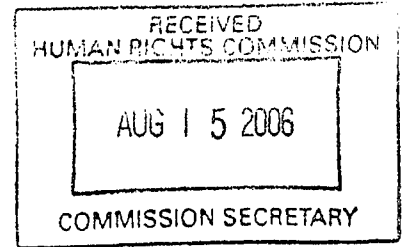


BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON APPOINTMENT BY THE STATE COMMISSION FOR HUMAN RIGHTS

Paula M. Haley ex rel. Bathwell Faria,)
)
Complainant,)
)
v.)
)
Federal Express Corporation,)
)
Respondent.)
_____)

OAH No. 05-0527-HRC
ASCHR No. R-99-080



Decision and Order

I. Introduction

This is a case before the Alaska State Commission for Human Rights in which the executive director of the State Commission for Human Rights alleges that Federal Express Corporation (Federal Express) discriminated against Bathwell Faria because of his race as an Asian/Pacific Islander when it disciplined him by terminating his employment based on violations of the company's Policy 2-5 (Acceptable Conduct).

Faria filed his complaint for discriminatory discharge with the commission on June 7, 1999. In accordance with AS 18.80.120 and 6 AAC 30.410, the executive director filed a two-count amended complaint on his behalf on February 25, 2004. The amended complaint alleges that Federal Express terminated Mr. Faria's employment because of his race in violation of AS 18.80.220, and that Federal Express treated him differently from those of other races in the terms and conditions of his employment in violation of AS 18.80.220. The executive director seeks retroactive reinstatement to a similar employment position to the one Faria held when discharged, along with lost wages and benefits. She also seeks to require Federal Express to eliminate adverse personnel records and prevent the corporation from penalizing him in the future relating to his termination, to require Federal Express to adopt and disseminate a policy of nondiscrimination in accordance with Alaska human rights law, and to require Federal Express to require training for its supervisors and managers in Alaska on human rights law in this state, with specific emphasis on provisions prohibiting racial discrimination.

The commission initially referred this administrative proceeding to a contract hearing examiner. Effective July 1, 2005, the commission re-assigned the case to the Office of Administrative Hearings for the appointment of an administrative law judge to preside at the hearing.¹ The matter is governed by provisions of the Alaska Human Rights Act (AS 18.80.010–18.80.300) and implementing regulations at 6 AAC 30.² Under AS 18.80.130, the State Commission for Human Rights is the final decisionmaker. Based on the evidence from the hearing, the two counts of racial discrimination were not proven.

II. Procedural History

A. Evidence

A hearing took place over a period of four days. The hearing record consists of thirteen audiocassette tapes. The following witnesses testified at the hearing under oath and subject to cross-examination in the sequence indicated:

1. Bathwell James Faria
2. Renee Mackey
3. Steve Freno
4. Holly Harris
5. Dan Kloeckl
6. Richard Viglione
7. V. S.
8. Barbara Stallone
9. D.P.
10. Michelle Phillips
11. Robert Leger³
12. Monique Doll
13. Charles Williamson
14. Fred Mitchell

The exhibits listed below were admitted as evidence in this proceeding. The executive director identified her exhibits with the prefix “CP” and Federal Express identified its exhibits with the prefix “Defendant’s.” In lieu of adding additional stickers to the documents, the documents are referred to in this decision as C-1, etc. for the executive director (complainant),

1 The Office of Administrative Hearings (OAH) was created under AS 44.64.010 in 2004. AS 18.80.120(b), effective July 1, 2005, provides that the Human Rights Commission shall request that OAH appoint an administrative law judge to preside at commission hearings.

2 The Administrative Procedure Act (APA) at AS 44.62.33 – 44.62.640 is not applicable to the case at this stage. See AS 44.62.330(a)(commission not listed as subject to APA adjudication provisions). See also AS 18.80.135(a)(judicial review of final order in accordance with AS 44.62.560 – 44.62.570).

3 Leger is incorrectly spelled Legar in many documents.

and R-1, etc. for Federal Express (respondent). By agreement of the parties, exhibits C-83 through C-105 are confidential and exhibits R-52 through R-77 and R-137 are confidential.

Faria's Exhibits

C-2, C-6, C-7, C-8, C-11, C-13, C-14, C-15, C-16, C-17, C-18, C-19, C-22, C-29, C-33, C-36, C-40, C-46, C-55, C-62, C-64, C-68, C-84, C-85, C-86, C-89, C-91, C-92, C-93, C-94, C-95, C-96, C-101, C-123, C-125, C-126, C-127, C-128, C-129, C-130

Federal Express's Exhibits

R-2, R-4, R-24, R-27, R-29, R-30, R-31, R-32, R-33, R-34, R-35, R-37, R-38, R-39, R-42, R-83, R-98, R-99, R-100, R-101, R-102, R-103, R-104, R-105, R-106, R-107, R-108, R-109, R-111, R-112, R-113, R-114, R-115, R-116, R-117, R-119, R-120, R-121, R-123, R-124, R-125, R-126, R-127, R-128, R-132

B. Alaska Civil Rights Act Procedures

Alaska's Supreme Court has held that the state's statutory anti-discrimination scheme "constitutes a mandate to the [Commission] to seek out and eradicate discrimination in employment."⁴ Under the Act, a person aggrieved by discriminatory conduct may file a complaint with the State Commission for Human Rights.⁵ The executive director of the commission or a staff member must then informally investigate the complaint to determine whether the allegations of the complaint are supported by substantial evidence.⁶ If the investigation results in a determination that the allegations are supported by substantial evidence, "the investigator shall immediately try to eliminate the discrimination complained of, by conference, conciliation, and persuasion."⁷ In State of Alaska v. Meyer, the court held that "[b]y implication, if the investigator determines that the allegations of the complaint are not supported by substantial evidence, the complaint is dismissed."⁸ If the investigator determines that substantial evidence exists and informal efforts to eliminate the discrimination do not succeed, a

4 State of Alaska v. Meyer, 906 P.2d 1365, 1372 (Alaska 1995) (citing Hotel, Motel, Restaurant, Construction Camp Employees & Bartenders Union Local 879 v. Thomas, 551 P.2d 942, 945 (Alaska 1976)). See also Miller v. Safeway, 102 P.3d 282, 290 (Alaska 2004) (The Alaska Human Rights Act, although modeled on federal law, is intended to be more broadly interpreted than federal law to further the goal of eradicating discrimination.).

5 AS 18.80.100.

6 AS 18.80.110.

7 Id.

8 State of Alaska v. Meyer, 906 P.2d at 1368.

hearing before the commission is required.⁹

Under these procedures, the following occurred in Mr. Faria's case. Faria filed a complaint with the commission on June 7, 1999 alleging discriminatory conduct by Federal Express. Commission staff informally investigated Faria's complaint and determined on August 17, 2001 that his allegation of racial discrimination was not supported by substantial evidence. Faria requested reconsideration of this determination on August 28, 2001. The executive director reopened the case on December 28, 2001. On November 4, 2003, the investigations director concluded that "complainant's allegation that respondent terminated his employment based on his race is supported by substantial evidence." A Notice of Commencement of Hearing Process dated January 28, 2004 states that informal efforts to eliminate the alleged discrimination were unsuccessful. The commission's attorney (Human Rights Advocate) filed an amended complaint under 6 AAC 30.410(g) on February 25, 2004.

This case is not a claim for wrongful discharge, which may be pursued through a lawsuit with original jurisdiction in the court system. Federal Express may have violated its own policies with respect to Faria, but a simple violation of company procedures is not a basis for relief. Violations of company procedures are relevant only insofar as they suggest discrimination. The executive director of the State Commission for Human Rights has the burden to establish racial discrimination.

III. Facts

This section of the decision includes subsections in the following areas in the order listed: Federal Express's Policy 2-5 (Acceptable Conduct), events leading to Mr. Faria's termination, Mr. Faria's termination from Federal Express, and events following Mr. Faria's termination.

A. Federal Express's Policy 2-5 (Acceptable Conduct)

Because many provisions of Policy 2-5 are at issue in this case, pertinent provisions are set forth below.

Policy	Federal Express expects all employees to demonstrate the highest degree of integrity, responsibility, and professional conduct at all times.
--------	--

Scope	All Federal Express Employees
-------	-------------------------------

⁹ AS 18.80.120 (commission "shall" conduct a hearing). See also State of Alaska v. Meyer, 906 P.2d at 1373 (exercise of prosecutorial discretion not involved).

Guidelines

General All employees are Federal Express representatives whether on or off duty. This is particularly important for the employee to remember when wearing a Federal Express badge or uniform.

Conduct Expectations

Acceptable conduct involves not only sincere respect for the rights and feelings of others but the assurance that personal conduct in both business and personal life avoids any action that might (1) be harmful to the employee, other employees, the Company, or (2) cause any unfavorable reaction from current or potential customers.

Misconduct Federal Express requires a high degree of personal integrity and responsibility of its employees. Violations of Company or departmental rules may constitute misconduct for which an employee may be immediately suspended with pay, pending a complete investigation. All alleged violations should be thoroughly investigated and documented. Disciplinary decisions should be based on logical analysis of the evidence.

Although the following list is not all-inclusive, the following specific violations may result in severe disciplinary action up to and including discharge. This list is not all-inclusive.

* * *

- Threatening, intimidating, coercing, directing abusive language, or displaying blatant or public disrespect toward any employee or customer while on duty, on Company property, at collection sites, or at off-site Company meetings and functions

* * *

- Fighting while on duty, at Company functions/Company property

* * *

- Leadership failure of a member of management
- Any other act obviously and significantly detrimental to the best interest of Federal Express and/or fellow employees as determined by management

* * *

Investigative/Disciplinary Suspensions

Investigative Suspension. Investigative suspensions provide time to management to further investigate a violation. The employee receives pay while on investigative suspension. The employee receives notice of the

suspension in writing. An investigative suspension may be changed to a disciplinary suspension without pay as outlined in the **Disciplinary Suspension** section below and in the **Warning Letter/Recurrent Patterns** guideline.

Investigative suspensions should be completed as soon as possible, normally within 7 calendar days. The employee is informed of the decision within 7 calendar days of the completion of the investigation.

Disciplinary Suspension. If a manager decides not to terminate an employee for a serious policy violation, the manager may issue a warning letter and a disciplinary suspension without pay. When appropriate, managers may change an investigative suspension to a disciplinary suspension without pay. Disciplinary suspensions are given only when they are deemed to be in the best interest of the Company and the infraction is of a severe nature. A disciplinary suspension must be in writing in the form of a warning letter outlining the reasons for the suspension and the applicable dates.

NOTE: All disciplinary actions normally should be initiated within 7 calendar days of the conclusion of the investigation.

* * *

Documentation

Management must completely document all actions taken by management related to misconduct. All notifications of deficiency (i.e., warning letters/reminders, termination letters, and disciplinary suspension documents[]) should contain

- date of infraction
- facts supporting the suspension, warning letter, reminder, and/or termination
- policy violated
- a reference to the employee's privilege to pursue the procedure in **5-5 Guaranteed Fair Treatment Procedure/EEO Complaint Process**

B. Events leading to Mr. Faria's termination

Bathwell Faria is Native Hawaiian of the Pacific Islander race. He began working for Flying Tigers in 1981. When Federal Express merged with Flying Tigers in 1989, Faria became an employee of Federal Express. He worked at the Anchorage International Airport facility. Mr. Faria was the Manager of Hub Operations in Anchorage for eight years. He was assigned responsibility for a ramp and supervised loading and unloading of aircraft performed by a group of hourly wage-earning employees. Faria was promoted by Federal Express to Manager of Technology Services in 1997, at the recommendation of his supervisor, Steve Freno.¹⁰ He managed five employees in his new position.

On Saturday night, December 12, 1998, Federal Express held a Christmas party for employees at the Sheraton Anchorage Hotel. The FedEx Express Employee Association, with offices in Memphis, planned the party. The group funded the party with ticket sales and from revenue generated by vending machines at the Federal Express airport facility. The company also contributed some money from Memphis. According to Holly Harris, a Senior Human Resources Representative at Federal Express, the party was "a Federal Express function." Attendance was open to any employee of Federal Express as well as the employee's spouse and family members. Guests of employees were also allowed to attend. The party included a buffet dinner, a raffle, a disc jockey playing music and four cash bars serving alcoholic beverages.

Mr. Faria attended the party with his wife, Renee Mackey.¹¹ She was employed by Federal Express in Anchorage at the time as a manager. Mackey was the primary coordinator for the party.¹² She and Faria intended to stay at a complimentary room that night provided by the Sheraton to the primary Federal Express representative.¹³ They arrived at the hotel around 7:00 p.m.

Most of the party activities occurred in the ballroom on the hotel's second floor. The party in the ballroom ended at midnight and the room closed. At around 12:30 a.m., many attendees including Mr. Faria and Ms. Mackey went to the first floor lounge (Legends) where

10 Exhibits C-2. Technology Services is a different division of Federal Express than the division that includes Anchorage hub operations.

11 Some exhibits refer to Mr. Faria and Ms. Mackey by their first names Bathwell ("Bat") and Renee respectively. The Human Rights Advocate referred to them as "the Farias." Opening Statement. Federal Express documents refer to her as Renee Faria and Renee Mackey.

12 Exhibit R-112, Direct and cross-exam of Mackey ("I planned the holiday party for the hub."), Exh. 29.

13 Cross-exam of Mackey, Exhibit R-115 (hotel register signed by Mackey for Company: Federal Express.). Mackey was appointed to administer the fund monies for the party. Direct exam of Stallone.

alcoholic drinks continued to be served and approximately 30 individuals mingled and engaged in dancing and talking.¹⁴ The company considered activity in the lounge that morning to be a continuation of the party and “part of a FedEx sponsored function.”¹⁵

Drinking alcohol was a predominant activity at the party.¹⁶ Mr. Faria and Ms. Mackey drank alcohol at the hotel that night. They both were under the influence of alcohol by the end of the party.¹⁷ Daniel Kloeckl, a package handler making an hourly wage at Federal Express at that time and currently a company employee for eight years, also attended the party. He was under the influence of alcohol by the end of the party.

Dancing in the lounge after 12:30 a.m. included pairs as well as larger groups. Mr. Kloeckl danced during multiple songs as did Ms. Mackey. Kloeckl asked Mackey to dance and she accepted. He did not know her, did not know that she was a manager at Federal Express, did not know Mr. Faria, and did not know Mackey’s relationship to Faria.¹⁸ According to Kloeckl’s testimony under direct exam, she was smiling at him as they danced and “she was hanging all over me.” Kloeckl characterized their dancing as dirty dancing. Richard Viglione testified under cross-exam that Mackey as not was not really dancing, “she was falling down most of the time.” “She was in a state where she wasn’t able to stand up straight.” Senior Human Resources Representative Barbara Stallone testified that she was at the party and observed Mackey over the

14 Mackey testified at the hearing that “several hundred people” were at Legends that morning after the party ended. Direct exam of Mackey. In contrast, less than a week after the incident she told another Federal Express employee that there were 20 company employees at the bar. (Exh. R-114) Kloeckl represented that 20-30 individuals were present at the bar. Exhibit C-125, condensed p. 3 (Kloeckl). Federal Express employee Michelle Thompson told Mitchell a “couple dozen folks” were at the lounge. Exhibit 68, p. 6. Richard Viglione testified that 20-30 employees were at the lounge. Cross-exam of Viglione.

15 Cross-exam of Harris.

16 According to Renee Mackey, Faria’s wife, “some people brought their own booze,” and there was a “lack of control over the drinking at the party.” Direct exam of Mackey. Faria was asked on direct “Were other people drinking at this Christmas party?” He responded “Oh yes, lots of people. Almost everyone.”

17 Mr. Faria “had 6-7 drinks” of tequila and tonic at the hotel that night. His drinking occurred between 7:00 p.m. and 12:30 a.m. Exhibit C-63. According to Faria, he and his wife decided “to go down [to the lounge] and have a nightcap before we went up to our room.” They went with “several of our friends.” In the lounge, Faria and Mackey sat at separate tables. Faria recalled that “somebody had ordered me a drink,” but “I don’t think I drank it.” Direct exam of Faria. The report of Robert Leger, the Security Specialist at the Anchorage Hub, indicates that Faria stated he and his wife were “pretty drunk.” Exhibit R-115. At the hearing, Faria denied that he told Leger he was pretty drunk. Direct exam of Faria (rebuttal). In contrast, his December 15, 1998 statement to Mitchell admits “I was over the legal limit of being drunk.” Exhibit C-12. Mackey testified at the hearing “I had some drinks” but “don’t know how many.” She also testified “I don’t know if I was drunk or not,” although she stated “I wouldn’t want to drive though.” Direct exam of Mackey, Exhibit C-60. Faria told Leger during the investigation the day after the incident that “I was taking care of Renee because she was pretty drunk.” Exhibit C-125, condensed p. 5. Faria told Federal Express during GFT Step 1 that his wife had a lot to drink. Exhibit C-63.

18 Cross-exam of Kloeckl.

course of the evening. In her words from cross-exam, Mackey "became increasingly more intoxicated during the course of the evening," and she was "stumbling" drunk. Another Federal Express employee, Michelle Phillips, testified that under direct exam that Mackey "was drunk" in the lounge that morning.

After they danced, Ms. Mackey indicated to Mr. Kloeckl that she needed to go to the restroom. The time was slightly after 2:00 a.m. Kloeckl agreed to escort her there and he did. According to him, he was "being a gentleman." Kloeckl testified under direct exam that he "could have been holding her arm" as he "walked her there." He also told Robert Leger that "Mackey was too inebriated to walk unescorted."¹⁹ Mackey's level of intoxication at the time of the incident is not a central issue in this case, but it does have a bearing on her status as a percipient witness. In addition to comments Faria and Kloeckl made about her level of intoxication, Mackey testified that she was counseled for being drunk at the Christmas party" and, in her words, a memo was placed in her personnel file that her "conduct had been inappropriate and very embarrassing to the corporation."²⁰

At the hearing, Mackey denied during her direct exam that she danced with Kloeckl, and she denied that he escorted her to the ladies room. When asked "Do you know if you danced with him [Kloeckl] in the lounge?" she quickly and emphatically responded "I did not dance with him in the lounge." She then was asked "Do you know if he escorted you to the ladies room at some point?" and she immediately responded "No, he did not."²¹ Based on overwhelming evidence to the contrary, observation of Mackey's demeanor while testifying, and given her obvious incentive to support her husband's claim in this case, her testimony at the hearing on these two issues was not credible. Notably, Mackey had the following colloquy with Robert Leger, the Federal Express investigator, on December 15, 1998.

19 Exhibit C-125.

20 Direct exam of Mackey.

21 Mackey was also asked "Do you remember seeing Mr. Kloeckl in the lounge?" She answered "No, I don't." Mackey additionally denied "speaking to [Kloeckl] at all" and even seeing him at the party before the lounge incident. Direct exam of Mackey. Mr. Kloeckl's account was given greater evidentiary weight. Additionally, Michelle Phillips, a Federal Express employee who was in the lounge that morning, testified telephonically that she saw Kloeckl ask Mackey to dance, that "they had danced," and that Kloeckl went with Mackey when she went to use the restroom. Although she was not on the dance floor, in Phillips's opinion, Kloeckl followed Mackey but "he was not invited to go with her." Direct exam of Phillips. Her opinion contrasts with Faria's statements to Leger during the investigation that Kloeckl told him in the hallway at the hotel "I'm escorting her [Mackey]" and that "[Kloeckl] had escorted her to the bathroom." Exhibit C-125, condensed pages 5-6. The administrative law judge finds that Kloeckl's in person testimony was more credible than that of Phillips concerning escorting Mackey to the restroom.

Q Do you remember this other man that was there, if he escorted you to the restroom?

A I think he did. I believe he did. I'm not real sure, but I think he did.

Both restrooms near the Legends lounge on the first floor of the Sheraton Anchorage Hotel are located off of a short narrow hallway that is about six feet wide and extends from the main lobby and atrium area approximately twenty feet. Mackey entered the women's restroom and Kloeckl waited in the hallway for her to return.²² Shortly thereafter, Faria had a physical confrontation with Kloeckl in the hallway, resulting in Kloeckl bleeding in the nose and lip area.²³ No one other than Faria, Mackey and Kloeckl witnessed the incident. According to Kloeckl, he was struck by Faria, impacted the wall, and then fell to the floor. Kloeckl immediately went to the restroom to clean up the blood on his face. Faria and Kloeckl agree that Kloeckl never struck Faria.

The incident resulted in Mr. Faria being suspended from employment during Federal Express's investigation of the matter and, ultimately, Faria's termination from employment as a consequence. Faria challenged his employment discipline throughout Federal Express's grievance process. He filed an Equal Employment Opportunity (EEO) complaint and a subsequent complaint with the State Commission for Human Rights, both of which allege discrimination on the basis of race.

Multiple investigations took place regarding the incident. Hotel security and Anchorage Police Department (APD) conducted investigations. The State Commission for Human Rights also later conducted an investigation. Faria challenges Federal Express's processes relating to his discipline. The facts surrounding the incident in the hallway, which the parties dispute, therefore are of paramount significance and central to resolution of this case. Consequently, a chronology is useful. Pertinent statements made by parties to the incident (Faria, Mackey and Kloeckl) are

22 Faria stated that Kloeckl was standing in the hallway mid-way between the restrooms. He also stated that Kloeckl was standing just outside the women's entrance.

23 Kloeckl stated in his deposition that he was unsure if his lip bled because Faria hit him. ("I don't think so. I don't remember it. I don't remember that."). Deposition of Kloeckl, Exhibit C-106, condensed page 27. It is possible he bled from his face striking the wall or floor after Faria's impact. His statements that Faria struck him in the face causing him to bleed in the lip / nose area, made to hotel security immediately after the incident (Exh. R-115) and to Leger at Federal Express during the company's investigation (Exh. R-115), are given greater evidentiary weight. Kloeckl also testified under direct exam that his nose was bleeding "because of the hit," and he had a bruise on his forehead from impact with the wall. Federal Express employee Sharon Jayne told Mitchell during an interview in Faria's GFT process that Kloeckl "had a cut on his mouth." Cross-exam of Mitchell, Exhibit R-127, p. 6-127.

set forth in the remainder of this section. Processes related to Faria's post-termination complaints are also presented in chronological order, including pertinent statements by the parties and Federal Express employees. Findings are made by the administrative law judge as necessary.

Security for the Sheraton Anchorage Hotel was at the scene within minutes of the incident. They performed the most contemporaneous investigation of the incident based on interviews that commenced at 2:30 a.m. The hotel security Incident Report²⁴ includes the following statements in its narrative:

Mr. Faria admitted to me he had hit another person [Kloeckl] who was too friendly with his wife.

Mr. Faria stated he had gone to the men's lobby restroom first. Mr. Kloeckl a few minutes later escorted his wife [Mackey] to the lobby restrooms. Mr. Faria saw them together and felt Mr. Kloeckl was being to [sic] friendly with his wife (i.e., talk and mannerism). Mr. Faria then punched Mr. Kloeckl in the face by his own admission.²⁵

APD was unavailable to take Kloeckl's interview at the hotel, so he went home after being picked up at approximately 3:45 a.m. by a friend. Faria waited on the first floor for an APD officer to show up at the hotel and interview him. After no officer arrived, he went to his room. Faria later reportedly gave a statement to an officer who contacted him at his hotel room. The statement was not introduced as evidence. The next day at work, December 14, 1998, hotel security called Robert Leger at Federal Express and recounted the incident to him. He contacted Faria's immediate supervisor, Fred Mitchell, about the incident. Mitchell communicated with Faria and asked him to submit a statement regarding his version of what happened at the hotel after the Christmas party.

A representative of the Sheraton also called Mackey on Monday and expressed displeasure at "the lack of control over the drinking at the party" and the hotel's concern about "people bringing in their own liquor," "underage drinking going on," "an incident that happened in the lobby," "and also an incident in the parking lot."²⁶ Mackey testified the incident that happened in the lobby was "probably what we're here about today [at the hearing]."

24 Exhibit R-115.

25 Faria's statement that he went to the restroom first, before Mackey and Kloeckl, contradicts representations at the hearing that he went to check on his wife at the restroom.

26 After the party concluded, the hotel found liquor bottles under tables in the ballroom. Direct exam of Mackey.

As part of Federal Express's investigation, Leger conducted tape-recorded interviews of the only known witnesses to the incident, Faria, Kloeckl and Mackey. Leger interviewed Kloeckl and Faria on December 14, 1998. The written transcript of Kloeckl's interview taken at 11:00 a.m. includes the following:

Kloeckl: Okay. What happened is I was just dancing with everybody at work. You know, I was just dancing. . . . And then all of a sudden, I just danced with one girl. I didn't know who she was; some blonde-haired lady I didn't know. So after our dance, she was dancing and all of a sudden she was -- you know, everybody was drinking, but she was way overdrinking. So she was kind of, you know, hanging on to me. I'd slow dance. So I just told her, you have to sit down because you are too drunk to dance. And then as soon as she sat down, she said she had to go to the bathroom, but she couldn't go to the bathroom. She would never have made it there. So I just walked her to the bathroom door, and she was inside and I was just -- I didn't know if she was married or what she was. So I waited till she gets done, I was going to bring her back to where the people are.

And while I was standing here waiting for her, I didn't even see him coming. He just -- I didn't even know his name. He just started swinging and hit me like four or five times, and I just -- I mean, it was just -- you know, I never have fought. I don't fight. You know, I don't swing back. I didn't do nothing. I just -- you know, all of a sudden the security guy was there. I was in the bathroom. I was cleaning to stop the blood.

Leger: What happened to you? I mean, did he hit you in the nose, the eyes, or what?

Kloeckl: Yeah, in the face. You can feel under my nose and my -- in here where he hit me.

Leger: Did he give you a bloody nose?

Kloeckl: Yeah, a bloody nose and my lip -- my lip, my nose, and my forehead. I didn't even know he was fighting. I mean, he just walked up to me and he just started swinging. He didn't say anything to me. That's -- that's what really bothered me. He could have said, what are you doing with my wife or, you know, that girl or whatever. You know, he could have just mentioned something and I could have told him what I did. I walked her to the bathroom because she couldn't walk; she was too drunk.

And he just started swinging, and then -- and then later on I just waited -- he was outside the entrance out with security waiting for the police to come, and I was inside the bar. Another security just kept him away, you know, make sure nothing else happened. But I was planning to do nothing about it.

* * *

Leger: Did she make any comments to you of you touched me, or anything like that? I mean, any type of inappropriate contact between the two of you?

KloECKl: No. We didn't even talk. We just -- as soon as we started dancing, she started getting close to me, and I mean, she was just, you know, too drunk. So I just told her she has to sit down. And then all of a sudden she wanted to go to the bathroom, and I helped her about a minute, you know, a couple minutes.²⁷

Leger interviewed Mr. Faria shortly after noon that day. The transcript of the interview includes the following:

Faria: And I went to the bathroom. I came out, there was -- when I went into the bathroom, there was a guy standing by the door of the ladies' room. The bathrooms -- the women's on the right, the men on the left, and this guy standing in the middle. I didn't think anything. I came out, he was still standing there. And then I can't remember who told me -- who told me my wife was in the bathroom, to wait for her. Okay.

So I'm standing out in the hallway. It didn't take very long, probably two, three minutes. She came out and so I said, hey, how is it going, you ready to go upstairs? She said -- my wife was pretty drunk by then, you know. And I don't know what she said, so I was -- she was kind of tipsy. So I was holding her with my left hand. And then this guy comes up and says, what are you doing? Who are you? I didn't know what was going on. I said what? He goes, who are you? I said, well, I'm her husband. He said, well, I'm escorting her. What? I said, what? And then I kind of pushed him -- he was kind of -- I don't know how close he was, but I kind of pushed him away. And then I don't know what happened after that.

* * *

Leger: Did you use an open hand or a backhand or a fist or --

Faria: I'm not sure. I know the first time I pushed him like that. And the second time I'm not sure, you know, because it was too close. . . . I don't think I punched him or anything like that.

* * *

To me -- in all honesty, to me I thought he was accosting Renee, and that's the only reason I started pushing him away and stuff. I don't know why -- I don't know why he was there. I guess he talked to Brett Hughes later on, I guess. He had escorted her to the bathroom. I don't know why or anything like that. She doesn't remember but, you know, that's what I thought was happening. I thought he was accosting her, and that's the only reason.

Leger: Did he make any gestures to you as far as his -- as physically threatening you other than just getting close in your face?

Faria: Oh, I don't (interruption) like I said Renee was falling, so I was holding her up, and when I turned, he was kind of right there. I was doing that and then -- then I turned around and he was still there, you know. And I pushed

²⁷ Exhibit C-125, condensed pp. 2-4. KloECKl considered filing a criminal assault charge, but he never did.

him away again, and he was saying something to me, and I – you know, I don't know what he was saying –

Leger: Okay.

Faria: -- or why he was talking to me at all. Tell you the truth, I don't know. I don't know why he was there or anything.

* * *

Leger: Have you talked to Renee about this?

Faria: She doesn't even remember.²⁸

Leger tape-recorded his interview of Mackey the next day, December 15, 1998. She provided the following statements.

Mackey: Well, the FedEx party was over, and a group of us headed downstairs to the bar, which I believe is called Legends, on the first floor of the Sheraton. The party was over, and we went down there, and there was a group of us. At one point I had to use the restroom. I went to the restroom, and I came out, and my husband Bat was there, and there was also another gentleman there. And went over to Bat, and this other person came up to Bat and asked him something about who – who was he, and I think he said he was going to escort me back to the – the table or to the bar.

And Bat said that he was my husband, and he kind of pushed the other guy. And then the other seemed to get up pretty close to Bat at that point. And I think Bat pushed him again harder. And – well, he did not push harder. And then Bat and I went back to the bar after that.

Leger: Do you remember this other man that was there, if he escorted you to the restroom?

Mackey: I think he did. I believe he did. I'm not real sure, but I think he did.

* * *

Leger: Okay. If you were driving, would you be considered intoxicated at the time this happened?

Mackey: Yes.

Leger: Okay. Do you remember any injuries to either party as a result of this altercation between Bat and this other guy?

Mackey: Seems to me as soon as Bat pushed him that second time, we went to the bar, and I didn't really notice injuries to either one of them at that point.

Leger: Did you hear of any later?

Mackey: I heard that – that Bat had hit him in the mouth or something.

²⁸ Exhibit C-125, condensed pp. 5-6. Faria also told Leger on December 14, 1998, two days after the incident, that Renee [his wife] did not remember anything about the confrontation. Exhibit C-62.

Leger: This was at the bar you heard that?

Mackey: Yeah.²⁹

On December 15, 1998, Faria faxed to Mitchell a written statement that represented:

I was at the Anchorage Sheraton Hotel on Saturday December 13 [sic] for the FedEx Holiday Party. My wife and I had a room at the hotel as did a lot of other people who attended the FedEx party. After the party was over a few of us went down to the lounge in the hotel lobby.

As the evening progressed, I should say early morning progressed, I went out to use the restroom. As I entered the Mens restroom I noticed some guy standing in front of the Womens restroom, thought it was strange, but continued on my way. When I exited the Mens restroom I noticed that he was still there and I continued out into the lobby.

One of my wifes friends told me that she was in the restroom, so I waited for her in the lobby. When she exited the restroom I walked toward her and asked her if she was ready to go upstairs. This guy that was hanging out by the doors started to grab for her, so I quickly held her with my left arm and this guy started asking me what I was doing and who I was. I was taken aback by this and pushed him away from us. My wife started to fall so I held onto her with my left arm.

I was trying to talk to her when this guy started getting in my face. (It felt like his face was right next to mine). So I pushed him again, it may have been in his face, but I'm not sure. Then my wife and I continued into the lounge to retrieve her things.

This is when the hotel security came and got me. I got one of my wifes friends to escort her to our room and I waited with security for the Anchorage Police to arrive. After a long while, I went up to the room and waited for them. They finally arrived around 4 in the morning. I gave them a statement and they left.

In conclusion, I must admit that I was over the legal limit of being drunk, that's why we were staying at the hotel. I did not know this guy or why he was hanging around the restrooms. I truly felt that my wife was being or was about to be accosted by this stranger.³⁰

In addition to contacting Faria, Mitchell communicated with two other Federal Express employees on December 15, 1998 about the incident at the Christmas party. He contacted his immediate supervisor, Charles "Buddy" Williamson, who works in Memphis, about the incident but received no recommendation from Williamson. Mitchell also advised Holly Harris, Senior Human Resources Representative at Federal Express, about the incident. Mitchell's e-mail jointly addressed to them, which he transmitted after receiving Faria's written statement, states:

29 Exhibit C-125, condensed p. 7.

30 Exhibit R-31 (emphasis added).

“At this point, I do not see a lot of options except for termination. I’ll followup with you as I get the written statements from security.” [sic]³¹

On December 15, 1998, Ms. Mackey also provided her immediate supervisor a statement that set forth her recollection of the incident. The brief handwritten account provides

A group of us headed to the bar downstairs once the FedEx Holiday [sic] party was over. We were talking and having a good time. At one point, I needed to use the restroom. I went t[o] the restroom. When I came out of the restroom, my husband Bat was waiting for me. I went t[o] him. Another man was there. He said something to Bat asking him who he was. Bat told him he was my husband and I think Bat pushed him. The man came up close t[o] Bat and Bat hit him. Then we returned t[o] the bar.

This is to the best of my recollection.³²

Mitchell made the decision to impose an investigative suspension against Faria. By fax transmission at around 5:50 p.m. on December 15, 1998, Mitchell informed Faria that he was suspended with pay that day. The memorandum communicating this action states:

Effective immediately, you are being placed on suspension with pay investigation [sic] of potential violation of the Policy 2-5, Acceptable Conduct, The People Manual. Please understand that this suspension is not punitive in nature.

* * *

If you have any questions regarding corporate policy and/or responsibilities during this time please call your Personal Representative, Holly Harris, at (901) 324-8899.³³

Faria signed the memorandum to indicate that he received it. Although the memorandum does not reference the incident between Faria and Kloeckl at the Sheraton, Faria knew that the incident was the basis for his “suspension with pay pending investigation.”³⁴ The prior day, December 14, he had been interviewed about the incident by Robert Leger at Federal Express. His immediate supervisor, Fred Mitchell, had contacted him earlier this day, December 15, and asked him to submit a statement. Faria submitted a written statement about the incident as requested. The Investigative Suspension memo Faria received at around 5:50 p.m. on December 15, 1998 resulted from the statements he gave to Leger and Mitchell. Mitchell’s Investigative

31 Exhibit C-42.

32 Exhibit R-115 (emphasis added).

33 Exhibit C-13. Policy 2-5 is set forth in the discussion section of this decision.

34 Testimony at the hearing indicated that the rules regarding the contents and detail for an investigative suspension letter “are not as stringent” as a termination letter. Direct exam of Mackey. Federal Express supervisor Steve Freno testified on direct exam that it is sufficient for an investigative suspension letter to use minimal language.

Suspension Extension letter to Faria on December 18, 1998 identifies the "pending investigation of allegations that had been made against you concerning incidents that occurred at or immediately after the Anchorage Christmas party that was held the weekend of December 12."³⁵ In addition, Mitchell testified under direct exam that from the time he asked Faria for a statement until the time of termination, he talked with Faria numerous times about the status of the ongoing investigation and whether Faria "had anything to add to his statement."³⁶ Mitchell testified under cross-exam that Faria never questioned him about what "incident" Mitchell had based discipline upon, up to and including the date of the termination letter.

On December 17, 1998, an APD officer interviewed Kloeckl. The police report prepared after the interview states "I contacted Daniel Kloeckl, who stated he had been assaulted at the Sheraton on 12-13-98."

Kloeckl stated he had been just outside the women's bathroom at the Sheraton Hotel at approx. 0220 hrs. on Sunday 12-13-98. He stated 'out of nowhere,' a man, later identified as 'Matt' [Bat] struck him 3-4X in the face w/ his fist. Kloeckl did not have any injuries or bruises on his face, where he indicated the suspect had struck him.³⁷

The APD officer did not interview Faria, and no criminal charges were brought as a result of the complaint.

On December 18, 1998, Faria was notified that the investigation was still ongoing. A letter of that date from Mitchell to Faria states:

On December 15 you were placed on Suspension with Pay pending investigation of allegations that had been made against you concerning incidents that occurred at or immediately after the Anchorage Christmas party that was held the weekend of December 12.

35 Exhibit C-14. The extension was due in part to Faria having requested that interviews of six people be undertaken in Anchorage. Cross-exam of Harris, Cross-exam of Mitchell, Exhibits R-37, R-127. Buddy Williamson traveled to Anchorage and conducted the interviews. An interview of Mackey was not accomplished because she was unavailable. Williamson's notes for Mackey's interview indicate that she was out sick, he tried to reschedule, and she did not respond back to him while he was in Anchorage. Exhibit R-127. The extension may also have been attributable to the fact that Leger's son was in an accident. Cross-exam of Stallone, Cross-exam of Williamson, Exhibit R-114.

36 Exhibit C-55, Exhibit R-120. Faria testified that he did not "want to discuss anything at that time." Direct exam of Faria (rebuttal).

37 Exhibit C-64. Although not part of Federal Express's investigation, Kloeckl also provided the following account to supervisor Steve Freno. Kloeckl said that he was standing outside the bathroom and some woman who was very drunk came out and fell on him. Kloeckl picked her up and propped her up against the wall. He turned around and "he got clocked." He said "he got punched in the face and he hit the ground." Direct exam of Freno. This statement about Mackey falling contradicts Faria's version of that event. Faria would not be justified to strike Kloeckl in either event.

The investigation is still ongoing. For that reason I am extending this suspension for additional [sic] seven (7) days with pay. This additional time will allow me to ensure I have all pertinent information and have adequate time to review it. The extension will run through Tuesday, December 29.³⁸

Leger completed his Investigation Report for Federal Express on December 21, 1998. In addition to interviewing Faria, Kloeckl and Mackey, he spoke with a representative of security for Sheraton Anchorage Hotel. The synopsis in Leger's report states

On December 12, 1998, Manager Bathwell Faria, # 99218 and his wife, Manager Renee Mackey, # 95185, attended the FedEx sponsored Christmas party at the Sheraton Hotel in Anchorage. By their own admissions, both managers had consumed enough alcoholic beverages to be considered legally intoxicated.

After the party, on the morning of the 13th, while still in the hotel, hourly Daniel Kloeckl, # 298629, escorted Mackey from the dance floor of the hotel bar to the toilet. Per Kloeckl's statement, Mackey was too inebriated to walk unescorted and had asked to go to the toilet. While waiting for her to exit, Faria noted an individual outside of the toilet and when his wife exited, approached to escort her back to the bar. Kloeckl stated in his interview that when Faria approached him, Faria struck him in the face without commenting to him, causing his nose and lip to bleed and a bruise on his forehead. Kloeckl stated that he did not return the blows and never struck Faria. Faria stated when he saw his wife exiting the toilet, he noted Kloeckl near the exit, asked him what he was doing and when his wife began to fall, pushed Kloeckl a time or two to get him out of the way.

Hotel security was called to the scene for a reported fight. Hotel security questioned Faria who told them that he "had hit another person who was too friendly with his wife."³⁹

C. Mr. Faria's termination from Federal Express

On December 31, 1998, Federal Express terminated Faria's employment. A letter that date from Mitchell to Faria gave notice that termination was effective January 1, 1999.⁴⁰ The letter states

On December 15 you were placed on paid suspension pending investigation of alleged violations of Acceptable Conduct policy [sic] P2-5 (copy attached). Based on an in depth investigation of the incident, it is my conclusion that your actions were inappropriate and your conduct was unacceptable. The fact that you are a member of management makes your offenses even more serious. Therefore, the

38 Exhibit C-14. An extension letter need not contain more information or different information than the original suspension letter. Direct exam of Mackey.

39 Exhibit R-115.

40 Exhibit R-34.

decision has been made to terminate your employment with Federal Express effective January 1, 1999.

If you feel this action is unfair, you may first hold an open and frank discussion with your immediate manager to attempt to resolve your concern or problem. You may also pursue this under the Guaranteed Fair Treatment Procedure, P5-5 (copy attached)⁴¹

Upon receiving the termination letter from Mitchell on December 31, 1998, Faria signed the letter and read its contents. Faria asked Mitchell if they were going to discuss the termination or if he had made up his mind. According to Faria's deposition testimony, the following discussion took place.

Q – Okay. After you read the letter did you say anything to Mr. Mitchell?

A – Yes. I asked him if we're going to discuss this or if he had made up – obviously he had made up his mind.

Q – And what did he [Mitchell] say in response?

A – He says yes, we can discuss it. But I said – I said there was no use discussing it, he had already terminated me.⁴²

In contrast, Faria was asked under cross-exam at the hearing "After Mr. Mitchell gave you your warning letter for your discharge [termination letter], did he offer to discuss it with you?" Faria responded "I don't remember." His lack of recollection is not credible given his demeanor at the hearing when responding to the question as well as his prior deposition testimony on this central issue. Mitchell testified under cross-exam that Faria never asked him "what incident?" and that he asked Faria "if he had anything to add." The administrative law judge finds that, at the meeting in which Mitchell gave Faria the termination letter, Mitchell offered to discuss the circumstances surrounding Faria's termination.

Faria testified at the hearing that he did not have "an open and frank discussion" with his immediate supervisor as invited by Mitchell in the December 31 letter. The evidence referenced above indicates, however, that Faria was given an opportunity for an open and frank discussion. He did not avail himself of the opportunity.⁴³

Faria additionally testified that he "didn't know what was going on with the

41 *Id.* (Emphasis added).

42 Exhibit C-130, deposition of Faria, p. 83 (emphasis added).

43 Cross-exam of Mitchell.

investigation,” implying that this was a reason for his decision not to add anything to what he had told Mitchell. This argument is refuted by Faria’s own testimony. He testified under direct exam that Mitchell consistently told him that he was terminated “because of the incident” with Kloeckl at the hotel.⁴⁴ Under cross-exam, Faria admitted that when he was asked by Mitchell if he had anything to add he responded “no.” Moreover, Faria acknowledged at the hearing that his statement to Mitchell dated December 15, 1998 addressing the Kloeckl incident was provided in response to Mitchell’s e-mail to him on December 14, 1998 seeking his written statement “regarding what happened at the Christmas party last weekend.”⁴⁵

Federal Express’s Policy 2-50 **Performance Improvement** (Exhibit C-123) provides as follows concerning the termination of an employee:

Termination Letters. When an employee is terminated, a termination letter must be . . . [illegible] should contain

- Date of deficiency or incident.
- Facts supporting termination.
- Policy violated (A copy of violated policy should be attached to the termination letter).
- Reference to the employee’s privilege to pursue the 5-5 Guaranteed Fair Treatment / EEO Complaint Process contents (Mackey end of testimony and policies 2-5, 2-50)

According to Steve Freno at Federal Express, Policy (Acceptable Conduct) and Policy 2-50 (Performance Improvement) are distinct provisions and the above words from 2-50 do not require the company to include certain information in a termination letter. Freno was asked on direct exam, “So, you wouldn’t look at [exhibit C-] 123 to figure out what should go in a termination letter for somebody who had violated the Acceptable Conduct policy?” He responded “No.”

Mitchell’s December 31, 1998 termination letter to Faria does not expressly reference the date of the incident. The letter similarly does not provide specificity concerning facts supporting termination, other than to state conclusively that “your actions were inappropriate and your

44 Direct exam of Faria. Faria also testified that he understood Leger to be referring to “the altercation outside the women’s restroom.” Cross-exam of Faria.

45 Exhibit R-107, Cross-exam of Faria (rebuttal).

conduct was unacceptable.” It may not reasonably be inferred, however, that Faria did not know of the date of the incident or the factual basis for his termination. The termination letter references the December 15, 1998 suspension with pay imposed on Faria for alleged violations of Acceptable Conduct policy. Although the December 15 disciplinary action does not identify the incident, the subsequent Investigative Suspension Extension letter dated December 18, 1998 identifies the suspension as involving “allegations that had been made against you concerning incidents that occurred at or immediately after the Anchorage Christmas party that was held the weekend of December 12.” The letter further states that termination is based on “an in depth investigation of the incident.” Faria did not raise the issue of lack of knowledge about why he was fired at GFT Step 1.⁴⁶ Other evidence in this case overwhelmingly establishes that Faria knew he was discharged for his physical confrontation with Kloeckl.⁴⁷

The termination letter identified the company policy violated (Policy 2-5 Acceptable Conduct), and a copy of the policy was provided to Faria with the letter. Faria was also advised of his opportunity to pursue the company’s Guaranteed Fair Treatment Procedure (Policy 5-5), and a copy of the procedure was enclosed with the letter.

D. Events following Mr. Faria’s termination

1. GFT

Faria pursued Federal Express’s internal appeal process entitled Guaranteed Fair Treatment Procedure (GFT), a three-step process administered by the company’s Employee Relations Department.⁴⁸ Federal Express management received Faria’s notification that he was pursuing GFT on January 5, 1999. A telephonic conference call, which was common for Step 1 proceedings at Federal Express, was held by Williamson and Faria was included and allowed to speak. Based on Faria’s identification of Federal Express employees at the Christmas party, Mitchell took statements for Williamson on January 13, 1999 from the following individuals: Sonya Hewes, Sharon Jayne, Richard Viglione, Daniel Kloeckl.⁴⁹ In a memorandum dated January 13, 1999, Williamson advised Faria that he was still conducting interviews with parties aware of the incident, and his final decision on GFT Step 1 would be extended until January 18,

46 Exhibit R-38.

47 See, e.g., Exhibits C-12, R-55, R-56, R-58, R-62, R-65; Direct, cross and re-direct exam of Faria (tapes 1A, 1B, 2A, 11A, 11B); Direct, cross and re-direct of Mitchell (tapes 9A, 9B, 10B), .

48 Exhibit C-17.

49 Exhibit C-127.

1999.⁵⁰

By memorandum dated January 18, 1999, Williamson decided: “After reviewing all pertinent documentation and information from the conference call regarding your GFT procedure, I have come to the decision to uphold the action of termination.” Williamson relied only on Faria’s conduct in the Kloeckl incident as a basis for termination and did not consider Faria’s prior discipline.⁵¹ He advised Faria in writing that if he disagreed with the decision, he had the right to pursue Step 2 of the GFT by submitting a written appeal within five days.⁵² Faria appealed.

Under Step 2, by letter dated February 2, 1999 from Federal Express Vice President Harry Dalton to Faria, the termination was upheld “based on the fact that this is [Faria’s] third incident of Acceptable Conduct that has occurred in your short tenure with the Technology Services Department.”⁵³

Federal Express employment records for Faria include three incidents in which Faria’s supervisor communicated with him in writing about matters of discipline. First, the “smokeshack” incident involved a November 26, 1997 incident arising from an alleged breach of managerial confidence regarding a shack on the ramp where employees congregated. Two employees were terminated for an altercation. That day, Faria was asked by management to assist with a personnel issue involving the two employees by searching for a weapon in an employee’s vehicle at the Federal Express parking lot. According to management, a breach of confidentiality occurred, and Faria was alleged to be the source of the breach.⁵⁴ After an investigation, Fred Mitchell determined that Faria was not the source of the leak. Mitchell informed Faria of his conclusion in a December 17, 1997 counseling letter⁵⁵ and reminded him of the need for confidentiality regarding personnel issues. The smokeshack incident did not result in a violation of company policy by Faria, and he was not disciplined. Although Dalton mistakenly referred to the smokeshack incident as discipline during the GFT process, Mitchell testified at the hearing that Faria’s counseling letter for the smokeshack incident was not

50 Exhibit C-37.

51 Williamson testified on cross-exam that “I did not consider anything other than the events surrounding the Sheraton Hotel incident.”

52 Exhibit C-38.

53 Exhibit R-39 (emphasis added).

54 Direct exam of Freno.

55 Exhibit C-11.

considered in his termination decision, although he thought it would have been permissible to do so.⁵⁶

The second incident occurred on February 16, 1998 and is referred to as the PRISM incident.⁵⁷ As the Manager of Technology Services, Faria had intentionally gained unauthorized access to confidential personnel information (salaries, payroll, bonus points) through the company's PRISM program. By letter dated February 16, 1998,⁵⁸ Mitchell informed Faria that an investigation led to the conclusion that Faria gained access to confidential PRISM information about his peers without proper authority or business need. Faria's PRISM ID had been used to access other managers' information. According to Mitchell, "[t]his is a serious violation of policy and trust" and it violates P & P 2-5 (Acceptable Conduct) and Finance Policy 20-2. The letter constituted a disciplinary action and was identified as a Warning Letter. The letter erroneously states "[t]his is the second such situation that has been brought to my attention since September 1997 when you joined Technology Services," as the smokeshack incident did not result in a violation of company policy or discipline. According to supervisor Steve Freno, a PRISM violation normally results in termination of employment, so Faria was showed leniency in this instance.⁵⁹ Holly Harris, with human resources, also testified on direct exam that Mitchell imposed less severe discipline on Faria than she recommended for the PRISM incident, based on her review of similar cases involving management employees.⁶⁰

The third incident is Faria's termination from employment on December 31, 1998. The three incidents therefore only resulted in discipline on two occasions for violations of policy 2-5 (Acceptable Conduct).

Vice President Harry Dalton's reference to a third incident appears to have been a mistake. Dalton upheld Faria's GFT appeal noting in an e-mail he wrote a "pattern of problems" by Faria and requesting someone else to prepare a letter with the appropriate wording for him to sign.⁶¹ The letter he signed erroneously refers to the smokeshack incident as a disciplinary

56 Cross-exam of Mitchell.

57 PRISM is a software program at Federal Express for personnel information.

58 Exhibit C-40.

59 Direct exam of Freno, Exhibit R-105. At least three managers including Faria were only given warning letters as discipline for the unauthorized PRISM use.

60 Cross-exam of Harris.

61 Cross-exam of Williamson, Exhibit R-128.

matter.⁶²

Faria was notified through the letter that if he disagreed with the Step 2 decision, he had the right to initiate Step 3 of the GFT to the appeals board. Faria submitted a Step 3 appeal on February 5, 1999. His letter states as grounds for the appeal:

1. My step 2 letter from VP Harry Dalton (attached) is in error. He alleges three incidents of the Acceptable Conduct Policy in which I have been involved in my tenure with the Technology Services Department. I am not aware of three incidents. He may be referring to a document dated December 17, 1997 (copy attached) in which I was exonerated of any wrongdoing in the incident referred to within that document as one incident. However, since the document clearly stated that I was not at fault, I did not interpret that as a disciplinary action nor does it state that it is. Please provide me with documentation to support Mr. Dalton's claim that there have been three incidents of the Acceptable Conduct Policy in my tenure with Technology Services.
2. I am GFTing the disciplinary action resulting from the incident that occurred at the Anchorage Sheraton Hotel on the morning of December 13, 1998. Mr. Dalton does not address his findings from investigating his incident and whether the discipline meted out in this was warranted. Instead, it appears that it was taken as a given that the previous investigation was sufficient and this infraction added to others justified my termination.
3. In addition, I believe that the investigation and my treatment has been discriminatory and unfair. (See attached letter that was sent to Fred Mitchell, Charles Williamson, and Harry Dalton).⁶³

Because Faria's Step 3 appeal included an Equal Employment Opportunity (EEO) complaint, the GFT process was stayed pending resolution of the EEO matter.⁶⁴ The EEO complaint dated February 16, 1999 alleged that Faria was treated more harshly through discipline (termination) because of his race. For the first time, Faria had an attorney with him. Faria argued that he did not understand why he was terminated.⁶⁵ He explained in his February 16, 1999 Employee Statement Form⁶⁶ why he felt he had been discriminated against:

1. I am a 49 year old Asian (Native Hawaiian) American. I believe that I have been treated far more harshly based on my race.
2. On December 31, 1998, I was terminated for an incident that was non-work related

62 Exhibit R-39 ("third incident of Acceptable Conduct").

63 Exhibit C-20.

64 Federal Express's GFT/EEO Procedure requires the Appeals Board to review all cases within ten days of receipt.

65 Cross and re-cross exam of Williamson.

66 Exhibit C-22.

and not my fault. The incident is as follows: (see attachment).

I believe that I have been treated far more harshly based on my race. I know of no other employee who has been terminated for a non-work related incident that was not their fault.

Attachment 1 with the Employee Statement Form includes the following representations by Faria about the incident with Kloeckl:

I left the lounge to use the men's restroom located in the lobby of the hotel. As I approached the men's restroom, I noticed a man acting in a bizarre manner standing very close to and directly in front of the door to the ladies restroom. I did not recognize the man. When I emerged from the men's restroom, the man was still standing close to and directly in front of the door of the ladies' restroom. I returned to the lounge. I was told that my wife had gone to the ladies restroom. I then left the lounge to wait for my wife in the hallway leading to the ladies' restroom. As I entered the hallway leading to the ladies' restroom, my wife came out of the ladies' restroom. At the same time, the man who had been lurking in front of the ladies' room door appeared to lunge for or grab my wife. I physically intervened to protect my wife. The stranger began yelling at me in a very belligerent and hostile tone. The stranger, in fact, had positioned himself right next to my wife and me and was yelling directly in my face. I pushed the man away and attempted to walk away with my wife. The man became more belligerent and threatening. Again, I pushed him physically away so the [sic] my wife and I could walk away. In the process, I may have pushed the man in the face. It was evident to me and my wife that the stranger was extremely intoxicated. When I returned to work on Monday morning, I learned that the stranger was a Federal Express employee named Daniel Kloeckl.

Incredibly, I, who was simply trying to protect my wife from bodily harm from an inebriated and menacing stranger, was placed on suspension pending investigation of the incident and subsequently fired. Mr. Kloeckl, who was clearly the instigator and aggressor in this incident, was neither suspended nor fired. Mr. Kloeckl is a white male.⁶⁷

Attachment 1 with Faria's Employee Statement Form includes the following reasons in support of his charge that he was "more harshly treated under [Federal Express] disciplinary rules than other non Asian (Native Hawaiian) Americans."⁶⁸

The letter dated 12/17/97 from my Senior Manager Fred Mitchell regarding counseling. That letter clearly exonerated me from charges that were made, never the less [sic], FedEx is now suggesting that this letter is now a disciplinary action. This incident involved a number of different people but I was the only one to receive this kind of letter. Disparate treatment because of my race.

67 Exhibit R-42, p. 6-109 (emphasis added).

68 Exhibit R-42.

* * *

My Termination letter dated 12/31/98 failed to provide me with an explanation of the facts and circumstances that was the basis for my termination. To this day, I still have not received a complete and detailed explanation of my discharge. It is therefore difficult to defend myself and respond to this grievance.

I was not given the opportunity for a frank and open discussion with my Senior Manager Fred Mitchell during the investigation of this matter. He already had my termination letter prepared before he talked to me and my back pay check had already been cut dated 12/30/98. In addition, during the investigation stage, no contact was made by Fred Mitchell for extended periods of time and the extension was extended for no reason.

In March 1999, Williamson informed Faria that the investigation was completed, that the evidence did not substantiate allegations of discrimination, and that GFT would resume at Step 3. The Appeals Board met later that month with the management team in Employee Relations to address Faria's GFT complaint. The group analyzed the facts surrounding his complaint and determined to uphold management's actions, thus concluding Step 3, the final stage of the GFT process.

During his direct examination at the hearing, Faria denied that he was given any details during GFT about the conduct he was alleged to have been involved in and that resulted in his termination. The evidence does not support this contention. Faria was aware throughout Federal Express's investigation that the conduct at issue involved circumstances surrounding his fighting with Kloeckl.

2. Human Rights Commission Complaint

Mr. Faria contacted the State Commission for Human Rights and obtained an intake questionnaire. He completed the questionnaire on February 24, 1999. Faria filed a complaint with the commission on June 7, 1999, alleging discriminatory conduct on the basis of race (Asian Pacific Islander) by Federal Express. Commission staff informally investigated Faria's complaint and determined on August 17, 2001 that his allegation of racial discrimination was not supported by substantial evidence. Faria requested reconsideration of this determination on August 28, 2001. On December 28, 2001, the executive director reopened the case. Just under two years later, on November 4, 2003, the investigations director concluded that Faria's allegation that Federal Express terminated his employment based on his race is supported by substantial evidence. A Notice of Commencement of Hearing Process dated January 28, 2004

states that informal efforts to eliminate the alleged discrimination were unsuccessful. Under AS 18.80.120(a) a hearing to answer allegations of the complaint is required. The Human Rights Advocate filed an amended complaint under 6 AAC 30.410(g) on February 25, 2004.⁶⁹

3. Administrative Hearing

After the case was re-assigned from the contract hearing examiner to the Office of Administrative Hearings, with a stipulated delay by the parties for good cause, the evidentiary hearing in this case commenced on September 12, 2005. Because alleged racial discrimination is the central issue in this case and, necessarily, inferences must be made from the evidence and credibility determinations made, the following testimony from the hearing is included for reference in the discussion section of this decision.

Faria's hearing testimony about the incident included the following. He was in the hallway as his wife approached him after exiting the restroom and

out of nowhere, the guy standing by the bathroom door is standing in front of me between my wife and I and he says "who the fuck are you?" I was surprised. . . . I said well, I'm her husband. I pushed him away and (pause) he was saying - I don't know what he was saying, but then I was holding onto my wife, then he came back and he was shouting obscenities and I don't know what he was saying because I wasn't paying attention to him. That's when he came back, the same time my wife sort of tripped, I don't know why, but either I tripped, or he tripped, or she just tripped on her own, I don't know. But I was holding her with my left arm and this guy's still getting into my face and that's when I pushed him again the second time. I don't know for sure where I pushed him or how hard I pushed him because I was concentrating on my wife."

Question: After you pushed this man, did you see what happened to him?

Answer: "No, I didn't."

Question: And do you recall which part of [his] body you pushed against the first and second time?

Answer: Uh, the first time I pushed him in the chest. . . . The second time I kind of just pushed up, I don't know what I hit, or if I hit him at all, or where I hit him. I mean, cause I wasn't looking at him really.

Question: And what did you tell hotel security?

Answer: I, I didn't tell them anything. They asked me if I was involved in an altercation there, and I said yes I was. And then they had me stand there, actually in the hallway again, in the bathroom around the corner from the uh, uh the front desk is right there. So I stood there for a while. I don't recall them asking me any questions or anything. . . .

⁶⁹ Exhibit C-2.

Under cross-exam, Faria was asked “[D]uring your physical altercation with Mr. Kloeckl, he did not touch you, did he?” Faria paused and was silent for four seconds then responded “No he did not.”

Kloeckl’s testimony at the hearing included the following. He only danced alone with Mackey for part of one song. According to Kloeckl, she was smiling at him as they danced and “was hanging all over me.” He walked her to the restroom due in part to the fact that she was so inebriated that she needed help to walk. Kloeckl did not remember Mackey coming out of the restroom. In Kloeckl’s words, Faria “came and hit me.” Faria “came out of nowhere” and “I didn’t see it coming.” “I don’t think I said anything [to Faria]”⁷⁰

Mackey’s testimony at the hearing was problematical in many areas including the following. She did not give a statement to either hotel security or APD that morning after the incident. While the exact level of her intoxication at the time of the incident is not at directly issue in this case, a preponderance of the evidence shows that she was very intoxicated and may not been a percipient witness to the central events. Her testimony at the hearing did not acknowledge that she fell, as referenced by her husband. When asked if she saw whether Kloeckl “hit the wall or the floor” after her husband impacted him, she responded “I didn’t notice,” despite apparently being within five or six feet of Kloeckl, and the fact that she was within her husband’s grasp according to him. She also testified that she did not see the initial contact her husband made with Kloeckl (“not the first time”) as well as

Kloeckl’s testimony about the incident was generally more credible than Faria’s. Kloeckl’s demeanor while testifying was believable. Both Kloeckl and Faria expressed at various times that they did not have a clear recall of all the events, perhaps due in part to being under the influence of alcohol that morning. Kloeckl’s story changed regarding the number of punches he received, but he admittedly was intoxicated at the time. Faria’s inconsistencies were more notable. He did not mention Kloeckl’s alleged expletives during his statements made more contemporaneously with the incident, in contrast with his clear recollection at the hearing. Also, at the hearing, Faria emphasized that Kloeckl came “out of nowhere.” That is how Kloeckl initially characterized Faria when recounting the incident. These are crucial facts (who struck first and what preceded the violence). Kloeckl’s statements and his testimony were more believable than Faria’s regarding who was the aggressor.

In addition, Mackey's statement to Leger on December 15, 1998 recounted that conversation in the lounge after the incident included that "Bat had hit him in the mouth or something."⁷¹ Faria's friend and co-worker Michelle Phillips testified during her cross-exam that Faria told her in the lounge that "he hit" Kloeckl.⁷² During Faria's direct exam rebuttal testimony, he denied that he spoke to Phillips after the incident. Based on the testimony of Phillips at the hearing, her 1/13/99 statement to Mitchell, and upon observing the demeanor of both Phillips and Faria while testifying, the administrative law judge concludes that Faria was not truthful when he denied that he spoke to Phillips after the incident. Faria's demeanor while testifying at the hearing was not believable in other areas where he was inconsistent or did not recall central facts regarding his actions that morning.

Faria's characterization of Kloeckl's conduct also directly bears on the central issue in this case. In Faria's written statement to Mitchell on December 15, 1998, he concluded "I truly felt that my wife was being or was about to be accosted by this stranger." (emphasis added) If it was the latter ("was about to be accosted"), Faria was not justified to strike Kloeckl.⁷³ The common definitions of accost are "to approach and address first" and "to solicit sexually."⁷⁴ The preponderance of the evidence in this case does not support a conclusion that Kloeckl accosted Mackey in the hallway. The preponderance of the evidence also does not support a conclusion that Kloeckl caused Mackey to fall in the hallway. Under cross-exam at the hearing, Mitchell agreed that Faria felt he was protecting his wife. That feeling does not justify his actions in this case. Faria could have walked away without engaging in violence.⁷⁵ Faria's equivocal statement on this central fact in the case ("was being or was about to be") is less credible than Kloeckl's account of the incident. The evidence in this case also does not support a conclusion that Kloeckl was soliciting Mackey in a sexual way while in the hallway. It is noted that Mackey did not complain about being sexually harrassed at the Christmas party or activities following it that

70 Direct and cross-exam of Kloeckl.

71 Exhibit C-125, condensed p. 7.

72 Phillips had been identified to Holly Harris by Faria as a person who was at the lounge the morning of the incident and as an individual who should be interviewed by Federal Express. Phillips testified that she had seen Kloeckl ask Mackey to dance and watched them dance and leave the lounge for the restroom.

73 Faria admitted under cross-exam that he did not feel threatened by Kloeckl.

74 Webster's II New Riverside University Dictionary, p. 71 (1988).

75 Mitchell stated in his deposition

Q . . . [D]id you believe that Faria felt his wife as about to be accosted by Mr. Kloeckl?

A In answer to your question, yes, but he could have handled the situation differently by just walking away with his wife.

morning at the hotel. Moreover, Kloeckl implied that Mackey invited his attention as they danced in the lounge, and there was much evidence to support the contention.

Faria claims to have been sitting in the lounge at a table next to his wife. Twenty to thirty Federal Express partiers, perhaps fewer, were in the lounge at around 2:00 a.m.⁷⁶ It seems improbable that Faria would not know that his wife was dancing with Kloeckl as he stated and, additionally, that Kloeckl assisted his wife to the restroom. Jealousy therefore may have provided the motive for his actions directed at Kloeckl. Michelle Phillips stated under cross-exam that Faria returned to the lounge after he used the restroom and told her that Kloeckl was coming on to his wife.⁷⁷ According to Phillips, "He [Faria] said that he was not leaving Renee alone out in the lobby and he had asked him [Kloeckl] several times to leave Renee be, that is my wife. You need to leave her alone." Phillips also testified that Faria went to the restroom area for the purpose of asking Kloeckl to leave his wife alone. Notably, Phillips did not recount anything about Kloeckl saying the inflammatory words "who the fuck are you?" In addition, she testified contrary to Faria that he never even went to the restroom – "he immediately came back to the table and sat down with me." If what Phillips said is true, Faria's contemporaneous accounts of the incident lack this vital information and contain inconsistencies on these points. If what she testified is untrue, her credibility on other matters she testified to is significantly diminished.

At the hearing, Faria testified under direct exam that Kloeckl stood between he and his wife in the narrow five foot hallway and asked "who the fuck are you?" Faria recounted the alleged question with a distinctly raised voice and obvious antagonism. Notably, Faria did not recite these highly inflammatory fighting words until long after he was discharged by Federal Express. In contrast, he told Leger during his interview at Federal Express on December 14, 1998, two days after the incident, that Kloeckl said "who are you?" and also that he "doesn't remember what [Kloeckl] was saying."⁷⁸

Based on the evidence and, having observed the demeanor of Faria, Kloeckl and Mackey

Exhibit C-130, Deposition of Mitchell, p. 55.

76 Exhibit C-63 (Approximately twelve people Faria knew went to the lounge.)

77 Phillips told Mitchell at her GFT interview on January 13, 1999 that she had danced with Kloeckl earlier in the evening but he "was a little 'strong' for me so I avoided him," and he was "too friendly" in her opinion, that Bat told her Kloeckl was "coming on to Renee." Exhibit C-68, p. 6 (Michelle "Thompson" statement).

78 Exhibit C-62.

while testifying, the administrative law judge finds that Kloeckl closely danced with Mackey as a pair in the lounge. She spoke with him and indicated that she needed to go to the restroom, and Kloeckl walked her to the restroom. While in the hallway, Faria struck Kloeckl in the face multiple times without sufficient provocation from Kloeckl and without justification for the use of such force. Kloeckl did not say "who the fuck are you?" Whether Faria struck Kloeckl repeatedly with a closed fist or not, Faria initiated the first physical contact and Kloeckl did not retaliate. All three individuals present at the incident made substantially contemporaneous statements about the incident, before the filing of a civil rights complaint, that Faria "hit" Kloeckl.⁷⁹ Faria's strikes caused Kloeckl to bleed from the nose and lip area. Kloeckl also bruised his forehead from impact with the wall or floor after being struck.

While alcohol played a role in the incident, its use by Faria, Mackey and Kloeckl does not provide an excuse for anyone's conduct regarding this incident. "The deciding factor" for Federal Express terminating Faria was the fact that Faria engaged in a violent physical confrontation with Kloeckl which was unjustified, not Faria's level of intoxication.⁸⁰

IV. Discussion

This section of the decision includes the analysis and addresses the evidence as applied to the counts in the amended complaint. Count I alleges that Federal Express terminated Mr. Faria's employment because of his race in violation of AS 18.80.220. Count II alleges that Federal Express treated Faria differently in the terms and conditions of his employment in violation of AS 18.80.220 by using a non-disciplinary memo in its termination decision, refusing to provide him a statement of the facts and circumstances of his termination during the grievance procedure, and denying him effective access to the grievance procedure.

The Alaska Civil Rights Act and the judicial test for unlawful employment practices

79 Exhibit R-115 (hotel incident report), Exhibit C-125, condensed pp. 2-7 (Leger interviews).

80 Direct exam of Mitchell. Mitchell testified under direct exam that factors surrounding the altercation that he considered in deciding to terminate included that Faria admitted he pushed Kloeckl more than once at a FedEx function. Faria's level of intoxication was addressed during the investigation. The executive director raised the issue at the hearing by asking Faria on direct "How would you describe your state with respect to the amount of drinking you had done [at the party]? Faria responded "I would say I was driving impaired. I was probably over the legal limit for driving." See also Exhibit R-31 ("I must admit that I was over the legal limit of being drunk, that's why we were staying at the hotel."). The Human Rights Advocate and Federal Express's attorney questioned witnesses at the hearing who attended the party about their level of intoxication and, even for witnesses other than Faria, Mackey and Kloeckl, about their perception of how intoxicated or impaired those three were. The fact that Faria was under the influence of alcohol was part of the factual circumstances underlying behavior that resulted in his termination. Exhibit C-130.

under the Act is discussed first. Alleged violations of AS 18.80.220 in Counts I and II are discussed next. Under 6 AAC 30.440(a), the executive director of the State Commission for Human Rights has the burden of proving the allegations of the complaint. The preponderance of the evidence standard applies.

A. Alaska Civil Rights Act

Faria seeks relief under the Alaska Civil Rights Act (AS 18.80.010 – 18.80.300). The Act is patterned after Title VII of the Civil Rights Act of 1964.⁸¹ The Alaska Legislature set forth the purpose of the Act at AS 18.80.200(a) and (b):

(a) It is determined and declared as a matter of legislative finding that discrimination against an inhabitant of the state because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy, or parenthood is a matter of public concern and that this discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety, and general welfare of the state and its inhabitants.

(b) Therefore, it is the policy of the state and the purpose of this chapter to eliminate and prevent discrimination in employment . . . because of race, religion, color, national origin, sex, age, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood.

AS 18.80.220(a)(1) prohibits an employer from discriminating against a person because of the person's race. The statute provides in pertinent part

(a) Except as provided in (c) of this section, it is unlawful for
(1) an employer . . . to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race . . .

The test for unlawful employment practices under AS 18.80.220 is provided by case law. Under Alaska and federal law, where there is no direct evidence of discriminatory intent – as is usually the case, courts use a three-part burden shifting test to determine whether an individual the subject of unlawful discrimination.⁸² The court addressed the burden shifting test in Raad v. Alaska State Commission for Human Rights.

The first step of the analysis places the burden on the complaining party to establish a prima facie case of discrimination. If a prima facie case of discrimination is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. If legitimate,

81 Adams v. Pipeliners Union 798, United Ass'n, 699 P.2d, 343, 347 n. 4 (Alaska 1985).

82 Raad v. Alaska State Commission for Human Rights, 86 P.3d 899, 904 (Alaska 2004), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(test first enunciated).

nondiscriminatory reasons are presented, the burden shifts back to the complaining party to show that the reasons offered by the employer are pretextual.⁸³

The elements of the threshold requirement for demonstrating a prima facie case by a preponderance of the evidence include the following. The complainant must show that: (1) he is a member of a protected class under the statute; (2) he was qualified for the position; (3) he suffered adverse employment action, despite these qualifications; and (4) the employer treated him less favorably than other qualified persons.⁸⁴ These elements derive from the U.S. Supreme Court's McDonnell Douglas prima facie test as adopted in Alaska State Commission for Human Rights v. Yellow Cab.⁸⁵ A "prima facie case" suggests that "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'"⁸⁶ Alaska's court has noted that the prima facie standard of McDonnell Douglas "is not inflexible, as '[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations.'"⁸⁷ Causation sufficient to establish a prima facie case may be inferred from both direct and circumstantial evidence.⁸⁸ The McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination.

Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible conditions. When the prima facie showing is understood in this

83 Raad, 86 P.3d 904.

84 Safeway v. Miller, 102 P.3d at 291.

85 Id., citing Alaska State Commission for Human Rights v. Yellow Cab, 611 P.2d 487, 490 (Alaska 1980).

86 O'Connor v. Consolidated Coin Caterers Corporation, 517 U.S. 308, 311-12 (1996).

87 Safeway, 102 P.3d at 291.

88 The Alaska Supreme Court distinguishes between direct and circumstantial evidence in applying the McDonnell Douglas test. Raad, 86 P.3d at 904. In a recent sex discrimination case under Title VII, Sylvester v. SOS Children's Villages, Illinois Inc., ___ F.3d ___, 2006 WL 1896394, July 12, 2006 (7th Cir. 2006), the Seventh Circuit noted that "[t]he distinction between direct and circumstantial evidence is vague." "From the relevant standpoint – that of probative value – direct and circumstantial evidence are the same in principle." Noting the distinction between the need to draw inferences from circumstantial evidence and the generally accepted lack of that need with direct evidence, Judge Posner stated that "actually all evidence, even eyewitness testimony, requires drawing inferences." "All evidence is probabilistic, and therefore uncertain; eyewitness testimony and other forms of 'direct' evidence have no categorical epistemological claim to precedence over circumstantial or even explicitly statistical evidence." Id. ("a convincing mosaic of circumstantial evidence' [is] an alternative 'direct' method to direct evidence of establishing the prima facie case"). See also Desert Palace, Inc. Costa, 539 U.S. 90 (2003). The Ninth Circuit defined direct evidence as "evidence, which if believed, proves the fact [of discriminatory animus] without inference or presumption." Vasquez v. County of Los Angeles, 349 F.3d 634, 640 (9th Cir. 2004).

manner, the employer must be allowed some latitude to introduce evidence which bears on his motive.⁸⁹

To satisfy the burden to articulate a legitimate, nondiscriminatory reason for the employment action [termination], an 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.”⁹⁰ An employer may not compose fictitious, post-hoc justifications for an employment action. Rather, “the employer must articulate legitimate business reasons existing at the time the employment decision was made and supported by admissible evidence.”⁹¹

“If the employer provides legitimate, nondiscriminatory reasons for the allegedly discriminatory action, the burden shifts back to the complainant to show that discriminatory reasons more likely motivated the employer.”⁹² The Raad decision provides the following guidance for determining a pretextual reason. “[T]he legal standard for evaluating pretext is not as clear as the standards for evaluating the first two prongs.” A complainant may demonstrate pretext “either by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” The complainant can show pretext either directly or indirectly. “[A] variety of factors can evidence a pretextual justification.”⁹³ A complainant may demonstrate pretext “either by directly persuading the [Commission] that a discriminatory reason more likely than not motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”⁹⁴ In the Raad decision, the court recognized that “there are generally three types of evidence used to show pretext: (1) direct evidence of discrimination; (2) comparative evidence; and (3) statistics.”⁹⁵

89 Furnco Construction Corporation v. Waters, 438 U.S. 567, 579 (1978).

90 Raad v. Alaska State Commission for Human Rights, 86 P.3d at 905 (quoting Miller v. Fairchild Industries, Inc., 797 F.2d 727, 731 (9th Cir. 1986)). See also Thomas v. Anchorage Telephone Utility, 741 P.2d 618, 624 (Alaska 1987)(holding that evidence of legitimate, nondiscriminatory justification is sufficient if it “allow[s] the trier of fact rationally to conclude that discriminatory animus was not the motivating actor in the employment decision”).

91 Raad, 86 P.3d at 905 (citing Thomas v. Anchorage Telephone Utility, 741 P.2d at 624)(emphasis original).

92 Raad, 86 P.3d at 905.

93 Id.

94 Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

95 Raad, 86 P.3d at 905 (citing Penk v. Oregon State Board of Higher Education, 816 F.2d 458, 462 (9th Cir. 1987)).

Although the burden of production in this case may shift under the McDonnell Douglas framework, the burden of proof remains with the executive director at all times.⁹⁶

B. Termination Because of Race (AS 18.80.220) [Count I]

Count I in this case alleges that Federal Express terminated Faria's employment because of his race, Pacific Islander, in violation of AS 18.80.220. The statute provides in pertinent part that it is 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 race . . ."⁹⁷ The allegations include that Federal Express's reasons for terminating Faria were pretextual and that the company did not terminate similarly situated non-Pacific Islanders who engaged in conduct similar to that for which Faria was terminated. Faria seeks damages in the form of lost wages and benefits. Federal Express denies that it discriminated against him because of race or national origin. The company argues that the reasons for terminating Faria were not pretextual and that it did not treat more favorably non-Pacific Islanders who engaged in conduct similar to that for which Faria was discharged.

Evidence pertaining to Count I (termination of Faria on the basis of race) and arguments and applicable law for the count will be addressed in this section of the decision. Reference will be made later in the discussion to these areas, as necessary, in the Count II analysis (different treatment of Faria because of race) which follows in the next section.

Application of Discriminatory Treatment Test to Termination

The three-part burden shifting test of McDonnell Douglas and its progeny applies to determine discriminatory intent regarding Faria's termination.⁹⁸ Faria, through the executive director, has the initial burden to establish a prima facie case by a preponderance of the evidence.

(a) Prima facie case

The first three elements of the prima facie case were proven and are not disputed by Federal Express. Faria is a member of a protected class (Asian/Pacific Islander), he was qualified for the position he held at Federal Express, and he suffered adverse employment action (termination) despite his qualifications.

The discussion next shifts to the fourth element of a prima facie case – that the employer

⁹⁶ Id. at 253; Leong v. Potter, 347 F.3d 1117, 1124 (9th Cir. 2003).

⁹⁷ AS 18.20.220(a)(1).

⁹⁸ Raad v. Alaska State Commission for Human Rights, 86 P.3d at 904-06 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

treated the employee less favorably than other qualified persons. The focus of this element under Count I is the company's act of terminating Faria's employment. The executive director produced no direct evidence of racial discrimination against Faria in his discharge. Federal Express witnesses (current and former employees) denied that Faria was terminated on the basis of race and that any racial animus existed against him.⁹⁹ In attempting to establish a prima facie case, the executive director argued that Federal Express treated Faria less favorably than other qualified persons by choosing to terminate his employment. Under the Raad and Haroldsen v. Omni Enterprises, Inc.¹⁰⁰ cases, the "fourth factor of a prima facie case requires showing 'that others, who are not within the protected class, were treated more favorably.'"

To meet the fourth element, the executive director relies on "comparators" – similarly situated non-minority employees or persons from a different minority who were allegedly treated differently than Faria.¹⁰¹ The following comparators were identified at the hearing.¹⁰²

- Exhibit C-89 – [Termination Letter] "On November 20th [1992] you were involved in an altercation with another employee which is a violation of Personnel Policy and Procedure Manual Section P2-5, 'Acceptable Conduct.'" "After completing a thorough investigation of the altercation, it is my finding that by your own admission and eyewitnesses, you initiated the first physical contact. My decision, therefore, is that your employment with Federal Express be terminated effective Friday, November 27, 1992." (emphasis added)
- Exhibit C-85 – [Suspension Letter] "You are being suspended with pay pending investigation for your part in the fight that occurred August 20, 1996 with a co-

99 The evidence tends to show that Faria was treated more favorably than other employees in his promotion to management at Information Technology within the company and in his discipline for the PRISM incident. Exhibit R-98 (As the only applicant for a 1997 promotion, Faria was recognized by management as "a minority and that would help with our overall utilization. (Asian)."), Cross-exam of Mitchell (Federal Express policy is to "promote from within" and "diversity is encouraged."), Cross-exam of Williamson (Faria's minority status was a "plus" in deciding to advance him through promotion.), Cross-exam of Harris (PRISM discipline for Faria characterized as less severe than Human Resources recommended.).

100 Haroldsen v. Omni Enterprises, Inc., 901 P.2d 426, 430 (Alaska 1995).

101 Federal circuits are split on whether comparative evidence should be addressed during the fourth prong of establishing a prima facie case, or only at the third stage of the McDonnell Douglas progression, after a prima facie case has been established and the employer has articulated a legitimate, nondiscriminatory explanation for the adverse employment action. See Conward v. The Cambridge School Committee, 171 F.3d 12, 19-20 (5th Cir. 1999). The administrative law judge finds it more logical to address the comparators at the first stage. See Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1185 (11th Cir. 1984).

102 At the parties' request, confidentiality of identities is maintained in this decision.

worker. This suspension is in accordance with People Policy 2-5 (Acceptable Conduct).” The evidence in this case did not establish whether the employee was terminated after the investigation.

- Exhibit C-89 – [Termination Letter] Physical altercation between two employees resulted in violation of Policy 2-5 (Acceptable Conduct). The letter states: “[B]y your own admission and eyewitnesses, you initiated the first physical contact.” The employee was discharged for the violation.
- Exhibits C-91, C-92 – [Warning Letter] A physical altercation between two male FedEx employees occurred on November 20, 1992 in the break room at the Anchorage hub. Both employees were suspended pending the investigation. After the investigation, one employee was terminated (Exhibit C89) for a violation of Policy 2-5 (Acceptable Conduct) based in large part on the fact that he “initiated the first physical contact.” The other employee, whom the investigation determined did not hit back, was reinstated and received a warning letter for conduct in violation of Policy 2-5 (Acceptable Conduct).¹⁰³
- Exhibit C-95 – [Warning Letter] A March 10, 1993 letter states: “On 3/3/93, you were suspended with pay pending a complete investigation regarding the incident in the Ready Room on 3/3/93.”

“After a complete investigation, it has been determined that you were in an altercation with a co-worker resulting in physical confrontation and abusive language. Additionally, the investigative suspension has been changed to disciplinary suspension without pay.”

“You are being issued a Warning Letter for violation of P2-5, ACCEPTABLE CONDUCT POLICY. Federal Express policy forbids disruptive conduct; and directing abusive language at a fellow employee while on duty or while on Company property.”

[Termination Letter] A subsequent March 10, 1993 indicates that the warning letter established the threshold from Policy 2-50 (“three performance reminders, or a combination . . . [illegible] type of notification totaling three”). As a consequence, the

¹⁰³ The Federal Express information about the incident was deemed more credible than the telephonic testimony of the individual who was terminated.

individual's employment was also terminated on that date.

- Exhibit C-96 – [**Warning Letter**] Use of abusive language by an employee towards a co-worker in the Ready Room at the Anchorage hub resulted in a warning letter for violation of Policy 2-5 (Acceptable Conduct).
- Exhibit C-101 – [**Warning Letter**] A June 14, 2000 letter states: “On June 5, 2000, you were suspended pending the outcome on my investigation into the incident on April 1, 2000, that led to your arrest for assault; I also reviewed the complaints filed with Federal Express by [a Federal Express employee].”

“[T]here were a number of factors I considered during my inquiry and subsequent discussions with Personnel and Legal. Among those factors were your excellent work history, with no letters or warnings on record, your openness about the situation, and”

“However, upon completion of the investigation I still determined that your conduct was in violation of the Acceptable Conduct policy and Workplace Violence guideline. . . . As a result, his warning letter is being issued.”

“Please be advised that recurrent patterns of behavior will not be tolerated. A repeat of this or any other behavioral problem may result in more severe disciplinary action, up to and including termination.”

- Exhibit R-137 – [**Termination Letter**] A January 28, 2003 letter terminated the employment of a white male employee of Federal Express in the Technology Services division for violation of Policy 2-5 (Acceptable Conduct). Sexual conduct, not fighting, was at issue. The letter is comparable in the scope of its contents to Faria's termination letter (Exhibit C-15) although, because the case was the result of an EEO investigation, the termination occurred at the end of Step 1.¹⁰⁴

Individuals are similarly situated for the purpose of establishing a prima facie case when they have similar jobs and display similar conduct of comparable seriousness.¹⁰⁵ The Sixth Circuit has held that the complainant “must show that the ‘comparables’ are similarly situated in all respects.”¹⁰⁶ Even if this broad criterion did not apply to Faria's case, employees who hold

104 Direct exam of Mitchell (rebuttal), Direct exam of Harris (rebuttal).

105 Vasquez v. County of Los Angeles, 349 F.3d at 641.

106 Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992).

supervisory positions are generally deemed not to be similarly situated to lower level employees.¹⁰⁷ In this case, the evidence does not establish that any of the comparators Faria relies on involved a management employee, like him. According to the evidence, managers at Federal Express are held to a higher standard of conduct than non-managerial employees.¹⁰⁸

Faria relied on a disciplinary action against an individual who was employed at Federal Express and received a suspension pending investigation followed by a warning letter for her involvement in an altercation and physical confrontation arising from a domestic dispute in a parking lot at a store.¹⁰⁹ The case can be discounted as evidence of discrimination against Faria for many reasons. First, the individual was a minority (Afro-American). In addition, the location of the incident had no relation to a Federal Express function. The individual was not in a managerial position at Federal Express and she had no authority over subordinates.¹¹⁰ Moreover, the individual had no prior discipline and had behaved with commendable openness in the investigation.

Holly Harris, a senior human resources representative for Federal Express, testified on direct exam that based on a review of disciplinary cases in Alaska, "every person involved in fighting was terminated."¹¹¹ Barbara Stallone, also a Senior Human Resources Representative, testified that in the cases involving fighting in Alaska since 1989, termination of the employee resulted. Harris additionally testified on cross-exam that her recommendation about Faria's discipline was made without knowledge of Faria's race.

One of the comparators included in Faria's exhibits and referenced in testimony at the hearing was a disciplinary action by Federal Express against an employee on November 27, 1992. (Exhibit C-89) A termination letter on that date included the following language:

107 Vasquez, 349 F.3d at 641.

108 Faria admitted to Mitchell that the confrontation with Kloeckl occurred and, as a member of management, he [Faria] should have been setting the example. Cross-exam of Mitchell, Exhibit C-130, pp. 16-17.

109 Exhibit C-101.

110 Direct, cross and re-direct exam of S.

111 See also Exhibit C-36, p. 2 ("in each case the employee was terminated"). Cf. Exhibits C-91, C-92 (employee in physical altercation who did not strike back reinstated) Courts recognize, however, that there is no cookie cutter approach to discipline.

Human relationships are inherently complex. Large employers must deal with a multitude of employment decisions, involving different employees, different supervisors, different time periods, and an incredible array of facts that will inevitably differ among seemingly similar situations. The law does not require, nor could it ever realistically require, employers to treat all of their employees all of the time in all matters with absolute, antiseptic, hindsight equality.

Equal Employment Opportunity Commission v. Flasher, 986 F.2d 1312, 1319 (10th Cir. 1992).

On November 20th, you were involved in an altercation with another employee which is a violation of Personnel Policy and Procedure Manual Section P2-5, "Acceptable Conduct."

After completing a thorough investigation of the altercation, it is my finding that by your own admission and eyewitnesses, you initiated the first physical contact. My decision, therefore, is that your employment with Federal Express be terminated effective Friday, November 27, 1992.¹¹²

The case evidenced by Exhibit C-89 mirrors the facts in this case and tends to show that Faria was not discriminated against on the basis of race because of the conduct at issue. The employee terminated for fighting, who was Asian, "initiated the first physical contact," like Faria.¹¹³ The other individual involved in that fight had apparently used a racial slur in dialog leading up to the physical altercation. He was disciplined less severely through a warning letter for violating Policy 2-5 (Acceptable Conduct) because he did not strike back.

The case evidenced by Exhibit C-95 differs from Faria's case. The preponderance of the evidence in this case does not suggest that Faria's conduct was limited to abusive language. Consequently, C-95 is not of comparable seriousness.¹¹⁴

The preponderance of the evidence does not allow a conclusion that Federal Express's decision to terminate Faria treated him less favorably than similarly situated employees. Based on the preceding discussion, the executive director did not establish a prima facie case of racial discrimination against Federal Express under Count I.

(b) Legitimate, nondiscriminatory reason for employment action

Notwithstanding the lack of a prima facie case, Federal Express articulated a legitimate, nondiscriminatory reason for its employment action (termination of employment). Faria was fired for violating the company's Policy 2-5 (Acceptable Conduct), based on the physical confrontation in which he struck Kloeckl.¹¹⁵

(c) Pretext

Under the McDonnell Douglas burden shifting test, because Federal Express established a legitimate, nondiscriminatory reason for the allegedly discriminatory action, the burden of

112 Exhibit C-89 (emphasis added), Direct exam of Mackey.

113 Direct exam of P., Re-cross exam of Williamson.

114 It is noted that the employee was later terminated for multiple disciplinary actions.

115 Ward v. Proctor & Gamble, 111 F.3d 558, 560 (8th Cir. 1997)(employee striking fellow employee is a legitimate, nondiscriminatory reason for dismissal).

persuasion would again shift back to the executive director to show that discriminatory reasons more likely motivated the employer. The executive director argues that the decision to terminate Faria based on violation of Policy 2-5 was a pretext for racial discrimination against him.

Federal Express is alleged to have departed from its discipline policy and, as a result, to have imposed unequal discipline against Faria. The executive director's pretext arguments for Counts I and II overlap in some areas. Her arguments will be addressed in this section as they relate to the allegations of Count I ("[T]he reasons given by Federal Express for terminating Mr. Faria's employment are pretextual" and "Federal Express did not terminate similarly situated non-Pacific Islanders who engaged in conduct similar to that for which Mr. Faria was terminated.").

As previously addressed in this decision, Faria knew that he was discharged for the incident with Kloeckl. Mitchell testified that the Kloeckl incident by itself provided a basis for termination. Dalton's mischaracterization of the smokeshack incident as discipline was not done out of racial animus. It was a simple mistake resulting from his clerical staff incorrectly preparing the letter for his signature.

The administrative law judge finds that Federal Express's explanation for terminating Faria's employment is worthy of credence. Faria was discharged for violating Policy 2-5 (Acceptable Conduct) based on the incident with Kloeckl. This is a legitimate non-race based reason for termination. The employment action on December 31, 1998 was made soon after the conclusion of Leger's investigation for Mitchell.¹¹⁶

The executive director did not establish a strong case using statistical evidence to establish that Federal Express's legitimate, nondiscriminatory reason for discharging Faria was pretextual.¹¹⁷

To summarize, the evidence in this case does not show the discriminatory intent necessary to prove Count I. Direct evidence does not establish discriminatory intent with regard to Faria's termination. The preponderance of the evidence does not show a racial animus toward Faria or his heritage by Federal Express. Faria's termination for violating Policy 2-5 (Acceptable

¹¹⁶ Cross-exam of Mitchell, Exhibit R-120.

¹¹⁷ Faria elicited testimony that the individual who replaced him in his former job at Federal Express was Caucasian, implying that was a motive for his firing. Faria did not establish a nexus with any racial motive by Federal Express in hiring this individual. According to Mitchell under direct exam, the individual hired was the only internal candidate who applied for the position.

Conduct) was not a pretextual reason for racial discrimination by Federal Express.

Based on the preceding discussion, the findings, and the evidence in this case, the executive director did not show that discriminatory reasons motivated Federal Express in deciding to terminate Faria's employment. Federal Express therefore should prevail on Count I.

C. Different Treatment Because of Race (AS 08.80.220) [Count II]

Count II alleges that Federal Express treated Faria differently in the terms and conditions of his employment because of his race based on the company's

- using a non-disciplinary memorandum in its termination decision,
- refusing to provide Faria with a statement of facts and circumstances of his termination during the grievance procedure, and
- denying Faria effective access to the grievance procedure.

or treated differently than other employees on the basis of race.

Federal Express denies that it engaged in racial discrimination as alleged in Count II.

1. Reference to "Smokeshack" incident

The executive director argues that Faria was racially discriminated against and treated differently in the terms and conditions of his employment through Federal Express's use of the smokeshack incident during Faria's termination, GFT, and EEO processes.

The test for a prima facie case was previously discussed in this decision. Only the fourth element remains at issue with regard to the smokeshack incident under Count II. The allegations include that Faria was treated differently through the company's reference to the incident. Because the incident did not result in discipline, yet Dalton referred to it as such, a prima facie case has been made.

Under the burden shifting framework of McDonnell Douglas, the discussion next turns to whether Federal Express provided a legitimate, nondiscriminatory reason for referencing the smokeshack incident as discipline. It did. Although Mitchell considered Faria's counseling letter for the smokeshack incident when he decided to terminate Faria, he was allowed to consider the work history of an employee when determining discipline.¹¹⁸ He was the immediate supervisor who concluded that Faria "was not the source of the leak" in the smokeshack incident. Mitchell was not part of the GFT / EEO process. During GFT, Dalton simply made an innocent

¹¹⁸ Cross-exam of Mitchell.

mistake. He asked a subordinate to prepare a letter for his signature and the letter contained an error. He signed the letter soon after it was prepared. Federal Express's reasons for referencing the smokeshack incident also include the following. The company has the right to consider the circumstances and result of the smokeshack incident (albeit non-disciplinary) in terminating Faria and during the GFT and EEO processes. Moreover, according to Mitchell, the company has the option to impose greater discipline during the appeal mechanisms than he originally imposed.¹¹⁹ Finally, the mistake regarding the smokeshack incident occurred only at an intermediate level of appeal. By the time of the final decision to uphold termination, the error was no longer a factor. Federal Express rebutted the presumption of the prima facie case concerning reference to the smokeshack incident under Count II.

With the presumption rebutted, the burden of production shifts back to the executive director to pretext requiring her to show that a discriminatory reason more likely motivated the employer or that the employer's explanation is unworthy of credence. She did not establish by a preponderance of the evidence that a discriminatory reason motivated Federal Express in referring to the smokeshack incident. Federal Express's explanation for use of the smokeshack incident is worthy of credence. Direct evidence of discriminatory animus by Federal Express in referencing the smokeshack incident is lacking. The preponderance of evidence did not establish that the company was motivated by a discriminatory reason in using this information. The executive director therefore did not establish a violation of AS 18.80.220 pertaining to the smokeshack incident as alleged in Count II.

2. Providing Faria with facts and circumstances of his termination

The executive director alleges that Federal Express refused to provide Faria with facts and circumstances of his termination, and that it therefore treated Faria differently in the terms and conditions of his employment, discriminating against him because of his race. This allegation focuses on the adequacy of the content of written communications from Federal Express during the grievance procedure.¹²⁰

The test for a prima facie case was previously discussed in this decision. Only the fourth element of the test remains at issue under Count II regarding whether Federal Express provided

¹¹⁹ Direct exam of Mitchell (rebuttal). Greater discipline would not have occurred in Faria's case since he was terminated.

¹²⁰ The grievance occurred after termination on December 31, 1998. Count II of the Amended Complaint states "under the grievance procedure."

Faria with facts and circumstances of his termination during the grievance procedure. As previously addressed in this decision (pages 21-27), Faria knew the facts and circumstances upon which his termination was based. Discipline was based on his conduct involving Kloeckl after the Christmas party, and he was found to have violated Policy 2-5 (Acceptable Conduct). The preponderance of the evidence shows that he knew this at all relevant times. The executive director nonetheless established a prima facie case by introducing into evidence disciplinary-related letters of other Federal Express employees, some of whom were Caucasian, that contained more detailed descriptions of the facts and circumstances for discipline.¹²¹

The burden of persuasion then shifted to Federal Express to provide a legitimate, nondiscriminatory reason for its conduct alleged to have been discriminatory (failure to provide a statement of facts and circumstances for termination). Federal Express established that there is no company policy for exact content of a disciplinary letter, and content of discipline letters may vary depending on the manager. Holly Harris testified during direct exam that the documentation section of Policy 2-5 is a guideline that does not contain mandatory content requirements for documentation during an investigation. The provision states that management must completely document actions and include 1) date of infraction, 2) facts supporting the suspension, warning letter, reminder, and/or termination, 3) policy violated, and 4) a reference to the employee's privilege to pursue the procedure in Policy 5-5 (GFTP/EEO). As addressed earlier in this decision (pages 16-26) and in the evidence, Federal Express provided that information.

According to Charles Williamson, Faria's conduct involving Kloeckl for which he was terminated violated the Acceptable Conduct policy in three areas: 1) gross management failure, 2) fighting at a company function, and 3) leaving a negative impression with other employees and customers.¹²² In her direct exam, Holly Harris cited the following four areas from Policy 2-5 that Faria violated:

- Threatening, intimidating, coercing, directing abusive language, or displaying blatant or public disrespect toward any

121 Exhibits C-84, C-85, C-86, C-89, C-93, C-94, C-96. Some letters were as brief in content as Faria's termination letter.

122 Direct exam of Williamson. According to evidence from Federal Express witnesses, management at the company is held to a higher standard than hourly employees, and it is even more important for management to present a positive professional image to the public. Cross-exam of Harris, Cross-exam of Williamson, Cross-exam of Mitchell, Exhibit C-15 (Faria termination letter).

employee or customer while on duty, on Company property, at collection sites, or at off-site Company meetings and functions

* * *

- Fighting while on duty, at Company functions/Company property
- * * *
- Leadership failure of a member of management
 - Any other act obviously and significantly detrimental to the best interest of Federal Express and/or fellow employees as determined by management

Faria did not express a failure to understand the reason for his termination at the time his employment was terminated or at the conclusion of GFT Step 1.

The only disciplinary letter introduced in evidence involving a Technology Services employee is nearly identical to Faria's termination letter in its brevity.¹²³ The employee was a white male. The individual terminated for violation of Policy 2-5 (Acceptable Conduct) had essentially the same job as Faria, but in another state.¹²⁴ The manager noted that the employee's conduct was "inappropriate for a member of FedEx management."

Based on the preceding discussion and the evidence, Federal Express rebutted the presumption of the prima facie case concerning its alleged refusal to provide Faria with the facts and circumstances of termination during the grievance procedure. The burden of production now shifts back to the executive director to pretext requiring her to show that a discriminatory reason more likely motivated the employer or that the employer's explanation is unworthy of credence.

The preponderance of the evidence does not establish that a discriminatory reason motivated Federal Express on refusal to provide Faria with the facts and circumstances of termination under this count. First, Federal Express did provide the facts and circumstances of termination to Faria. Federal Express's explanation of its grievance procedure is worthy of credence. Consequently, the executive director did not establish a violation of AS 18.80.220 pertaining to this allegation under Count II.

Faria also argues that the delay in his disciplinary process is evidence of being treated differently because of his race. He did not present a prima facie case on this issue. Evidence did not establish that unjustified delays occurred. The timeline of events prepared by Mitchell for

¹²³ Exhibit R-137 (conduct arising from an EEO investigation that did not involve a physical altercation).

Williamson and evidence supporting it reflect that Federal Express was not dilatory and that it conducted a prompt investigation.¹²⁵ Moreover, Faria did not present evidence that other disciplinary actions were conducted more quickly.

3. Denying Faria effective access to grievance procedure

The executive director alleges that Federal Express denied Faria effective access to the grievance procedure, treating him differently in the terms and conditions of his employment and, therefore, discriminating against him because of his race. Federal Express denies the allegation.

Only the fourth element of the prima facie test remains at issue under Count II regarding the claim based on whether Federal Express denied Faria access to the grievance procedure. As previously addressed in this decision (pages 21-26), Faria availed himself of the entire GFT process and filed an EEO complaint. The executive director did not establish by a preponderance of the evidence that Faria was treated less favorably by Federal Express because of his race regarding the grievance procedure. No prima facie case has been established. Federal Express should prevail on this allegation in Count II.

D. Sanctions

No discussion of sanctions or damages is necessary because no violation of the Alaska Human Rights Act was proven.

V. **Conclusion**

Federal Express did not violate AS 08.80.220 as alleged in Counts I and II. Mr. Faria's complaint is rejected.

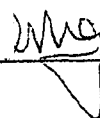
DATED this 14th day of August, 2006.

THE UNDERSIGNED CERTIFIES THAT ON THIS DATE AN EXACT COPY OF THE FOREGOING WAS PROVIDED TO THE FOLLOWING INDIVIDUALS:

P. Nelson - HRC / Rachel Plunk
M. Beard / T. Owens
L. Tatzel

SIGNATURE

DATE
8-14-06



David G. Stebing
Administrative Law Judge

124 Direct exam of Mitchell (rebuttal), Direct exam of Harris (rebuttal).
125 Exhibit R-120, Cross-exam of Mitchell.

COMMISSION ACTION ON DECISION AND ORDER

The Commission having reviewed the proposed Decision and Order by the administrative law judge in: **Paula M. Haley ex rel. Bathwell Faria v. Federal Express Corporation**, OAH Case No. 05-0527-HRC, hereby

Option 1: adopts the proposed decision in its entirety.

Date: _____ By: _____
Chairperson

Option 2: rejects the proposed decision and remands this case to the same/different administrative law judge to receive additional evidence on the following issues:

Date: _____ By: _____
Chairperson

Option 3: rejects the proposed decision and orders that the entire record be prepared for commission review and that oral or written argument be scheduled in front of the commission prior to final consideration of the decision in this case.

Date: _____ By: _____
Chairperson

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION FOR HUMAN RIGHTS, PAULA M. HALEY, EXECUTIVE DIRECTOR, *ex rel.* BATHWELL J. FARIA,

Complainant,

v.

FEDERAL EXPRESS CORPORATION

Respondent.

Received
DEC 20 2006
State of Alaska
Office of Administrative Hearings

ASCHR No. R-99-080
OAH No. 05-0527 HRC

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, now ORDER that the Administrative Law Judge's decision of August 11, 2006 is hereby ADOPTED by the Commission in its entirety. Accordingly, the complaint of *Bathwell J. Faria v. Federal Express Corporation* alleging (1) termination based on his race, Asian/Pacific Islander and (2) treatment different from those of other races in the terms and conditions of employment, in violation of AS 18.80.220, is DISMISSED.

IT IS SO ORDERED.

Judicial review is available to the parties pursuant to AS 18.80.135 and AS 44.62.560-570. An appeal must be filed with the superior court within 30 days from the date this Final Order is mailed or otherwise distributed to the parties.

DATED: December 19, 2006

Lester C. Lunceford, Commissioner

DATED: December 19, 2006

Grace E. Merkes, Commissioner

DATED: December 19, 2006

Robert B. Sawyer, Jr., Commissioner

ALASKA STATE COMMISSION FOR HUMAN RIGHTS
800 A Street, Suite 204
Anchorage, Alaska 99501-3669
(907) 276-7474 FAX (907) 278-8588

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that on December 19, 2006, a true and correct copy of this Final Order was mailed or delivered to the following parties:

Rachel Plumlee, Esq.
Human Rights Advocate
Alaska State Commission for Human Rights
800 A Street, Suite 204
Anchorage, Alaska 99501 (hand delivery)

Respondent or Respondent's Representative



Thomas P. Owens III, Esq.
Burr, Pease & Kurtz
810 N Street
Anchorage, AK 99501

Complainant Representative

Laurel K. Tatsuda, Esq.
Law Office of Laurel K. Tatsuda
P. O. Box 221829
Anchorage, AK 99522

Administrative Law Judge

✓ Christopher Kennedy, Esq.
Office of Administrative Hearings
State of Alaska
Department of Administration
550 W. 7th Avenue, Suite 1600
Anchorage, AK 99501

By:  _____ 
Margaret A. Taylor
Commission Secretary