transcripts mailed directly from colleges and/or universities of attendance.** Please note: If you are qualifying through a concentration in accounting, you must request your college(s) or university(s) to send official transcript(s) verifying your accounting concentration in accordance with 12 AAC 04.185. If you received a bachelor degree with an **ACCOUNTING MAJOR** from the University of Alaska, you need only have the University of Alaska transcript submitted. Official transcripts submitted previously to qualify for CPA examination and NO changes have occurred do not need to be resubmitted. NOTE: In accordance with AS 08.04.120, bachelor's degrees awarded **after January 1, 2001** must include at least 150 semester hours.

We have this

2. **A completed application (form 08-4092) and the following fee(s):**

Initial application fee:	$ 50.00 (Nonrefundable)
Certification fee:	$220.00
Wall Certificate fee:	$ 20.00 (Optional)

We have this

3. **Proof of accounting experience satisfactory to the board (Form 08-4092b).** Years of experience required varies with educational background. Please refer to Alaska State Board of Public Accountancy statutes and regulations for specific information.

   If your experience was obtained under the supervision of a CPA who is not certified in Alaska, you must also use **Form 08-4092(d)** to verify the supervising CPA's certificate to practice.

must be 1996 Rev.

4. **Official verification mailed directly from the AICPA showing that you passed the AICPA Ethics examination.** The State Board of Public Accountancy does not administer the Open Book Ethics examination. It is provided and graded by AICPA and is an open book exam. To request the exam, write: The American Institute of Certified Public Accountants, Order Department, P.O. Box 2209, Jersey City, NJ 07303-2209, telephone 1-888-777-7077.

5. **Official verification of your exam scores if passed in another state. (Form 08-4092a – copy form as needed.)**

we have these

6. **Official verification of certification/license/permit from each state in which you hold or have held a certificate/license/ permit to practice. (Form 08-4092a – copy form as needed.)**

X. **Attach recent full color, passport size photograph.**

RECIPROCITY (Alaska Statute 08.04.195): If you are applying by Reciprocity, you must have five years of experience (earned after passing the examination) and obtained outside the State of Alaska in public accounting within the last ten years. Provide the following items:

1. Items 1, 2, 5, 6, and 7 listed above.
2. Proof of qualifying experience for reciprocal certification – **Form 08-4092c.**
3. Proof that CPA Supervisor was certified during time experience earned – **Form 08-4092d.**

GENERAL INFORMATION

CERTIFICATE RENEWAL AND INACTIVE CERTIFICATE STATUS: All CPAs renew their certificates on December 31 of odd-numbered years. If a person is not practicing as a CPA, he/she may renew his/her certificate in an inactive status. An applicant for active renewal must have completed 80 hours of approved continuing education during the two years immediately preceding the application. KEEP THE DEPARTMENT NOTIFIED OF ANY CHANGE IN YOUR ADDRESS.

REGISTRATION OF PARTNERSHIPS, CORPORATIONS, LIMITED LIABILITY COMPANIES: The Application for Registration and the appropriate fees must be submitted to the Department of Community and Economic Development for the board's review. Each office must be under the direct supervision of a licensed Public Accountant or Certified Public Accountant. A supervisor may serve in this capacity for one office only. Contact the Division of Occupational Licensing for applications and/or information about the certification process.

SOCIAL SECURITY NUMBER: The department is not authorized to issue a certificate unless the applicant's United States Social Security Number is provided. If you are a foreign citizen unable to obtain a U.S. Social Security Number, contact the division for further instructions.

MAIL COMPLETED APPLICATION AND FEES TO:

CPA

FOR OFFICE USE ONLY

Department of Community and Economic Development
Division of Occupational Licensing
Alaska State Board of Public Accountancy
333 Willoughby Avenue, 9th Floor
P.O. Box 110806
Juneau, Alaska 99811-0806
Telephone: (907) 465-3811
E-mail: license@dced.state.ak.us

APPLICATION FOR CERTIFIED PUBLIC ACCOUNTANT

Nonrefundable Application Fee: $ 50.00
Certification Fee: $ 220.00
Wall Certificate (Optional): $ 20.00

Make checks payable to: STATE OF ALASKA

I HEREBY APPLY for ❑ Certification by EXAMINATION ❑ Certification by RECIPROCITY (Must have five years post exam experience within last ten years)

1. Name: _____
   Last First M.I. Maiden or Other Names

2. Mailing Address: _____

   _____
   City State ZIP Code

   Daytime Telephone Number: _____ S.S.N: _____
   Area Code (Required by AS 08.01.060)

3. Date of Birth: _____ Sex: ❑ F ❑ M
   Mo. Day Year

4. The Passage of Uniform CPA examination:

   State(s) _____ Date(s) _____

   Date Ethics Exam Passed? _____ Administered by: _____

5. List all Jurisdictions in which you hold or have held certificates/licenses to practice public accountancy.
   ❑ **Check here if NONE**

State or Jurisdiction	Certificate or Permit Number	First Issue Date	Expiration Date	Periods of Lapse?

6. List all jurisdictions in which you have applied for certification/license and been denied. ❑ **Check here if NONE**

State or Jurisdiction	Application Date	Reason for Denial

7. **EDUCATIONAL HISTORY:**

High School Name	Location	Date Graduated

College or University

Name	Address	Dates in Attendance	Degree Type

8. **PAST EXPERIENCE**

List your accounting experience – use separate sheet if necessary.

Employer, Address, Telephone No.	Dates of Employment	Position/Title

9. **PERSONAL DATA (AS 08.04.450)**

	YES	NO
a. Have you ever had your certificate, license or permit to practice public accountancy in another jurisdiction suspended, revoked, restricted, reprimanded, or otherwise acted upon by that jurisdiction's licensing board?	❑	❑
b. Have you ever had the right to practice before a federal or state agency denied, suspended, or revoked?	❑	❑
c. Have you ever been convicted of a felony under the laws of any state or of the United States?	❑	❑
d. Have you ever been convicted of any crime of which dishonesty or fraud was an essential element under the laws of any state or of the United States?	❑	❑
e. Have you ever been found guilty of gross negligence in the practice of public accounting, or other acts discreditable to the accounting profession?	❑	❑
f. Have you ever had an application for a fidelity or surety bond denied?	❑	❑

If so, what date? _____

Name of Surety Company _____

Address _____

If you answered "yes" to any of these questions, please submit a detailed statement of explanation and legal documentation, if applicable. All information supplied with applications is considered public information except information considered confidential by state or federal law. Information about licensees, including mailing addresses, is available from the division's website at: www.dced.state.ak.us/occ under "Occupational License Search."

10. **CHARACTER REFERENCES**

List three character references

Full Name	Address	Telephone Number	Relationship

11. **PROFESSIONAL SOCIETIES**

List the professional societies of which you are a member.

_____

_____

I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE, the statements contained in this application are true and correct, and that all credentials supplied by me to support my application are true and correct. I understand that any falsification of credentials may result in failure to obtain certification in the State of Alaska or subsequent revocation of my certificate.

_____
Signature of Applicant

_____
Date of Application

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 20_____.

_____
Notary Public

My Commission Expires: _____

Attach recent passport size, color photograph

ALASKA STATE BOARD OF PUBLIC ACCOUNTANCY
AUTHORIZATION FOR INTERSTATE EXCHANGE OF EXAMINATION AND CERTIFICATION INFORMATION

This form is essential to the application you are filing with this board. Before your application can be considered for approval, the information requested below must be officially verified by the accountancy board where you passed the examination as well as each state where you hold or have held a certificate, license or permit. You are advised to check with the licensing board(s) before forwarding this form to determine if there are additional requirements to be met before the information will be released.
(Copy this form as needed before completing Section A.)

SECTION A

TO BE COMPLETED BY THE APPLICANT (Please type or print legibly):

Name of Applicant: _____

Mailing Address: _____

City: _____ State: _____ Zip Code: _____

Daytime Telephone Number: _____ Social Security Number: _____

Date of Birth: _____

I hereby request and authorize the _____ Board of Accountancy to provide any and all pertinent information requested in this form to the Board of Accountancy in the State of Alaska to complete an application filed with that agency.

_____ _____
Signature Date Signed

SECTION B THROUGH D ARE TO BE COMPLETED BY THE BOARD OF ACCOUNTANCY ONLY

SECTION B. VERIFICATION OF EXAMINATION CREDITS

The following are grades awarded on the Uniform CPA Examination(s) for the applicant as reported by the AICPA Advisory Grading Service and approved unchanged by this Board. (Please use Section E of this form to explain if any of the grades were changed; if an exam other than the Uniform CPA Exam was used; or if there is any reason why they should not be accepted by another board.)

IMPORTANT

1. Was the applicant identified in Section A ever denied a sitting(s)? ❑ Yes ❑ No
2. If the applicant has not completed the CPA Exam, are there any restrictions preventing him/her from sitting in your state? ❑ Yes ❑ No (Please use Section E to explain.)
3. Does your Board consider this applicant's credit to be valid and in good standing at the present time? ❑ Yes ❑ No (If no, please attach an explanation.)
4. Date credits expire, if any _____.

(Please list all grades, including failing, recorded for applicant)

Date of Examination	AICPA I.D. Number	Auditing	LPR (Law)	FARE (Theory)	ARE (Practice)