IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ANCHORAGE SCHOOL DISTRICT,)
Appellant,)
v.)
ALASKA STATE COMMISSION for)
HUMAN RIGHTS; VILMA ANDERSON,) Case No. 3AN-10-10122CI
Appellees.)

DECISION ON APPEAL

This case focuses on the essential functions of a substitute teacher and what, if any, accommodations can be made for a visually impaired substitute with a service dog. The other primary issue is the way in which the Anchorage School District ("ASD") and the substitute in this case, Vilma Anderson, approached (or failed to approach) the reasonable accommodation process and termination, and whether the decision to hold ASD liable for failing to engage in the interactive process was supported by the record. The final issue deals with whether the employee properly mitigated her losses in this instance.

FACTS

Many of the basic facts are uncontested. Vilma Anderson is in her sixties and suffers from a degenerative eye condition that has rendered her legally (and almost completely) blind. She has very limited but functional vision up close, but uses a black lab named "Jerry" as a service animal. The ALJ stated that "[s]he needed and relied upon Jerry the same way a paraplegic relies upon a wheelchair."[1] She testified that it never occurred to her that she could not take Jerry anywhere or that people had dog phobias or allergies because she had never met anyone with those conditions.

After moving with her husband from Trapper Creek to Anchorage in 2005, Anderson applied for and was accepted as a substitute teacher with ASD. She met the basic requirements under ASD regulations (teaching certificate, background check, college degree,

[1] OAH No. 09-0233-HRC Decision 6 [herinafter "ALJ Decision"].

and positive letters of reference). She also speaks English, German, and Spanish. She specifically wanted to be a substitute because she suffers from migraines and believed she would need too much time off to maintain a full-time job. She also liked the flexibility of subbing, as she is an active genealogy researcher and traveler. As a substitute teacher, she could pick the days she wanted to work. When substitute teachers are needed within the ASD system, the assignments are posted on the Sub Finder system, which allows potential substitutes to log in, peruse both immediate and longer-term assignments, and select which ones they would like to accept.

Anderson ultimately qualified for work and was told she could begin accepting assignments as of October 10, 2005. She did not inform anyone of her blindness at the time because she did not think it limited her ability to work and she believed that she was legally allowed to take her service dog anywhere. It never occurred to her that it would be an issue.

1. Teaching Assignments

Because Anderson relied on public transportation, she could only realistically accept assignments at 17 schools. She worked at 5 different elementary schools on seven days in October 2005. At least some of the principals were uninformed and caught off guard by her blindness when she arrived to substitute. The ALJ described each assignment in more detail, but suffice to say that there were at least some problems on several of these occasions.

For example, she spent two half-days at Wonder Park Elementary, and the principal there, Lisa Zelenkov, was surprised to see Anderson arrive with a service animal because the school was designated dog-free. Ms. Zelenkov testified that otherwise the assignment was basically successful, but attributed that in large part to the fact that she prepped the children before Anderson arrived and checked in on the class frequently, which she would not be able to do regularly.

At Baxter, the principal, Vicki Hodge, did not believe that Anderson had successfully controlled her classroom because there was a disruption in class between two students that someone else handled. It also seems that Anderson had accidentally closed the door to the classroom while two students were still outside. Neither of these incidents was reported to ASD until after the adverse employment action taken a few days later.

At Creekside, the principal was informed prior to Anderson's arrival that she used a service animal. One child was removed from the class due to a dog phobia or allergy. No other problems were reported.

Finally, when she arrived to teach at Nunaka Valley one morning, she was informed that Jerry could not be accommodated at the school because it had been designated fur/dog free. At the direction of ASD's Human Resource Director for Certified Staff and Recruitment, Dr. Robb Boyer, Anderson was paid for the day but did not teach.

2. Accommodation/Termination

Dr. Boyer is the main ASD actor in this case. He first became aware of Anderson's blindness after the first principal to use Anderson found out she was blind and voiced concerns over potential safety issues. When this information got to Boyer, he contacted ASD's EEO office. A "fact-finding meeting" was scheduled for Oct. 24, 2005 because ASD did not know what, if any, limitations Anderson had. The meeting consisted of Anderson, Boyer, and ASD EEO investigator Valerie Woods.

During the meeting, Boyer learned about Anderson's near total blindness and discussed her experiences thus far. She described some instances of limitations (such as not being able to see all her students in an assembly), but believed that ASD's concerns over student safety in an emergency situation, allergies, and classroom control were not insurmountable. She also explained her methods of controlling students, such as rewarding good behavior with stickers, pencils, and time petting Jerry, and said that she walked around the room to check students' work and monitor them frequently. Later she explained in testimony that she also appointed a student leader to take attendance and help her know what was happening in class. She also suggested that she could check with the school nurse before any assignment and deal with allergy problems by either not teaching or having the child moved to another class for the day. She indicated that the safety concerns could be met by limiting her assignments to one or two schools, so that she could become very familiar with the layout and emergency plans at each location. Finally, she said that one of her biggest problems was the small text in the materials, but that she dealt with this by either using the student edition with larger print or by copying and enlarging the materials.

This meeting lasted about one hour, during which all parties agree that Anderson did not specifically ask for an "accommodation" by name. Dr. Boyer was still "open to Anderson subbing" after that meeting, but changed his mind after hearing the concerns from the two principals noted above.[2] At that point, he decided that she could not be a substitute teacher because of the safety issues, the unreasonable requirement of moving students to accommodate the dog, and the fear that allowing her to remain on the "all-call" list would endanger her and the students at schools with which she was not familiar.[3]

The next day, Anderson discovered that she had been blocked from the Sub Finder system. She met with Dr. Boyer again the following day (October 26), bringing along service dog advocate Carol Shay because she thought that the meeting was to address lingering issues over Jerry. Instead, she received a letter that reiterated ASD's health and safety-related concerns, and advised her that she was being removed from the all-call list on the Sub-Finder system, which meant she was no longer available as a substitute. During the meeting, Dr. Boyer also described some alternate bilingual tutor positions that he thought she could fill because they would place her in a smaller, consistent setting with proximity to other adults who could assist in case of an emergency. Although he did not have the authority to offer her such a position, he urged her to seek one, identified several that were available within her travel restrictions, gave her an application, and later encouraged at least one principal to consider her. She left the meeting "bewildered and angry."[4]

She eventually inquired about those positions, but they had been filled. She did not return to Dr. Boyer because she felt she had been given "the run-a-round and her 'fate was sealed'."[5] She never discussed, nor was she informed of, any other options for addressing the situation or changing ASD's decision. She then filed a complaint with the ASD EEO office on Nov. 11, 2005.[6] Before a scheduled fact-finding meeting could be held, she filed a complaint with the ASCHR on November 30, 2005. According to ASD, its internal process was terminated as a result of the ASCHR complaint.

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[2] ALJ Decision 11.
[3] *Id.* at 11.
[4] *Id.* at 12.
[5] *Id.*
[6] R. 827.

3. Proceedings Below

The Human Rights Commission ("HRC") initiated the hearing in this matter by filing a complaint in April 2009. After discovery and thorough briefing, the ALJ established the law of the case through several summary judgment motions. Most importantly, she ruled that under the undisputed facts, Anderson was disabled for the purposes of AS 18.80.220.[7]

The ALJ conducted a three day evidentiary hearing beginning on December 2, 2009. On March 23, 2010, she issued a preliminary recommended decision, accepted objections, and issued a final Recommended Decision on April 9, 2010. The HRC adopted that Decision on July 30, 2010.

4. Decision on Appeal

The HRC's Final Decision concluded that ASD had discriminated against Anderson by failing to explore (through the so-called "interactive process") whether her disability could be reasonably accommodated. Specifically, it found ASD responsible for the breakdown in the interactive process, but declined to reach the ultimate conclusion regarding whether Anderson could have fulfilled the essential functions of a substitute teacher with reasonable accommodations. Rather, the HRC ordered compensation based on the ASD's failure to properly engage in the process, and further directed the parties to engage in that process to determine whether reasonable accommodation was possible. It awarded back-pay of $44,607, rejecting ASD's arguments that Anderson failed to mitigate her losses. The HRC also ordered ASD to provide 8 hours (increased from the ALJ-recommended 3 hours) of training on the special accommodation process to employees. ASD appealed the decision to this court. The detailed findings of the ALJ as adopted by the HRC will be addressed separately in accordance with the approach taken by the parties.

ISSUE PRESENTED

ASD raises 7 points on appeal:

1. The HRC erred by applying AS 18.80.300(14)(D) in a manner that created an irrebutable presumption of disability.

2. The HRC erred by excusing Anderson's failure to request a reasonable accommodation.

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[7] ALJ Decision 14

3. The HRC erred by assessing liability to ASD for the breakdown of the interactive accommodation process.

4. The HRC erred by assessing liability without determining whether a reasonable accommodation process was possible.

5. The HRC erred by applying the wrong standard to the failure to adequately mitigate losses issue.

6. The ALJ incorrectly excluded evidence regarding Anderson's alleged failure to adequately mitigate her losses.

7. The HRC's calculation of backpay was incorrect and not supported by substantial evidence.

LEGAL STANDARD

A determination of fact by the HRC will stand if it is supported by substantial evidence.[8] Substantial evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9] Whether the amount of evidence is substantial is a question of law,[10] but the court should never substitute its view of the evidence for that of the HRC.[11] Notably, whether or not an employee's refusal to accept a job offer is reasonable (for mitigation purposes) is generally a question of fact.[12]

The court applies the reasonable basis standard to questions of law involving agency expertise, and the substitution of judgment standard to questions outside the agency's expertise.[13] Whether an agency has complied with statutory requirements is a question of law.[14]

HRC and Anderson urge this court to accept all of the ALJ's findings and the final decision as long as they are supported by substantial evidence, whereas ASD attempts to cast its appellate points as legal issues in an effort to avoid the substantial evidence test, specifically noting that it largely does not dispute the facts. Part of the difficulty in this, and

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[8] *Pyramid Printing Co. v. Alaska State Com'n for Human Rights*, 153 P.3d 994, 997-98 (Alaska 2007).
[9] *Leigh v. Seekins Ford*, 136 P.3d 214, 216 (Alaska 2006).
[10] *Id.*
[11] Oceanview Homeowners Assoc. v. Quadrant Const., 680 P.2d 793, 798 (Alaska 1984).
[12] *Id.*
[13] *Pyramid*, 153 P.3d at 998.
[14] *Id.*

most other employment discrimination cases, is deciding which issues are legal ones, and which are factual determinations that merely require the court to ensure that there is sufficient evidence in the record to support the conclusion reached by the ALJ/HRC.

ANALYSIS

AS 18.80.220(a)(1) prohibits employers from discriminating against a person "because of the person's…physical or mental disability…when the reasonable demands of the position do not require distinction on the basis of" the disability. The ADA and Alaska Human Rights Act both rely on the traditional burden shifting regime for discrimination cases, set forth federally by *McDonnell Douglas* and adopted by Alaska in *Yellow Cab*.[15] The person claiming discriminatory intent must establish a *prima facie* case of discrimination. If a *prima facie* case ("PFC") is made, the burden shifts to the employer to articulate a legally sufficient reason for the employment action. If this showing is made, the burden shifts back to the employee, who then must carry the ultimate burden of proving that she suffered an unlawful employment act because of her disability.[16] Under an HRC regulation, an employer is not required to accommodate an otherwise qualified individual if the employer can demonstrate by "clear and convincing evidence that a distinction in employment…is required by business necessity or the reasonable demands of the position."[17] Federal law makes the same allowance where reasonable accommodation would result in a direct threat to the employee or others.[18]

POINTS ON APPEAL

I. The prima facie case

To establish a PFC for a failure to accommodate claim, Anderson must first show by a preponderance of the evidence that she (1) has a <u>disability</u> within the meaning of the statute; (2) is able to perform the <u>essential functions</u> of a substitute teacher, with or without reasonable accommodation; and (3) has suffered an <u>adverse</u> employment decision because

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[15] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *ASCHR v. Yellow Cab*, 611 P.2d 487 (Alaska 1980).
[16] *McDonnell Douglas*, 411 U.S. at 802-805.
[17] 6 AAC 30.910(c).
[18] 42 USC § 12111(3).

of her disability.[19] The ALJ applied this standard for establishing a *prima facie* case of discrimination under AS 18.80.220(a)(1), but ASD argues that she applied it incorrectly.

Whether the plaintiff established the PFC is a mixed question of law and fact.[20] Factual findings (such as whether each element of the PFC was proven by a preponderance of the evidence)[21] are reviewed under the clearly erroneous standard, and questions of law (such as the description or formulation of the elements of the PFC)[22] are reviewed *de novo*. In Alaska, the Court has been unclear about what questions are fact-based and which are legal, but in *Moody-Herrera*, it specifically referred to the establishment of the PFC as a "fact finding," so it is acknowledged to be at least primarily a factual issue.[23]

A. Whether Anderson is "disabled" under the statute

First, the ALJ concluded on summary judgment that Anderson was "disabled."[24] Under AS § 18.80.300(14), a "physical or mental disability" is defined in part as "a condition that may require the use of a … service animal…" Additionally, a "physical or mental impairment" is a physiological disorder or condition affecting special sense organs. The ALJ relied upon the undisputed facts that Anderson is legally blind and requires the use of a

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[19] *Moody-Herrera v. State, Dept. of Natural Resources*, 967 P.2d 79, 82 (Alaska 1998); *see also id*. at 82 n. 3 (citing *Gafford v. General Elec. Co.,* 997 F.2d 150, 169 n. 10 (6th Cir.1993) ("[T]he determination that a plaintiff has or has not established a prima facie case of disparate treatment encompasses both questions of law (viz., determination of the elements of a prima facie case), and questions of fact (viz., whether the plaintiff has proven to the factfinder each element of the prima facie case by a preponderance of the evidence).").
[20] *Id*. at 82.
[21] *See, e.g., Goldstein v. Manhattan Indus., Inc.,* 758 F.2d 1435, 1443 (11th Cir.) ("Whether a prima facie case of discrimination has been shown in any given situation is essentially a factual question.").
[22] *See, e.g., Hagans v. Clark,* 752 F.2d 477, 480 (9th Cir.1985) ("The decision ... to interpret case law to require a particular prima facie showing, is a legal judgment freely reviewable on appeal.").
[23] *Moody-Herrera*, 967 P.2d at 82 ("The superior court therefore found that Moody did not establish her prima facie case. Moody does not challenge this fact finding.").
[24] ALJ Decision 14 (referencing November 25, 2009 Summary Judgment/Law of the Case Order). The more complete statutory definition for a "physical or mental disability" includes

> (A) a physical or mental impairment that substantially limits one or more major life activities; …
> (C) having
>> (i) a physical or mental impairment that does not substantially limit a person's major life activities but that is treated by the person as constituting such a limitation;
>> (ii) a physical or mental impairment that substantially limits a person's major life activities only as a result of the attitudes of others toward the impairment; or
>> (iii) none of the impairments defined in this paragraph but being treated by others as having such an impairment; or
>
> (D) a condition that may require the use of a … service animal;….

AS § 18.80.300(14).

service dog to conclude that she has a disability for the purposes of the *prima facie* case under AS 18.80.220.[25]

ASD argues that the ALJ used the fact that Anderson uses a service animal to create an irrebutable presumption of disability, ignoring its evidence that Anderson's condition did not limit any major life activities. The "limiting major life activities" approach is commonly used in federal ADA cases, and is included in the Alaska equivalent, but is not a required finding.

Regardless, ASD's argument is unconvincing. Anderson uses a service dog and was found to have a disability based on that undisputed fact. Additionally, there is simply no dispute that she is almost completely blind in spite of ASD's assertions that some of her major life activities are not impaired. The clear statutory language permits a finding of disability for any "condition that may require the use of a … service animal." Because Anderson uses such an animal, she may be found to have a disability regardless of the impact of her blindness on her major life activities. The statute is <u>disjunctive</u>—"disability" may be borne of the impairment of major life activities *or* use of a service animal, and the legislative history clearly shows that this was a conscious decision on the part of the legislature.[26] In this way, Alaska's Human Rights Act is broader than analogous federal law, and the more liberal interpretation applies.[27]

Though ASD treats the issue as one where categorical presumptions led to an anomalous result, that simply did not occur here. The ALJ's conclusion is supported by substantial evidence, correct as a matter of law, and will not be disturbed on appeal.

B. "Essential Functions" analysis

ASD next argues that the HRC erred in applying the second prong of the PFC, where Anderson must demonstrate that she is able to perform the essential functions of a substitute teacher, with or without reasonable accommodation. Again, this inquiry is mostly factual.[28] "Essential functions" (under federal law) are "fundamental job duties of the employment

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[25] *Id.*
[26] Alaska H.B. 172, Sect. 4, 1985 Reg Sess. (Feb. 2, 1985); Hearing on HB 172, 14th Leg., Reg. Sess. (March 20, 1985) (Discussion by Rep. Gruenberg, Rep. Clocksin).
[27] 6 AAC 30.910(b); *see VECO, Inc. v. Rosebrock*, 970 P.2d 906, 912-13 (Alaska 1999) (quoting *Wondzell v. Alaska Wood Prods., Inc.*, 601 P.2d 584, 585 (Alaska 1979)).
[28] *Moody-Herrera*, 967 P.2d at 82.

position…not including the marginal functions of the position."[29] The parties agree that the essential functions of a substitute teacher include supervision, safety, and education of students.

The ALJ concluded that Anderson made a *prima facie* showing that she could perform these functions. She met the "paper qualifications" for the job (college degree, teaching certificate, *etc.*), and none of the principals notified ASD that they were dissatisfied with her performance as of her first meeting (Oct. 24) with Dr. Boyer, who left that meeting still open to her performing as a sub. She also described many methods she had for dealing with her limitations, several of which the ALJ agreed "appear[ed] reasonable on their face."[30]

ASD argues that its evidence tending to show that Anderson was not qualified to perform the essential functions (consisting largely of the problems reported by teachers after the meeting) was treated as an affirmative defense, rather than as rebuttal to the *prima facie* case, which left ASD bearing the burden of proof on this claim rather than Anderson. It bases this argument on the way the ALJ framed the law she applied to this essential functions analysis:

> Alaska law is silent on the level of proof required to make this showing for a prima facie case. Federal law provides that when the employer is claiming affirmative defenses that go to the heart of whether the employee can perform the essential functions with or without accommodation, the complainant must only make a "facial showing that a reasonable accommodation is possible…."[31]

The ALJ *cited E.E.O.C. v. Wal-Mart Stores, Inc.* for the latter proposition, and went on to conclude that Anderson "met her minimal evidentiary burden and has established a *prima facie* case of discrimination…."[32]

The ALJ's statement of the analogous federal law here does intimate that an affirmative defense in some way lowers the burden for the complainant. Due to the fact that it pled direct threat and business necessity as affirmative defenses, ASD argues that its other

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[29] 29 CFR § 1630.2(n)(1) (cited at ALJ Decision 15).
[30] ALJ Decision 18
[31] ALJ Decision 16-17 (citing *EEOC v. Wal-Mart Stores, Inc.* 477 F.3d 561, 569 (8th Cir. 2007)).
[32] *Id.* at 18.

general evidence on the reasonableness of the proposed accommodation was ignored and considered only later as an affirmative defense. Apart from the statement of law noted above, however, the ALJ's analysis on the essential functions issue does not mention anything relating to ASD's affirmative defenses. Rather, it carefully identifies the essential functions, the proposed accommodations, and ASD's concerns with each. Thus, apart from the allusion to affirmative defenses in the rule statement, the ALJ's analysis of the evidence and the apparent reasonableness of the proposed accommodations that would allow Anderson to fulfill the essential functions of the position proceeds in perfect accordance with the legislative scheme. There is no indication that the affirmative defense of direct threat or business necessity went into that phase of the analysis, nor that it resulted in improper evidentiary burdens.

On the other hand, it is not entirely clear how the ALJ formulated the rule statement she included in this section of her opinion. Far from relying on affirmative defenses to alter the burden, the quoted section of the *Wal-Mart* case is actually preceded by a statement that would have been perfectly suited for this case, and for the analysis that the ALJ actually conducted: "[I]f the employee cannot perform the essential functions of the job *without* an accommodation, he must only make a 'facial showing that a reasonable accommodation is *possible* ....'"[33] That is precisely the situation in this case, and the precise conclusion that the ALJ reached. She analyzed the conflicting arguments over the reasonableness of each side's position and concluded that Anderson had "met her minimal evidentiary burden and has established a *prima facie* case of discrimination …."[34]

The imprecise allusion to affirmative defenses notwithstanding, it appears the ALJ applied the correct standard, and even if she had not, the conclusion under this court's independent judgment would be the same. Although Alaska law is silent on the level of proof that is required to get past the PFC "hump," the standard from *Wal-Mart* has been used by many other circuits, including our own: "If accommodation to their handicap is required to enable them to perform essential job functions, then plaintiffs must only provide evidence

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[33] *Wal-Mart Stores, Inc.* 477 F.3d at 569 (emphasis in original).
[34] ALJ Decision 18.

sufficient to make at least a facial showing that reasonable accommodation is possible."[35] This burden is significantly lower than the "ultimate burden of persuading the trier of fact that [the complainant] has suffered unlawful discrimination."[36] Rather, as the Supreme Court of the United States has noted, the level of proof required is similar to that which is necessary for a plaintiff to overcome a summary judgment motion by the employer. At the first stage of the burden shifting analysis,

> a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an "accommodation" seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. *See, e.g., Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (plaintiff meets burden on reasonableness by showing that, "at least on the face of things," the accommodation will be feasible for the employer); *Borkowski v. Valley Central School Dist.*, 63 F.3d 131, 138 (2nd Cir. 1995) (plaintiff satisfies "burden of production" by showing "plausible accommodation")….[37]

The ALJ correctly applied this low standard to the evidence to conclude that the proposed accommodations "appear[ed] reasonable on their face,"[38] and her conclusion is both reasonable and supported by the evidence. Anderson demonstrated that accommodation was at least reasonably possible by limiting her work locations, using large font materials, *etc.* ASD argued that these proposed options were not reasonable, citing primarily student safety concerns or impracticality. That the ALJ rejected ASD's arguments for the purposes of the PFC initial showing does not mean she held it to an inappropriate burden, but simply indicates that she weighed the evidence and reached a factual conclusion with which ASD disagrees.[39] This does not mean she would have reached the same conclusion regarding the ultimate question of actual reasonableness, but it is sufficient to meet the low burden of presenting a PFC. This preliminary finding that Anderson could

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[35] *Buckingham v. U.S.*, 998 F.2d 735, 740 (9th Cir. 1993); *see also Turner v. Hershey Chocolate U.S.*, 440 F3d 604, 614 (3rd Cir. 2006); *Woodman v. Runyon*, 132 F.3d 1330, 1344 (10th Cir. 1997); *Shiring v. Runyon*, 90 F.3d 827, 832 (3d Cir. 1996).
[36] *Wal-Mart Stores, Inc.*, 477 F.3d at 569.
[37] *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002).
[38] ALJ Decision 18.
[39] *Id.* at 18.

perform the essential functions with accommodations is supported by the record and has a reasonable basis in law and fact, and should be upheld.

C. Adverse employment action

As is so often the case in burden shifting discrimination cases, it is difficult to recognize and maintain strict separation between the elements of the *prima facie* case and the ultimate question of liability. Here, for instance, it is tempting to conclude that the third element of the PFC (adverse employment action) is obviously established because Anderson was terminated. This, however, was not the third element of the PFC, nor was it the adverse employment action for which ASD was ultimately liable. Rather, the ALJ concluded that the adverse employment action occurred when ASD failed to engage in the interactive process, an occasion that (according to the ALJ) was manifested by the District's premature decision to block her from the Sub-Finder system.[40]

It was this breakdown of the interactive process that constitutes the adverse employment action for the purposes of the third element of the PFC, and which ultimately formed the basis of ASD's liability. More importantly, liability premised on a breakdown in the interactive process does not require that the ALJ determine the ultimate question as to whether Anderson could have been reasonably accommodated, for reasons explained below.[41] Thus, in order to reach the issue of whether the ALJ's properly imposed liability, we must first review the conclusion that ASD was responsible for the breakdown in the interactive process.[42]

1. Triggering the process

"[T]he interactive process is a mandatory … obligation on the part of employers … [and] is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation."[43] Usually, it is the employee who bears the burden of initiating the interactive process.[44] Such a request need not use the

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[40] *Id.* at 21-23.
[41] *Smith v. Anchorage School Dist.*, 240 P.3d 834, 843 (Alaska 2010).
[42] *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1115 (9th Cir. 2000) ("[C]ourts should attempt to isolate the cause of the breakdown [in the interactive process] and then assign responsibility" so that "[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown.").
[43] *Id.* at 1114.
[44] *Id.*; *see also Benz v. West Linn Paper Co.*, 2011 WL 2935396 (D. Or. 2011).

magic words “reasonable accommodation,” but the employee must typically put the employer on notice of the need for accommodation. In this case, Anderson did not specifically request accommodation, nor did she even believe that she needed any, in part because she did not recognize that the use of her dog qualified as such. So it is not disputed that she did not initiate the process.

In cases where the need for accommodation is “obvious” or the employer recognizes the need for accommodation when the employee does not, however, the requirement to engage in the process can be triggered without any distinct action on the part of the employee.[45] The ALJ concluded that by the end of the October 24 meeting, ASD knew of the disability and the desire for accommodation, even if Anderson herself did not request accommodations by name or even recognize that the actions she was proposing qualified as such (using Jerry, limiting her assignments to certain locations, making large font materials, *etc.*).

Additionally, the ALJ found that ASD itself had a duty to initiate the process as soon as it became concerned that she could not carry out the essential functions of a teacher as a result of her disability.[46] In fact, the ALJ noted that on October 24, Anderson was still unaware that there had been any problems with her work—the negative incidents described above were largely unknown to her until later, she received no notice that she was in danger of losing her job, and the discipline procedures in the substitute handbook had not been utilized.[47] As a result, she had no way of knowing that she needed to discuss further accommodations in order to alleviate ASD’s concerns, and so could not be expected to request anything.

Because ASD harbored those concerns, however, it had a responsibility to continue or reengage in the process.[48] This is analogous to the situation in *Humphrey*, where an employee was terminated after one effort to provide accommodation turned out to be impractical. The Ninth Circuit noted there that “the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues

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[45] *Barnett*, 228 F.3d at 1112 (recognition); *Norris v. Allied-Sysco Food Services, Inc.*, 948 F.Supp 1418, 1436 (N.D. Cal. 1996) (obviousness).
[46] *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001) (“[T]he duty to accommodate is a continuing duty that is ‘not exhausted by one effort.”).
[47] ALJ Decision 20-21.
[48] *Humphrey*, 239 F.3d at 1138.

when…the employer is aware that the initial accommodation is failing and further accommodation is needed."[49] In the instant case, Dr. Boyer discovered new information *after* the meeting on the 24th that led him to believe that Anderson could not be reasonably accommodated, which triggered a duty to re-engage in the process to see if those concerns could be addressed. It was not error to conclude that the requirement for the two parties to engage in the interactive process was triggered at least by the October 24 meeting, and probably again upon the discovery of new information subsequent to that meeting.

2. Responsibility for the breakdown

When that process is triggered, the parties, particularly the employer, "using a problem solving approach, should:

> (1) Analyze the particular job involved and determine its purpose and essential functions;
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> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
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> (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
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> (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer."[50]

The overall "shared goal is to identify an accommodation that allows the employee to perform the job effectively. Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process."[51] Each party's participation is critical, and each must engage in good faith.[52] The failure on an employer's part to do so is an adverse

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[49] *Id.*
[50] 29 CFR P6. 1630, App. § 1630.9 (Interpretive Guidance).
[51] *Barnett*, 228 F.3d at 1115.
[52] *Id.* at 1113 ("While employers have superior knowledge regarding the range of possible positions and can more easily perform analyses regarding the "essential functions" of each, employees generally know more about their own capabilities and limitations.")

employment action for the purposes of the PFC and ultimate liability.[53] It is also not a defense to argue after the fact that no accommodation would have been possible, unless there is no evidence from which a reasonable fact finder could draw the contrary conclusion.[54]

Thus, where the breakdown in the process is the operative employment action, "courts should attempt to isolate the cause of the breakdown [in the interactive process] and then assign responsibility" so that "[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown."[55] This is very fact-specific inquiry that insists upon a great deal of communication, a dearth of which indicates a lack of good faith efforts to engage in the process.[56] One effort to accommodate or a single discussion is generally not sufficient,[57] and employers are encouraged to seek out guidance from disability or employment organizations who might be able to lend expertise, such as the National Federation of the Blind's division for blind educators, which educates employers about how blind teachers can function in classrooms.[58]

The ALJ determined that ASD was responsible for the breakdown in the interactive process. This is a factual determination, and it is supported by the record. The October 24 meeting appears to have been a good faith effort to begin the process. The parties discussed

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[53] *Smith*, 240 P.3d at 843 ("An employer's failure to make reasonable accommodations for an employee's disability is an adverse employment decision for the purposes of the prima facie case…An employer is liable for failing to provide reasonable accommodation if it is responsible for the breakdown in the interactive process.").

[54] *See Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 317 (3d Cir. 1999). There, a school teacher was terminated and argued that the school district had not meaningfully engaged in the interactive process. The School District argued that the teacher was simply incapable of being accommodated, but the Court held that that issue of fact precluded summary judgment.

The school district can be understood as arguing implicitly that it did not have to participate in the interactive process because there was no feasible accommodation that would have made Taylor capable of performing the essential functions of her job. In *Mengine* the court stated that "if reasonable accommodation is impossible, nothing more than communication of this fact is required. Nonetheless, if an employer fails to engage in the interactive process, it may not discover a way in which the employee's disability could have been reasonably accommodated, thereby risking violation of the Rehabilitation Act." *Mengine v. Runyon*, 114 F.3d 415, 420-21 (3d Cir. 1997). The court explained that whether an employer's duty to participate in the interactive process has been discharged will often be a matter of "timing": i.e., the employer will almost always have to participate in the interactive process to some extent before it will be clear that it is impossible to find an accommodation that would allow the employee to perform the essential functions of a job.

[55] *Barnett*, 228 F.3d at 1115.

[56] *Humphrey*, 239 F.3d at 1137 ("The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process.").

[57] *Id.* ("Moreover,…the duty to accommodate "is a 'continuing' duty that is 'not exhausted by one effort.").

[58] ALJ Decision 24.

options and Dr. Boyer was apparently still "open" to the possibility that Anderson could be a substitute teacher at that point, indicating that he believed there were possible accommodations that could be extended.[59]

After the meeting, Dr. Boyer obtained new information from the principals that changed his hitherto "open" mind about using her as a substitute. Instead of re-engaging the process and giving Anderson the opportunity to identify ways she might address the new concerns, as called for by *Humphreys*, Dr. Boyer appears to have made up his mind that Anderson could not be accommodated. Then the parties had a second meeting. If that meeting had been used to discuss ways of addressing the new concerns, ASD might not have been at fault. Instead, the decision had apparently already been made that the concerns could not be alleviated. In fact, Anderson's access to the Sub-Finder system was blocked before that meeting.

The ALJ concluded that this was a failure to explore reasonable alternatives and so put the blame for the breakdown of the interactive process on ASD, rather than Anderson. This is consistent with the mandate in federal cases such as *Humphrey*, which noted that the duty to accommodate is "not exhausted by one effort."[60] Rather, it at least superficially appears to reflect a lack of openness to the idea that a blind woman could successfully lead a classroom. The ALJ noted that ASD presented no evidence, other than subjective belief, that Anderson would not be able to correct her performance deficiencies. It merely asserted that the problems were inherent in her disability,[61] precisely the kind of judgment the Human Right Act is intended to prevent.

Although ASD argues that Anderson could have used the second meeting to "ask questions…or make suggestions herself," the ALJ concluded that Dr. Boyer's efforts at this meeting did not fulfill ASD's obligations under the statute.[62] Given Anderson's inexperience and unfamiliarity with the system and her apparent distress at what she perceived as Dr.

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[59] *Id.* at 11.
[60] *Humphrey*, 239 F.3d at 1137.
[61] ALJ Decision 30-31
[62] At. Br. 27. The ALJ also concluded that Dr. Boyer's efforts to steer Anderson towards a bi-lingual tutor position were not a "reasonable accommodation" because that job was significantly different from the one she sought as a substitute. This finding was not explicitly challenged, and because the job was significantly different in that it was full-time and she was not even offered it explicitly but merely advised to apply for it, that conclusion too should stand. ALJ Decision 21-22.

Boyer's "giving her the run-a-round,"[63] it was not unreasonable to conclude that she was ill-equipped at that time to press for her rights aggressively. The ALJ also concluded that the letter's invitation for her to contact Dr. Boyer if she had further questions was likewise, not a sufficient good faith effort to further the interactive process. This too is consistent with federal law.[64]

It is the ALJ's job to draw factual inferences with regard to the reasonableness of the parties' efforts in the process and whether these fulfilled the "duty to explore further arrangements to reasonably accommodate [the] disability."[65] Here, she concluded that ASD's efforts did not fulfill this duty and was therefore responsible for the breakdown, a factual conclusion that is supported by the record, and one that will not be overturned on appeal.

Accordingly, Anderson successfully made a *prima facie* case that she suffered unlawful discrimination as a result of her disability. The ALJ rightfully determined that *for the purposes of the PFC* and the first stage of the burden shifting regime, (1) Anderson was disabled; (2) she could perform the essential functions of the job with at least facially reasonable accommodations; and (3) she suffered an adverse employment action.

II. Liability can attach where the employer is responsible for the breakdown of the interactive process

A. Liability based on failure to mitigate

ASD's strongest objection is that the finder of fact did not conclude that Anderson could, ultimately, have been reasonably accommodated. Because the ALJ did not reach that conclusion, ASD reasons that Anderson necessarily did not carry her burden of proving that she suffered an unlawful discriminatory act because of her disability. She therefore should not be entitled to damages. In fact, as part of the remedy, the ALJ ordered the parties to engage in the interactive process to determine whether any accommodations will allow her to carry out the essential functions and be a substitute teacher in some capacity going forward, specifically noting that because the interactive process broke down prematurely, it was

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[63] ALJ Decision 12
[64] *See Humphrey*, 239 F.3d at 1138 (rejection of employee's proposed accommodations by letter without offering any practical alternatives, or failure to re-engage after such rejection can constitute a violation of the duty to engage in the interactive process)
[65] *Id.*

impossible to determine whether reasonable accommodation was possible. She explicitly recognized the possibility that a full inquiry could lead ASD to conclude that Anderson cannot be reasonably accommodated, and even declined to award front pay on that basis.[66]

But liability was based on ASD's failure to adequately engage in the interactive process, and it is appropriate to assess liability based on this failure—whether the Plaintiff could ultimately have been accommodated—as long as a fact finder could reasonably find that accommodation would at least have been possible. "[A]n employer who has received proper notice cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that would prevail in litigation."[67] Rather, the plaintiff alleging failure to engage in the interactive process must simply offer enough evidence to allow a fact finder to conclude that there were at least plausible options that the employer should have explored, no matter what the outcome of that exploration ultimately was.[68]

The fact finder here concluded that there were plausible options that ASD ought to have explored, and that ASD wrongfully failed to explore those possibilities with her.[69] Anderson therefore need not further prove that those accommodations would have been entirely successful, nor that ASD would have been in the wrong if they had refused.

This is perfectly reasonable from a policy perspective because otherwise employers have no incentive to engage in the interactive process.

> Without the possibility of liability for failure to engage in the interactive process, employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations. The result would be less accommodation and more litigation, as lawsuits become the only alternative for disabled employees

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[66] ALJ Decision 40-41.
[67] *Taylor*, 184 F.3d at 317.
[68] *See Barnett*, 228 F.3d at 1115-16 (citing *Taylor*, 184 F.3d at 317-18. (The range of possible reasonable accommodations, for purposes of establishing liability for failure to accommodate, can extend beyond those proposed: "an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations. In making that determination, the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations.")
[69] ALJ Decision 40.

> seeking accommodation. This is a long way from the framework of cooperative problem solving based on open and individualized exchange in the workplace that the ADA intended.[70]

Having concluded that there were options available that were reasonable on their face and that ASD unlawfully failed to explore these options, the ALJ did not need to reach the further conclusion that ASD wrongfully terminated her. It was therefore not error to impose liability without this explicit finding.

B. The remedies are not logically inconsistent and do not support ASD's argument

The fact that the ALJ awarded back pay while nevertheless ordering ASD and Anderson to "engage in the interactive process to determine whether a reasonable accommodation exists" does not create the logical inconstancy advanced by ASD. ASD argues that this acknowledgement that Anderson may ultimately be unable to be accommodated essentially proves that she did not carry her ultimate burden of proving that she was discriminated against unlawfully. The ALJ acknowledged that the process might result in a determination that Anderson could not teach,[71] but the award of back pay essentially operates as the policy mechanism that forces employers to engage in the interactive process in good faith, as noted above. So it is appropriate here, and does not create the logical inconsistency suggested by ASD.

Front pay, on the other hand, is not appropriate because the ALJ was not able to conclude that Anderson should be reinstated. Front pay is available when a terminated employee could theoretically be reinstated, but as a practical matter cannot be, usually because of extreme animosity between the parties.[72] Because the interactive process has not been carried out, the ALJ could not conclude that Anderson could be reinstated at all, a necessary prerequisite to the subsequent determination that animosity in fact prevents that from being feasible. A front pay award would pre-suppose Anderson's success on the merits of her claim in a way that the back pay award does not (if only for those policy reasons stated

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[70] *Barnett*, 228 F.3d at 1116.
[71] ALJ Decision 41.
[72] *Gotthardt v. National R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999).

in *Barnett* and *Taylor*), so is not appropriate in a failure to engage in the interactive process claim.

Finally, *Barnett* notes that "[i]f an employer fails to participate in or obstructs the interactive process, injunctive relief is an available remedy to insure compliance with the requirement of good faith interaction and to require reasonable accommodation."[73] This justifies the order that the parties engage in the process to determine whether Anderson could reasonably be expected to work in the future. This rests in part on the fact that her condition is degenerative, and whether she was capable of working in 2005 or not, she may not be capable of doing so now, as was acknowledged at oral argument. Therefore, there are no logical inconsistencies in the awards, nor were these an abuse of discretion.[74]

III. Burden shifting and the affirmative defense of business necessity

The same reasoning dispenses with ASD's arguments involving its business necessity defense. Upon making a *prima facie* case of discrimination, the burden shifted to ASD to articulate a legally sufficient reason for the employment action.[75] Business necessity or the "reasonable demands" of the position can relieve the employer of liability for an adverse employment decision. To prevail, the employer must show by clear and convincing evidence that (1) the action is necessary to the safe and efficient operation of the business; (2) the business purpose is sufficiently compelling to override any disproportionate impact on an individual, (3) the challenged business practice efficiently carries out the business purpose it is alleged to serve, and (4) there is no available or acceptable policy or practice which would better accomplish the business purpose advanced or accomplish it equally well with less discriminatory impact on the complainant.[76]

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[73] *Barnett*, 228 F.3d at 1116 n.7.

[74] Although this issue does not appear to have been preserved on appeal, the HRC's increase in the training hours remedy from three to eight hours is consistent with the justification for the ALJ's determination—namely, that ASD failed to fulfill it's obligation under the ADA and the AHRL. The increase from three to eight hours is not an abuse of discretion.

[75] Under a Commission regulation, an employer is not required to accommodate an otherwise qualified individual if the employer can demonstrate by "clear and convincing evidence that a distinction in employment…is required by business necessity or the reasonable demands of the position." Federal law makes the same allowance where reasonable accommodation would result in a direct threat to the employee or others. 42 USC § 12111(3).

[76] 6 AAC 30.910(c). ("It is a defense to a complaint of unlawful discrimination to establish by clear and convincing evidence that a distinction in employment prohibited by AS 18.80.220 (a)(1) is required by business necessity or the reasonable demands of the position.").

The ALJ agreed that ASD proved elements 2 and 3 because its need to place effective substitutes in schools was sufficiently compelling to justify terminating Anderson.[77] She concluded, however, that ASD had not proven elements 1 or 4 because it had not proven that blocking her from the system entirely (and later officially terminating her) was "necessary" or that no less discriminatory action could accomplish the goal.[78]

ASD's objections to this conclusion do not implicate the actual conclusion under the business necessity defense as much as they do the ultimate finding of liability in this case. The ALJ's conclusion that ASD failed to meet its burden of proving business necessity was based largely on her finding that ASD did not fully engage in the interactive process to determine what accommodations were possible. Since it did not engage in the process, she reasoned, ASD could not show that it had studied alternatives and had a reasonable basis for rejecting them (part of the business necessity calculus). This is logically consistent with the reasoning in the previous section because the whole reason for the interactive process is to carefully consider the available alternatives.

IV. Mitigation and the calculation of backpay

A. The Mitigation Standard

ASD's final objections regard mitigation and the ALJ's calculation of backpay. Specifically, ASD contends that HRC erred by applying the wrong standard in analyzing Anderson's alleged failure to adequately mitigate losses, the ALJ incorrectly excluded evidence regarding Anderson's alleged failure to adequately mitigate her losses, and the HRC's calculation of backpay was incorrect. ASD's objection with regard to the first of these—appropriate mitigation standard—essentially turns on two inquiries: (1) what standard ought to apply to mitigation and (2) whether employment was shown to be available which met that standard.

The ALJ utilized, in her recommended decision, a "substantially equivalent employment" standard to analyze mitigation.[79] The ALJ further explains that "substantially equivalent employment" is employment which "affords virtually identical promotional

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[77] ALJ Decision 26-7.
[78] *Id.* at 27-31.
[79] *Booker v. Taylor Milk Co.*, 64 F.3d 860, 866 (3rd Cir. 1995)(discussing failure to mitigate in a Title II claim)

opportunities, compensation, job responsibilities, and status as the position from which the [employee] has been discriminatorily terminated."[80]

ASD argues that the "substantially equivalent employment" standard is not appropriate. Specifically, it argues that Alaskan law and federal law are in conflict with regard to the standard here. To support its assertion, ASD cites to general maxims of Alaskan contract law and mitigation. Specifically, with regard to wrongful discharge, ASD cites *City of Fairbanks vs. Rice* for the rule of law that that the employee is generally "entitled to the total amount of the agreed upon salary for the unexpired term of his employment, less what he could earn by making diligent efforts to obtain similar employment."[81] ASD also cites to a number of state and federal opinions which outline the standard as "suitable alternative employment" or similar standards.[82]

ASD further argues that, even if federal law is appropriate, the ALJ erred in applying it. ASD notes that *Greenway*, a case cited in the ALJ's decision, actually holds that a discharged employee must use "reasonable diligence in finding other suitable employment, *which need not be comparable to their previous employment*."[83] Consequently ASD asserts that since there is no restriction under Alaska law that Anderson's mitigation duty is limited to seeking only "substantially equivalent employment," her failure to make any reasonable effort to find "suitable alternative employment" is a failure to mitigate as a matter of law.

HRC contends that ASD's argument that the Commission erred because it considered Anderson's duty to be limited to seeking "substantially equivalent employment" rather than "suitable alternative employment" is not persuasive.[84] This Court, however, need not address which standard applies to the case at hand. Even if this Court were to adopt the "suitable alternative employment" standard[85] over the "substantially equivalent" standard,[86] ASD would still not have met its burden of proving that Anderson failed to mitigate.

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[80] *Id*. at 865.
[81] *City of Fairbanks v. Rice*, 20 P.3d 1097, 1111 (Alaska 2000)(citing to *Skagway City School Board v. Davis*, 543 P.2d 218, 225 (Alaska 1975)).
[82] *Pyramid*, 153 P.3d at 998-999; *see also Ford Motor* stating that all Title VII claimants are subject to the duty to minimize damages by "using reasonable diligence in finding suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (U.S.N.C. 1982); *see also Webb v. VECO* found in HRC Br. Ex A at 20, where the HRC recognizes a complainant must make reasonable diligent efforts to find "*alternative* employment." (emphasis added).
[83] *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir. 1998)(emphasis added).
[84] At. Br. 34.
[85] *Pyramid*, 153 P.3d at 998-999.

In *Pyramid Printing*, the court held that the question of whether an employee has reasonably accepted or rejected a job offer that would mitigate her damages is a question of fact, and a Commission decision on the issue "will stand if it is supported by substantial evidence."[87] Further, despite ASD's reliance on the language of Greenway, a more careful reading of the opinion indicates that there is at least some level of similarity or comparableness built into the mitigation standard.[88] In the instant case, the ALJ found that the full-time bilingual tutor position was not similar or comparable to the substitute teacher position because the tutor position was a full-time position, it was not a classroom position, and the prerequisites were different as the substitute teacher position required a college degree while the tutor position required two years of college.[89] Moreover, the tutor position did not have the flexibility of a substitute teacher position. Flexibility and non-full time status were integral elements for Anderson because she suffered from migraines that could last several days and she desired to pursue research work.[90] Consequently, there are meaningful differences regarding the nature of the job, the full time or part time requirements of the position, and the flexibility provided by one but not the other. The ALJ's factual determination that the bilingual tutor positions were not sufficiently similar is supported by substantial evidence, and the ALJ's determination would be affirmed whether this Court were to use the "substantially equivalent employment" standard or the "suitable alternative employment" standard.

Lastly, ASD's reliance on the *Greenway* exception is not persuasive in the instant case. In *Greenway* the court ruled that when an employee makes only minimal efforts to seek employment, the employer is relieved of the burden of proving that suitable employment

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[86] *Ford Motor*, 458 U.S. at 231-232 (The duty to mitigate is "rooted in an ancient principle of law, [and] requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied."); *E.E.O.C. v. Farmers Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994).
[87] 153 P.3d at 998.
[88] Although ASD accurately quotes *Greenway*'s requirement that an employee find "other suitable employment, which need not be comparable to their previous employment[,]" reading the opinion as a whole, it is evident that there is some degree of comparableness required. (*i.e.* The court holds that the employer is relieved from its burden of showing that "comparable employment was available.") 143 F.3d at 55. Further, the text ASD quotes from *Greenway*, actually cites *Ford Motor Co.*, which uses "substantially equivalent" language. 458 U.S. 219, 3066.
[89] ALJ Decision at 22.
[90] ALJ Decision at 36.

was available.[91] This is referred to as the *Greenway* exception. The ALJ notes, however, that during the four year period at issue, "Ms. Anderson submitted applications to be a translator for the court system and online at Fred Meyer."[92] Although Anderson was never contacted for these positions, she did interpret for a physician on four different occasions.[93] The ALJ determined that these efforts, however slight, are sufficient to rebut the application of the *Greenway* exception. Thus ASD had the burden to prove that during the time in question there was, at the least, "suitable alternative employment" available to Anderson *and* that she failed to use reasonable diligence in finding it.[94] In this instance, the ALJ's finding that the full-time bilingual tutoring positions were not comparable employment is supported by substantial evidence in the record and ASD presented no other evidence of suitable alternative employment. Thus, the ALJ's determination is affirmed by this Court.

B. Exclusion of Evidence

ASD also claims that the ALJ erred in excluding Exhibits K, M, and U just prior to the hearing. This Court reviews a challenge "to an agency decision to admit or exclude evidence for abuse of discretion, and will reverse only if the ruling 'erroneously affected the substantial rights of a party.'"[95]

The exhibits at issue show that, in the context of a settlement offer, ASD invited Anderson to interview for the following three non-teacher full-time positions: Bilingual Tutor, Youth Development Tutor, and Teacher Assistant.[96] The basis of Anderson's objection was that the exhibits involved offers of compromise and thus ought to be excluded under Alaska Rule of Evidence 408. ASD argues that the exhibits were simply being offered to show that Anderson failed to reasonably mitigate her damages, and thus not precluded by Rule 408.

Alaska Rule of Evidence 408 states, in pertinent part, that evidence of "furnishing or promising to furnish … a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to

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[91] *Greenway*, 143 F.3d at 53-54.
[92] ALJ Decision at 34.
[93] *Id*.
[94] *Greenway*, 143 F.3d at 53.
[95] *Button v. Haines Borough*, 208 P.3d 194, 200 (Alaska 2009), quoting *Fleegel v. Estate of Boyles*, 61 P.3d 1267, 1270 (Alaska 2002).
[96] At. Br. at Exc. 2

prove liability for or invalidity of the claim or its amount."[97] It also states, however, that "[t]his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."[98]

The court in *Redman v. Department of Education*,[99] in addressing Civil Rule 43(j)(2)—the predecessor to Rule 408, confronted similar circumstances and held that the rule was inapplicable there. In *Redman*, the plaintiff was not re-hired as a home-school coordinator, which qualified as a tenured teacher under state law.[100] As Redman's claim progressed, the Department of Education sent Redman a letter which included both an offer of employment as a school social worker and an offer to reach a compromise settlement.[101] The *Redman* court determined that the "questioned evidence was not introduced by one party to show an admission by an opponent[,]" but rather the that the Department of Education "introduced evidence of its own offer solely to meet its burden of proving that alternate employment was available to Redman for purposes of mitigation."[102]

Here, similarly to *Redman*, ASD contacted Anderson with an offer to interview for a number of full-time, non-teacher positions and also included an offer to reach a compromise. Further, ASD asserts, and this Court agrees, that the exhibits were intended to be introduced solely to meet ASD's burden of proving that alternate employment was available to Anderson for purposes of mitigation, as was the case in *Redman*. Ultimately, in the instant case, as in Redman "[w]hen introduced under these circumstances, evidence of an offer of compromise is certainly admissible absent some other valid grounds for exclusion."[103]

Despite that finding, however, this evidentiary ruling will not be overturned. As discussed above, even if this Court were to consider the evidence which ASD claims was erroneously excluded—namely the availability of bilingual tutoring positions, ASD would still not have met its burden in establishing an affirmative defense based on Anderson's failure to mitigate. The positions mentioned in the excluded exhibits are neither substantially

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[97] AK. R. EVID. 408.
[98] *Id.*
[99] 519 P.2d 760, 767-768 (Alaska 1974).
[100] *Id.* at 763.
[101] *Id.* at 767.
[102] *Id.* at 768.
[103] *Id.*

equivalent employment nor suitable alternative employment, and therefore the ALJ's decision to exclude them did not "erroneously [affect] the substantial rights of a party."[104]

C. Calculation of Backpay

As the ALJ noted in her decision, the general principle regarding backpay damages is that they should be awarded where needed to put the claimant in the position he or she would have been but for discriminatory or retaliatory treatment.[105] Further, any uncertainty should be resolved in the complainant's favor.[106] Also, as mentioned above, a determination of fact—such as the number of days that Anderson will work over a period of time—by the ALJ will stand if it is supported by substantial evidence.[107] Substantial evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[108] The ALJ, in her Recommended Decision, went into a detailed analysis with regard to how she arrived at her backpay award.

The ALJ began by noting that the parties were advised that they should address what each believed to be an appropriate backpay award and calculation should Anderson win.[109] The parties agreed that the work pattern established by Anderson prior to her removal from the Sub Finder system should form the basis for any backpay award.[110] Disagreement exists, however, over how many schools should be considered in calculating the award and when this "test period"[111] actually began. ASD argued that only 16 schools—rather than 17—ought to be considered and the period over which Anderson could have sought employment began as early as October 6, 2005.[112] The ALJ finds fault with ASD, however, because they failed to state how these factors would specifically influence the backpay award and failed to provide an actual calculation. Further, the ALJ made a factual finding that Anderson could

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[104] *Button*, 208 P.3d at 200, quoting *Fleegel*, 61 P.3d at 1270.
[105] See, e.g. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). *Albemarle* interprets Title VII of the federal Civil Rights Act. Alaska's Human Rights Law is modeled on that act, and federal cases interpreting it are considered helpful in interpreting the parallel Alaska law. *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860, 862-63 (Alaska 1978).
[106] *Hudson v. Chertoff*, 473 F.Supp.2d 1292, 1298 (2007); Webb v. Veco, No. C-88-295 at 13 (ASCHR September 24, 1993).
[107] *Pyramid*, 153 P.3d at 997-98.
[108] *Leigh*, 136 P.3d at 216.
[109] ALJ Decision 35 n. 127.
[110] *Id.* at 35.
[111] The period between when Anderson was authorized to teach and when she was taken off Sub-Finder will hereinafter be the "test period."
[112] ALJ Decision 35.

not start to accept assignments until October 11, 2005.[113] Thus, the ALJ determined that in the test period of 12 days over which Anderson was eligible to work, she worked the equivalent of 7 full days, or 58% of the time.[114] Yet, the ALJ explicitly recognized that this was not the most accurate projection because, not only was it a short period of time to analyze, but also, as established above, Anderson was not seeking full time employment, but rather sought a substitute teaching position precisely because it was part-time and allowed her to take time off for her research and migraines.[115] Accordingly, the ALJ determined that a calculation based on an average of three days per week was an overestimate.[116]

Despite having broad discretion to fashion "any appropriate" remedy,[117] the ALJ was put in the unenviable position of estimating roughly how many days Anderson would have worked over an approximately four year period based on a twelve day test period and without having a "low" monetary estimate from ASD.[118] She correctly determined that the Plaintiff-side calculation that Anderson would work 60% of the school year was unreasonably high. The ALJ instead found that "it is not unreasonable to conclude that Anderson would have worked an average of 50% of the school year."[119]

In response to the ALJ's analysis, ASD first argues that the backpay award is based on two faulty legal determinations. The first allegedly faulty determination is the existence of a disability based on the irrebuttable presumption resulting solely from her use of a guide dog, and her failure to establish the core element of the disability claim—namely, the ability to perform the essential functions as a teacher, with or without accommodation. As these claims are addressed above, however, this analysis focuses on ASD's other argument.

The second faulty legal determination the ALJ made, according to ASD, was that the calculation of backpay was based on speculation rather than substantial evidence.[120] Specifically, ASD now asserts that the calculation should have been based on assignment to only four schools—rather than 17—because Anderson only accepted assignments at four

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[113] *Id.*
[114] *Id.*
[115] *Id.* at 36.
[116] *Id.*
[117] AS 18.80.130(a)(1) (the quoted language appears in both the pre- and post-2006 versions of the statute).
[118] The ALJ does note that "[p]resumably the ASD was attempting" to show her that with a longer test period—three weeks—Anderson only worked slightly over two days per week. ALJ Decision 35. But this assertion was never made explicit and regardless the ALJ disagreed with the ASD's proposed extension of the test period.
[119] ALJ Decision 37.
[120] At. Br. 37.

schools during October 2005 and there likely would have been more schools with allergy issues. ASD also points out that Anderson testified that she believed a reasonable accommodation was to limit her substitution to two schools.[121] The Court finds neither of these arguments persuasive, however. The allergy determination, which ASD finds issue with, was an estimate based on projecting 2009 allergy records backward over the prior four-year period.[122] While such a method is not fool-proof, it is a reasonable response to a difficult analysis. Further, the fact that she only worked at four schools over a period of twelve days does not make it unreasonable that she would work at more over a four year period. Also the statement which ASD points to regarding Anderson limiting her substitution to two schools, in reality, was given by Anderson to assuage ASD's health and safety concerns in the context of a fact-finding discussion, not as recognition on her part of an upper limit to how many schools at which she was able to teach.[123]

HRC also introduced evidence which supports the reasonableness of the ALJ's calculation. Evidence was submitted showing that Anderson would have had ample opportunity to work, by looking at only a few of the schools that Anderson could have accessed by bus or had actually taught at during the 2005-2006 school year. Specifically, HRC identifies the number of days worked by five substitutes between those schools—41%, 67%, 74%, 78%, and 100% of the year.[124] Ultimately, with regard to the backpay calculation, ASD neither points to evidence that contradicts the ALJ's factual findings nor presents legal authority which shows that the ALJ exceeded her authority to devise relief. Moreover, as evidenced above, the factual determinations by the ALJ are supported by substantial evidence and, thus, will not be overturned.

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[121] ALJ Decision 28.
[122] At. Br. 38.
[123] ALJ Decision 28.
[124] These numbers are reached by dividing the numbers outlined in HRC's brief (HRC Br. 33) by 170 days, which was the number of days the ALJ determined that students are in school (ALJ Decision 36).

RULING

The Alaska State Commission for Human Rights' Final Order is **AFFIRMED**.

ENTERED this 12th day of October, 2011, in Anchorage, Alaska.

_____/SIGNED/________________
Hon. Patrick J. McKay
Judge of the Superior Court

I certify that on ___10/13/11___________**,**
a copy of the above was mailed to each of
the following at their addresses of record:

_______/SIGNED/___________________
K. Nixon/Judicial Assistant

[This document has been modified to conform to the technical standards for publication.]