

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION FOR)
HUMAN RIGHTS, PAULA M. HALEY,)
EXECUTIVE DIRECTOR, *ex rel.*)
VILMA ANDERSON,)
Complainant,)
v.)
ANCHORAGE SCHOOL DISTRICT,)
Respondent.)



ASCHR No. C-05-231
OAH No. 09-0233-HRC

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners have reviewed and considered the hearing record and the Recommended Decision dated April 27, 2010, of the Administrative Law Judge in this matter. The Commissioners have also reviewed an Objection filed by the Anchorage School District to the Notice of proposed revision to the Recommended Decision. The Recommended Decision is ADOPTED by the Commission in its entirety EXCEPT AS SO MODIFIED regarding the issue of training.

The Recommended Decision is modified as follows:

Page 40 of the Recommended Decision proposes that certain ASD staff be required to attend training and in pertinent part states:

to Dr. Boyer and its EEO department in the reasonable accommodation process. The training should take place within 90 days of the date the Commission adopts this proposed order and be at least three hours in length, conducted in person by a trainer approved by the Commission staff.

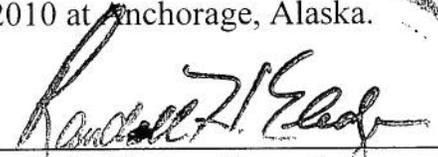
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The Commissioners, pursuant to 6 AAC 30.480(a), hereby revise
this portion of the Recommended Decision to state:

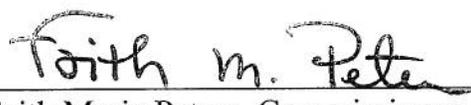
to Dr. Boyer and its EEO department in the requirements of the Americans
with Disabilities Act and Alaska law regarding the rights of disabled
individuals to seek and retain employment, including an employer's
obligations to engage in the reasonable accommodation process. The
training should take place within 90 days of the date the Commission
adopts this proposed order and be at least eight hours in length, conducted
in person by a trainer approved by the Commission staff.

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.

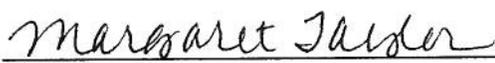
DATED this 30th day of July 2010 at Anchorage, Alaska.


Randy H. Eledge, Commissioner


Mark S. Fish, Commissioner


Faith Marie Peters, Commissioner

This is to certify that on July 30, 2010
a copy of the foregoing was hand-delivered
to ASCHR Human Rights Advocate Stephen
Koteff and mailed to Bradley D. Owens and
Administrative Law Judge Rebecca Pauli.


Margaret Jaisler

continues to accrue at \$3.9679 per day from January 1, 2010 until the Commission enters its final order. It further recommends that the Commission require the ASD to provide training to certain employees in the laws prohibiting discrimination in employment based on disability and that the parties be directed to engage in the interactive process to determine if Ms. Anderson can be reasonably accommodated.

II. GENERAL FACTUAL BACKGROUND

This case focuses on the essential functions of substitute teachers and what accommodations, if any, can be made for a visually impaired substitute with a service dog. Therefore, a brief overview of the duties of substitute teachers and the procedure for accepting substitute teaching assignments is necessary to provide the background against which Ms. Anderson's abilities, the success or failure of her substitute teaching assignments, and the ASD's decision to block her from substitute teaching can be evaluated.

A. Substitute Teachers

The ASD provides educational opportunities in 100 schools with over 3,000 teachers serving 50,000 students. The ASD employed 2,000 substitute teachers in 2005 and 2,800 in 2009.³ On any given day there will be substitute teaching opportunities that go unfilled. In 2005 approximately 10% of the vacancies remained unfilled and presently 4% of the vacancies remain unfilled.⁴ In general, substitutes earned \$100 for the first 20 days and \$120 for each additional day. Bonuses are available for substitutes working 40 or more days at a small group of schools that varies from year to year.⁵

To become a substitute teacher the person must complete an application, pass a criminal back ground check, have a bachelor's degree, and have positive letters of reference. The ASD offers a Substitute Teacher Training (STT) class. STT provides guidance, resources, instructional techniques, and classroom management skills.⁶ The

³ Boyer Deposition at 28.

⁴ *Id.* at 29.

⁵ See Ex. ED 3; Ex. ED 38 (for the 2009-2010 school year ASD offers a \$300 year end bonus to any substitute teacher working more than 100 days or working more than 40 days at Mt. Iliamna, Whaley, Nunaka, Northwood ABC, Wonder Park, Airport Heights, Tyson or Wendler. Workdays from each school cannot be combined (e.g., 12 days at Wendler and 38 days at Whaley). For the 2007-2008 school year the incentive-eligible schools were Mt. Iliamna, Whaley, West Anchorage, and East Anchorage).

⁶ Ex. ED 1 at 3.

class is required for substitute teachers who have never taught in their own classroom and it is optional for substitute teachers with experience in their own classroom.⁷ Once a person has met the prerequisite requirements he or she has access to the Sub Finder system.

Substitute teaching assignments are either prearranged or dispatched by posting on the Sub Finder system. Prearranged assignments are, as the name implies, prearranged between the teacher and a particular substitute teacher. These assignments do not appear on the Sub Finder system. Dispatched assignments are posted on the ASD's Sub Finder system where all approved substitute teachers can view open assignments. Positions may be posted in advance or on short notice, *i.e.*, the night before or that morning. Positions are for classroom assignments or roving assignments. A classroom assignment is where the substitute steps into the shoes of the teacher. A "rover" is a substitute who is brought in to assist with a variety of functions such as working in the library or helping with a project. A rover may or may not be assigned to a specific classroom. Unless the assignment is prearranged, the school and the teacher have no idea who the substitute will be until the substitute checks in at the school's administrative office.

A substitute teacher can access the Sub Finder system by phone or computer using an assigned personal identification number. Once an assignment is accepted it is removed from the list of available assignments. If a school has "blocked" a substitute from teaching at that school, the substitute teacher will not be able to view assignments at that school.

There are written procedures for removing or blocking a substitute from the Sub Finder system.⁸ If a substitute has exhibited poor or inappropriate performance, the supervisor is to discuss the matter with the substitute and, within three working days, submit a written summary to the appropriate administrative office. If desired, the supervisor can request that the substitute be blocked from a class or a school. After three occurrences of reported poor/inappropriate performance or a single major incident, the substitute no longer has access to the Sub Finder system.

⁷ *Id.*

⁸ *Id.* at 5, 6.

The functions and expectations of a substitute teacher are outlined in the substitute handbook. The handbook provides that “The substitute teacher will perform the duties assigned to the teacher the substitute is replacing”⁹ The substitute is to follow the lesson plan identified by the teacher, to supervise the classroom, and to provide a safe learning environment.¹⁰ The classroom teacher is to have available for the substitute teacher the daily lesson plan, a list of any special duties or activities, a seating chart, instructional supplies, and a list of students who have designated responsibilities.¹¹ The principal is to supervise the substitute teacher and provide building procedures, location of the classroom, lesson plans, supplies, identification badge (if required), and current emergency drill procedures as well as a map of exits.¹² Generally a substitute teacher is to arrive 30 minutes before class begins and remain 30 minutes after class ends. It is the substitute teacher’s responsibility to make sure the educational goals for the day are met.

New substitutes have to familiarize themselves with a school’s exits and emergency plan. If there is a fire drill, all staff participates. A substitute would be expected to refer to the evacuation map provided by the principal. He or she would gather the class, make sure all were present and lead them to the exit. The class goes to its assigned spot and attendance is taken. If all of the students are present the substitute holds up a green sign; if not, a red sign. If a student is missing the Building Plant Operator (day custodian) would go and look for the child. All of this is to occur within a few minutes.

There are always concerns with new substitute teachers. The principals do not know what to expect; they do not know the skills and abilities of the substitute who has accepted the assignment. Students have a tendency to try to take advantage of a substitute teacher. Students in a class are a mix: some may have attention deficit disorders, others behavior problems, others anger management issues, etc. All subs are at a disadvantage. One ASD witness who had a slight facial paralysis spoke of her

⁹ *Id.* at 9.

¹⁰ Boyer Testimony; Ex. ED 31 at 2; Ex. ED 1.

¹¹ Ex. ED 1 at 8.

¹² *Id.* at 7.

experience subbing and the “cruelty” of the students.¹³ As noted by another witness even if a substitute has no disability, once the teacher’s back is turned, “there could be so many things that happen.”¹⁴ Substitute teaching is not an easy job.

Present in the class with the teacher may be teacher’s assistants (TAs) or bilingual tutors. TAs are not assigned to a teacher as the name would imply. Rather, they are assigned to a specific student or students. In some schools a TA may go from classroom to classroom assisting students with a specific task such as reading. TAs are full time ASD employees.

Bilingual tutors are also full time ASD employees who are assigned to work with a small group of (typically six to eight) students. They are assigned to a school and work in a specific classroom or in a separate room. The position requires a minimum of two years of college education.¹⁵

B. Vilma Anderson

Ms. Anderson is a confident 62-year-old woman who suffers from pigmentosis retinitis, a degenerative eye condition. At the time of hearing she had no vision in her right eye and tunnel vision in her left eye of less than 5 degrees.¹⁶ Her distance vision is also restricted. She can see up to 20 feet away but lacks detail after a few feet. Ms. Anderson is legally blind.

Ms. Anderson first knew of her condition in 1966 but was unaware that she was actually losing her sight until the mid 1980’s when, after she was involved in a series of automobile accidents caused by her lack of peripheral vision, her husband insisted she see a doctor. She thought everyone saw things as she did and continued to drive even though she could not see the road and relied upon her children to tell her when to go straight or when to turn.¹⁷ Eventually, Ms. Anderson lost her driver’s license and it was determined that she could benefit from a service dog.

¹³ Zelenkov Testimony.

¹⁴ Val Woods Record of Interview April 9, 2008 Ex. ED 32 at 3.

¹⁵ Ex. ED 4.

¹⁶ In 1985 her range of vision had narrowed to 5 degrees. Ex. 1 to Anderson Opposition To Motion For Summary Judgment. It has continued to deteriorate since then although the exact extent is unknown. Anderson Deposition at 33, 34.

¹⁷ *Id.* at 30; Anderson Testimony.

Before she could receive a service dog, Ms. Anderson was required to complete orientation and mobility (O&M) training, which she completed in 2002. The goal of O&M training was to provide the student, Ms. Anderson, with the independence and confidence in her ability to get to where she needed to go. The training included instruction on how to teach sighted individuals to guide Ms. Anderson and help familiarize her with an area. The training also included instruction in the use of a cane and how to find clues and landmarks. For example, Ms. Anderson testified that a door leading to the outside sounds different when tapped by a cane than a door leading to an inside room. After O&M training, Ms. Anderson's functional ability was described as "pretty good." This assessment from her O&M instructor, John Clare, was based not on her physical ability, but on her personality and confidence.¹⁸ He described Ms. Anderson as "smart, capable, [with] a lot of good problem solving skills."¹⁹

In 2003, Ms. Anderson received her service dog, a black lab named Jerry. Jerry gave Ms. Anderson back her independence. She needed and relied upon Jerry the same way a paraplegic relies upon a wheel chair.²⁰ Jerry went everywhere with her and "the law said he could."²¹ It never occurred to Ms. Anderson that Jerry could not accompany her into a facility or that people would actually have allergies. She had heard of people having dog allergies but had never met anyone with an allergy or dog phobia.²²

In 2005, Ms. Anderson moved to Anchorage. Prior to that time she lived in Trapper Creek with her husband where they ran a bed and breakfast. As her vision deteriorated Ms. Anderson become more dependent upon her husband and family for transportation, but she craved independence.

Ms. Anderson was active in genealogy research. By moving to Anchorage she had access to research facilities and public transportation. After getting settled Ms. Anderson wanted to earn extra money so she could travel to genealogy conventions and to Salt Lake City for genealogy research. Having been a certified teacher the mid to late 1970's, she had experience subbing, and had had her own classroom for a short period of time in the Fairbanks school system. While living in Trapper Creek Ms. Anderson home

¹⁸ Clare Testimony.

¹⁹ *Id.*

²⁰ Anderson Testimony.

²¹ *Id.*

²² *Id.*

schooled her children. All she knew how to do, in addition to running a bed and breakfast, was teach. Substitute teaching, Ms. Anderson thought, would be a good fit.

Ms. Anderson saw substitute teaching as a “freedom job,” in which she would be able to choose when and for how long she would work.²³ The flexibility it afforded would allow her, at her liking, to take time off and travel. She “may decide to substitute 4-5 months in a row and then take off somewhere.”²⁴ Ms. Anderson also thought substitute teaching would be a good fit because she suffered from migraines that could last for several days. As a substitute, if she felt a migraine beginning to start, she simply would not accept an assignment until it had passed.²⁵

Ms. Anderson met all the prerequisites to substitute – she had a college degree, had classroom experience, and had been a certified teacher in Alaska. She spoke English, German, and Spanish. Because she had teaching experience, the ASD did not require Ms. Anderson undergo STT before having access to the Sub Finder system. With an application submitted and background check complete, Ms. Anderson was informed she could begin accepting substitute teaching assignments October 10, 2005.²⁶

Ms. Anderson relied on public transportation, which limited her ability to accept assignments; she was restricted to 17 schools.²⁷ She worked at five different elementary schools for a total of seven days before Robb Boyer, Ph.D., Human Resources Director for Certificated Staff and Recruitment, had her access to the Sub Finder system permanently blocked on October 25, 2005.²⁸ Ms. Anderson was surprised by Dr. Boyer’s action because she thought the assignments were successful and the schools were happy with her work. Also, as discussed below in *Part D*, she had met with Dr. Boyer the day before and he gave no indication that she would not be able to teach.

²³

Id.

²⁴ Record of Interview Vilma Anderson April 7, 2007, Ex. RES P at 2.

²⁵ Anderson Testimony.

²⁶ Ex. 7 at 18.

²⁷ Anderson Testimony.

²⁸ She worked one two-day assignment, three one-day assignments and four half-day assignments. Ex. ED 8. The letter was dated October 26, 2005, but Ms. Anderson was blocked as of October 25, 2005. Anderson Testimony.

C. *Ms. Anderson's Substitute Teaching Assignments*

1. Mountain View

Ms. Anderson's first substitute teacher assignment was for Josh Hegna's sixth grade class at Mountain View Elementary on October 11, 2005. Mr. Hegna was in an adjacent classroom doing developmental reading assessments and did not observe Ms. Anderson in the classroom. Ms. Anderson's substitute teaching assignment was unremarkable other than that she had a service dog. He had no concerns about the safety or supervision of the classroom because he was next door.²⁹

2. Wonder Park

Ms. Anderson substituted at Wonder Park Elementary on two different occasions, October 14, 2005 and October 21, 2005, each for a half day. The first day she accepted a classroom assignment and the second day she was there as a rover: extra help filling in where needed and assisting other teachers. The principal was Lisa Zelenkov.³⁰ Ms. Zelenkov did not recall Ms. Anderson's assignment as a roving substitute. She did, however, recall Ms. Anderson's first day. Ms. Zelenkov was caught off guard when a substitute teacher with a service dog arrived because, due to gang-related safety issues, the school had been designated "dog-free."³¹

Ms. Anderson was under the impression that Ms. Zelenkov was supportive and wanted Ms. Anderson to substitute at her school.³² Ms. Zelenkov testified that Ms. Anderson's experience was successful only because she spent a lot of time prepping the students and it was her opinion that this would need to be done prior to each assignment, as well as identification of any allergy/phobia issues. Also she checked in on Ms. Anderson at frequent intervals, which Ms. Zelenkov could not do on a regular basis.³³ Ms. Zelenkov did not think Ms. Anderson was aware that she was checking in because Ms. Anderson never acknowledged her presence.

²⁹ Hegna Testimony.

³⁰ Formerly Lisa Prince.

³¹ Zelenkov Testimony.

³² Ex. RES P at 3.

³³ Zelenkov Testimony.

3. Baxter

Ms. Anderson had two assignments at Baxter Elementary School. The principal, Vicki Hodge, did not believe Ms. Anderson had successfully controlled the classroom because there was a disruption between two students that a TA in the classroom handled.

After the decision to block Ms. Anderson from the Sub Finder system was made (discussed below), Ms. Hodge informed Dr. Boyer of a second incident. The second incident occurred when Ms. Anderson was returning to her classroom with the students and closed the door on two students who were lagging and goofing around. Ms. Hodge testified that Ms. Anderson was unaware that she had left two children in the hall.

4. Creekside

Ms. Anderson went to Creekside Elementary after her first meeting with Dr. Boyer. Dr. Boyer contacted Creekside and informed them that they had a substitute teacher coming who was visually impaired and had a service dog. He asked the school to check its records. One of the students in the class had allergies or a dog phobia and the student was removed and placed in another class. Other than removing the student, Ms. Anderson's assignment was unremarkable.

5. Nunaka Valley

Ms. Anderson never actually substituted at Nunaka Valley Elementary School. Upon arrival she was informed that Nunaka Valley was a fur/dog free school and that Jerry could not be accommodated due to allergies at the school. At Dr. Boyer's direction Ms. Anderson was paid for the day even though she did not teach.

D. The ASD's Decision to Block Ms. Anderson from the Sub Finder System

When Ms. Anderson arrived at her first substitute teaching assignment, neither the principal nor his staff was aware that the substitute who had accepted the job had a visual impairment or used a guide dog. The principal called the substitute dispatch office and voiced concerns about potential safety issues, which raised concerns about Ms. Anderson's ability to supervise and direct the students in a safe manner.³⁴ When Dr. Boyer became aware that the ASD had a visually impaired substitute and learned of the principal's concerns, he contacted the ASD's EEO office. Because the ASD had no

³⁴ Boyer Testimony; Deposition at 63.

knowledge of Ms. Anderson's limitations, a fact-finding meeting was scheduled for October 24, 2005. In the interim, Ms. Anderson continued to substitute teach.

Present at the October 24, 2005 meeting were Ms. Anderson, Dr. Boyer, and Valarie Woods, ASD EEO investigator. Ms. Anderson brought Jerry with her. It was at this meeting that the ASD discovered that Ms. Anderson had no vision in her right eye and limited vision in her left eye. Ms. Anderson told them that when she had taken students to an assembly the students sat in a single row but because of her inability to see at a distance, she couldn't see all of her students. However, she did not feel her limited ability to see all the students was a problem because that day she had extra help.³⁵ Dr. Boyer discussed with Ms. Anderson the ASD's concerns about classroom control, allergies, and ensuring student safety in an emergency situation. Ms. Anderson did not see these as insurmountable problems.

Ms. Anderson told Dr. Boyer and Ms. Woods how she used Jerry as part of her classroom control technique – if the students were good they could pet Jerry at the end of the day. Another technique she used was rewarding good behavior with pencils and stickers. She assessed student performance by constantly walking around the classroom to learn student names and by checking their work. If there was a disruption in the class she could hear it. (At hearing Ms. Anderson elaborated that she relied upon the designated student classroom leaders to take attendance and help her know what was happening in class.)

Ms. Anderson did not believe allergies were a barrier to her accepting substitute teaching assignments. At the meeting Ms. Anderson explained that she checked with the nurse upon arrival to see if children had allergies to dogs and, if they did, she then either would not teach or the child could be moved to another class for the day.³⁶

Regarding safety concerns, Ms. Anderson informed Dr. Boyer and Ms. Woods that she could limit herself to teaching at just one or two schools. She explained to them that she could go into the schools early to familiarize herself with the layout of each school and the emergency exit locations.

³⁵ Woods Notes of Meeting from October 24, 2005, Ex. ED 10. The exact nature of the help is unknown.

³⁶ Anderson Deposition at 51, 52; Anderson Testimony.

Ms. Anderson told them what she found most difficult about substitute teaching was that the teaching materials were not always in large enough print. However, Ms. Anderson told Dr. Boyer and Ms. Woods that she dealt with this by either using the student edition, which was typically in larger print, or by taking the teaching materials and enlarging them.

The October 24, 2005 meeting lasted about an hour and at its conclusion Ms. Anderson left to her next assignment at Creekside. All agree that at this meeting Ms. Anderson did not specifically ask for an accommodation. At the end of the meeting Dr. Boyer was still open to Ms. Anderson subbing. After talking to Ms. Hodge and Ms. Zelenkov, however, he decided Ms. Anderson could not be a substitute teacher because:

... there were safety issues related to her supervising students, that there were issues of [student] discrimination of having to move students to accommodate the dog, that there was – I had concerns for her safety, and that, from an all-call situation, free for all, show up at any school to substitute standpoint, that we were endangering kids and herself to leave her in the position.³⁷

The next day, October 25, 2005, Ms. Anderson went to look for her next assignment and discovered she could not access the Sub Finder system. On October 26, 2005, Ms. Anderson again met with Dr. Boyer. Ms. Anderson thought the purpose of the second meeting was to discuss whether she could have Jerry accompany her on her substitute teaching assignments and she brought Carole Shay, service dog advocate, to the meeting. Instead, Dr. Boyer presented Ms. Anderson with a separation letter.³⁸

The letter, dated October 26, 2005, informed Ms. Anderson that the ASD concluded she could not continue to substitute because of health and safety concerns. Dr. Boyer believed Ms. Anderson had skills that would benefit the students and ASD. He thought that a bilingual tutor position would be a good compromise because the position would provide Ms. Anderson with a smaller, known, consistent setting with the assurance that there will be additional adults in close proximity to assist her in an emergency situation. Although he did not have the authority to place Ms. Anderson in a bilingual tutor position, he identified several available positions and spoke with at least one of the principals to urge Ms. Anderson's employment. He and Ms. Anderson identified

³⁷ Boyer Deposition at 75; *See also* Boyer Interview Ex. ED 31 at 6.

³⁸ Ex. ED 9.

available bilingual positions that met her transportation restrictions. Dr. Boyer gave Ms. Anderson an application and understood she was going to complete the application and submit it for consideration. Ms. Anderson left the meeting bewildered and angry.³⁹

Ms. Anderson eventually contacted some of the schools but was informed that the bilingual positions were no longer available. In making these inquiries, she did not tell the principal who she was.⁴⁰ She did not go back to Dr. Boyer because she felt as if he had given her the run-a-round and her “fate was sealed.”⁴¹ It was then that Ms. Anderson decided to file a discrimination complaint.

The first complaint was filed with the ASD EEO office. A fact-finding meeting was scheduled for December 8, 2005. Before the meeting took place, Ms. Anderson filed a complaint with ASCHR. When ASCHR notified ASD of the complaint, the internal ASD process ended.

III. DISCUSSION

A. The ASD unlawfully discriminated against Ms. Anderson when it failed to engage in the interactive process.

AS 18.80.220(a)(1) makes it unlawful to “discriminate against a person in . . . a privilege of employment . . . because of . . . physical . . . disability.” The Alaska Supreme Court has found that 18.80.220 “imposes a duty on an employer to reasonably accommodate a disabled employee.”⁴² An employer’s failure to reasonably accommodate is a violation of the Americans with Disabilities Act (ADA) which constitutes discrimination for purposes of AS 18.80.220.⁴³ The interactive process is part of the accommodation process.⁴⁴ The Ninth Circuit Court of Appeals has held that employers “who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.”⁴⁵

³⁹ Anderson Testimony.

⁴⁰ Anderson Deposition at 90 - 94.

⁴¹ Anderson Testimony.

⁴² *Moody-Herrera v. State, Dep’t of Natural Resources*, 967 P.2d 79, 87 (Alaska 1998).

⁴³ *Id.* at 86-87.

⁴⁴ Whether a reasonable accommodation is possible is “best determined through a flexible interactive process” between the employer and the individual with a disability. 29 CFR Pt. 1630, App. § 1630.9.

⁴⁵ *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000), vacated on other grounds, 535 U.S. 391 (2002).

To prevail on a failure to accommodate claim, Ms. Anderson must first establish a *prima facie* case. Ms. Anderson does this by showing by a preponderance of the evidence that she (1) has a disability within the meaning of the statute; (2) is able to perform the essential function of a substitute teacher (with or without reasonable accommodation); and (3) has suffered an adverse employment decision because of her disability.⁴⁶

Once a *prima facie* case is established, the burden shifts to the ASD to articulate a legally sufficient reason for the employment action. 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.”⁴⁷ Federal law recognizes that an employer is not required to reasonably accommodate an employee where to do so would result in a direct threat to the employee or others.⁴⁸

The ASD argued that Ms. Anderson had not established that she could perform the essential functions of a substitute teacher. Moreover, it contended that no interactive process was required because she failed to request an accommodation. Alternatively, the ASD offered that if the interactive process was triggered, it made reasonable efforts to accommodate Ms. Anderson but she failed to engage in good faith in the accommodation process. The ASD also argued that Ms. Anderson failed to pursue alternative employment and thus failed to mitigate her damages. Finally, the ASD has argued that it had no duty to accommodate Ms. Anderson under either the Commission’s “business necessity” analysis or the federal “direct threat” analysis.

The Executive Director acknowledged the “direct threat” defense but argued that it was melded with the “business necessity” analysis. “The commission considers instructive, but not binding, relevant federal . . . statutes, . . . if they do not limit the commission’s obligation to construe AS 18.80 liberally. . . .”⁴⁹ As a practical matter an

⁴⁶ *Moody, supra* at 88 (Alaska 1998).

⁴⁷ 6 AAC 30.910(c).

⁴⁸ 42 USC § 12111(3).

⁴⁹ 6 AAC 30.910(b). Where there is a conflict between the HRA and federal law, the HRA controls when it is more liberal than the federal law. *Id.*; see also Decision on Law of the Case (November 25, 2009).

employer's evidence with respect to its affirmative defenses merge with an employee's burden to show he or she can perform the essential functions of a position with an accommodation. When considering whether an employee poses a direct threat, the employer may present many of the same facts as it relies upon when asserting the business necessity defense. Therefore, while legally distinct concepts, the legal analysis for the direct threat defenses and the business necessity defense overlap with determining whether the employee can perform the essential functions of the position desired with or without an accommodation.

This decision does address the ASD's direct threat defense as a distinct defense. However, it is not necessary to resolve whether the Commission should accept a claim of direct threat as a distinct defense to a failure to accommodate claim because, at part B *infra*, I find the ASD failed to present evidence that would give rise to a direct threat defense.

Ms. Anderson alleged that the ASD violated the AHRL and the ADA when it failed to engage in the interactive process and conduct an individualized assessment of her abilities for purposes of a reasonable accommodation prior to blocking her access to the Sub Finder system. Although Ms. Anderson was adamant that Jerry was the only accommodation needed to perform the essential functions of a substitute teacher, she argued that to the extent other accommodations were available (enlarged print, limiting the number of schools at which Ms. Anderson could substitute, etc.), the ASD failed to provide an accommodation.⁵⁰

1. Ms. Anderson has established a *prima facie* case of discrimination.
 - (a) Ms. Anderson has a disability within the meaning of the AHRL and she suffered an adverse employment decision because of her disability

As to the first element of complainant's *prima facie* case, it was determined in the November 25, 2009 Decision on Summary Adjudication and Law of the Case, that under AS 18.80.220, Ms. Anderson has a physical disability because she has a condition that requires the use of a service animal.⁵¹ A physical disability is defined as:

⁵⁰ Providing materials in a larger print could be a form of accommodation. The fact that Ms. Anderson failed to recognize large print as an accommodation does not preclude its consideration.

⁵¹ At page 3, 4.

- (A) a physical ...impairment that substantially limits one or more major life activities;
- (B) a history of ... physical impairment that substantially limits one or more major life activities ... or
- (D) a condition that may require the use of a ... service animal.⁵²

A physical impairment is a physiological disorder or condition affecting special sense organs.⁵³

In its Motion for Summary Judgment, ASD focused upon federal ADA case law, arguing that Ms. Anderson is not substantially limited in one or more major life activities. However, Alaska law is more liberal than federal law. The legislature saw fit to expand the definition of disability beyond limitation of a major life activity to include in the definition of physical disability a condition that may require the use of a service animal. Alaska law will govern where it is more liberal than federal law.⁵⁴

It is undisputed that Ms. Anderson suffers from retinitis pigmentosis. It is also undisputed that she is legally blind, having suffered a complete loss of sight in her right eye, and a narrowing of the field of vision to five degrees in her left eye. ASD did not dispute that as a result of her condition Ms. Anderson has a trained and certified service dog. Therefore, the undisputed material facts establish that Ms. Anderson has a physical disability because she has a condition that does require the use of a service animal.

As to the third element of the *prima facie* case, I find that Ms. Anderson suffered an adverse employment action when the ASD blocked her access to the Sub Finder system because of alleged performance deficiencies and concerns which ASD attributed to her physical disability.⁵⁵

This leaves only the second of the three elements: whether Ms. Anderson is able to perform the essential function of a substitute teacher (with or without reasonable accommodation). “Essential functions” are “fundamental job duties of the employment position...not include[ing] the marginal functions of the position.”⁵⁶ The parties agree

⁵² AS 18.80.300(14).

⁵³ AS 18.80.300(15)(A).

⁵⁴ 6 AAC 30.910(b) (“In the event of a conflict between federal laws and AS 18.80 and the regulations in this chapter, the provisions of state law will govern when state law is more liberal than federal law.”).

⁵⁵ Ex. ED 9.

⁵⁶ 29 CFR § 1630.2(n)(1).

that the supervision, safety, and education of students are the essential functions of a teacher.

(b) Ms. Anderson has made a facial showing that she could perform the essential functions of a substitute teacher with a reasonable accommodation.

(i) Ms. Anderson met the initial threshold requirement to be a substitute teacher.

It is undisputed that Ms. Anderson met the minimum “paper” qualifications to perform the duties of a substitute teacher and was given access to the Sub Finder system. Ms. Anderson has a college degree, held an Alaska teaching certificate, taught school for one year, passed the background check, and had the required letters of recommendation. She completed seven substitute teaching assignments.⁵⁷ At the end of his first meeting with Ms. Anderson, Dr. Boyer was still open to her subbing.⁵⁸ Only one principal initiated contact with sub dispatch and that was because he was caught off guard, not because of performance issues.⁵⁹ The remaining principals, even if they were not exuberant about Ms. Anderson subbing at their schools, did not notify sub dispatch of any performance issues, nor did they request she be blocked from their schools.

(ii) Ms. Anderson has met her initial burden of showing that a reasonable accommodation is possible.

When an employee seeks a reasonable accommodation, he or she must establish that a “reasonable” accommodation is possible. Alaska law is silent on the level of proof required 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 an accommodation, the complainant initially must only make a “facial showing that a reasonable accommodation is

⁵⁷ There were eight assignments accepted by Ms. Anderson but she did not substitute at Nunaka Valley because of its designation as a “fur/dog free” school so it is not included in the count of completed assignments.

⁵⁸ Boyer Record of Interview, April 9, 2008, Ex. ED 31 at 6.

⁵⁹ Boyer Deposition at 65. The weight of the evidence establishes that the initial call to Sub Dispatch involved Ms. Anderson arriving at a school without any forewarning and questioning whether there were any safety concerns.

possible....”⁶⁰ Applying this standard promotes liberal construction and is appropriate in this case.⁶¹

At hearing Ms. Anderson offered several ways to address the ASD’s safety concerns. First, Ms. Anderson offered that the ASD could solicit volunteers to join her when she substitute taught, thereby ensuring another adult in the classroom.⁶² The solicitation of volunteers to work in a classroom with Ms. Anderson while she is substitute teaching is not reasonable. A position is posted and a substitute teacher can accept that assignment or not. Once accepted, the substitute must arrive at the school ready to go. Until the substitute arrives, the school does not know which substitute accepted the assignment. Adding an additional step or coordinating a volunteer interferes with the nature of the substitute function: that there is a vacancy and it is filled by a person who is qualified to step into the shoes of a teacher on short notice. The business of running a school is to educate students in a safe environment. The role of a substitute is to carry on the business purpose. The ASD has no supervisory authority over a volunteer. It was unclear who could be responsible for volunteer coordination. In sum, relying on a volunteer is too tenuous and not reasonable.

Many of the other suggestions mentioned by Ms. Anderson were more practical. Some were measures of the sort taken by Mary Willows, a blind teacher from California who testified for Ms. Anderson. Ms. Willows no longer substitutes and is a permanent special education teacher. She does not have a service dog and she has never taught for the ASD. Before taking a permanent teaching position, Ms. Willows substitute taught about ten times in two different schools from 1990 - 1992. The jobs were prearranged. She did take special preparatory steps such visiting the campus ahead of time with a person who could help her orient to the physical layout before going into the classroom. Ms. Willows’ substitute teaching experience included a regular class with 30 students, although she recalled having a roaming TA for part of the day. Regardless, the important distinguishing factor between Ms. Willows’ substitute teaching experience and Ms.

⁶⁰ *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 569 (8th Cir. 2007) (footnote omitted) (quoting prior authority).

⁶¹ “The commission considers instructive, ... relevant federal case law, ...if they do not limit the commission’s obligation to construe AS 18.80 liberally.” 6 AAC 30.910(b).

⁶² The Executive Director is not asserting that it would be reasonable for the ASD to hire a TA specifically for Ms. Anderson.

Anderson's is that Ms. Willows' jobs were prearranged, and Ms. Anderson's were not. The ASD has presented testimony, however, that some substitute teaching assignments are posted in advance. If they were posted in advance and if Ms. Anderson were limited to one or two schools, she may be able to familiarize herself with the exits and layout of the schools. This suggests a possibility for successful accommodation.

To address the ASD's concerns regarding allergies, not all schools have students with allergies.⁶³ The ASD could identify those schools without allergies and provide Ms. Anderson with access to the Sub Finder system for those particular schools. Allowing Jerry in a classroom with no student allergies is a reasonable accommodation.

Finally, Ms. Anderson identified the need to have printed materials in large font. This had not been an insurmountable challenge on her seven substitute assignments and there is no evidence that Ms. Anderson failed to complete the lesson plans left by the teacher. Ms. Anderson dealt with the font size by using the student edition or simply enlarging the print.

I find Ms. Anderson's proposed accommodations, such as enlarging printed materials, limiting herself to one or two schools, etc., appear reasonable on their face. This finding is supported by Dr. Boyer's impression after his first meeting with Ms. Anderson that she could continue subbing.⁶⁴ Therefore, at this initial step, Ms. Anderson has met her minimal evidentiary burden and has established a *prima facie* case of discrimination based on a failure to accommodate her physical disability.

2. The ASD erred when it removed Ms. Anderson preemptorily from the Sub Finder system, thereby terminating the interactive process.

(a) The legal framework.

The general rule is that the employee bears the burden of initiating the informal, interactive process.⁶⁵ The employee must communicate his or her need for an accommodation, "in a manner that would be understood by a reasonable employer, that the employee has a disability that requires some sort of accommodation in order for the

⁶³ Affidavit of McIntyre.

⁶⁴ Ex. ED 31 at 6.

⁶⁵ *In re Block*, OAH No. 07-0665 HRC, ASCHR No. C-03-165, Recommended Decision at 8 (adopted 2009).

employee to be able to perform [her] work duties.”⁶⁶ The request needs to be “sufficiently direct and specific” to put the employer on notice of the need.⁶⁷ However, it is not necessary that an employee use the magic words “reasonable accommodation” when communicating with the employer.⁶⁸

As with most general rules, there are exceptions. One such exception is where the employer is aware of or recognizes the employee's need for accommodation, or if the need for accommodation is “obvious.”⁶⁹ “What matters under the ADA are not formalisms about the manner of the request, but whether the employee ... provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.”⁷⁰ Whether the employer can be found to know of the disability and the need for an accommodation “will, therefore, often depend on what the employer already knows.”⁷¹

Once the interactive process is triggered, the EEOC has outlined a process that requires an employer to:

1. Analyze the particular job involved and determine its purpose and essential functions;
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;
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;
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.⁷²

When the interactive process breaks down, liability is assigned to the party responsible for the breakdown. An employer is responsible for the breakdown when the

⁶⁶ *Norris v. Allied-Sysco Food Services, Inc.*, 948 F. Supp. 1418, 1437 (N.D. Cal. 1996), *aff'd*, 191 F.3d 1043 (9th Cir. 1999).

⁶⁷ *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001) (quoting prior authority).

⁶⁸ *Norris*, 948 F. Supp. at 1437.

⁶⁹ *Humphrey v. Memorial Hosp. Ass'n.*, 239 F.3d 1128, 1137 (9th Cir. 2001); *Barnett v. U.S. Air*, 228 F.3d at 1112 (recognition); *Norris*, 948 F. Supp. at 1436 (obviousness).

⁷⁰ *Taylor v. Phoenixville School District*, 184 F.3d 296, 313 (3rd Cir. 1999); *see also Zivkovic v. Southern Calif. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002).

⁷¹ *Conneen v. MBNA Bank*, 334 F.3d 318, 332 (3rd Cir. 2003).

⁷² 29 CFR Pt. 1630, App. § 1630.9 (Interpretive Guidance).

employer rejects the employee's proposed accommodation and does not “explore” alternative accommodations.⁷³

- (b) The interactive process was triggered when the ASD understood that Ms. Anderson required Jerry and when the ASD developed concerns regarding her ability to perform the essential functions of the position because of her disability.

Ms. Anderson should have informed the ASD of her disability and requested an accommodation for Jerry. She did not. As described by one of Ms. Anderson’s witnesses, this is not the type of situation where one acts as if they do not have a disability.⁷⁴ Ms. Anderson acknowledges that she never asked for an “accommodation” by that name.⁷⁵ She explains that she did not ask because she did not perceive her need for Jerry, her service animal, as an accommodation. She considered her use of the dog to be no different than a person using a wheelchair, “[y]ou just use it.” However, Ms. Anderson did make it clear that she needed her service dog.

I find that at the end of the October 24, 2005, meeting the ASD knew of both the disability and desire for accommodation (to bring Jerry with her to work).⁷⁶ Therefore, the interactive process was triggered.

The interactive process was also triggered when the ASD believed Ms. Anderson could not perform the essential functions of a substitute. In addition to concerns regarding Jerry, the ASD removed Ms. Anderson from the Sub Finder system list because of its concern that she could not safely supervise students because of her disability. This inquiry was distinct from the need for Jerry.

The weight of the evidence establishes that at the October 24, 2005 meeting Ms. Anderson was unaware of any performance issues or concern that she could not perform the essential functions of the position. Because Ms. Anderson received no written or oral notice that her performance was lacking, she had no way of knowing that the ASD perceived her disability as interfering with her ability to safely supervise and monitor students. The substitute handbook identifies a discipline process. It was not

⁷³ *Humphrey*, 239 F.3d at 1138; *see also Barnett*, 228 F.3d at 1117.

⁷⁴ Clare Testimony.

⁷⁵ Anderson Deposition at 121.

⁷⁶ “I already knew the dog was part of the accommodation.” Valarie Woods Record of Interview – April 9, 2008, Ex. ED 32 at 4.

unreasonable for Ms. Anderson to expect that if her performance was not meeting expectations, she would be notified. Ms. Hodge testified that she spoke with Ms. Anderson regarding the children left in the hall but this event only gained significance after Dr. Boyer informed Ms. Anderson she could not substitute. The evidence does not establish that the principals discussed her perceived shortcomings, nor were they so concerned with her performance that they sought to have her blocked from accepting substitute teaching assignments at their schools.

Accordingly, the need for an accommodation beyond a guide dog was unknown to Ms. Anderson and she could not be expected to ask for a further accommodation. The situation presented is the converse of the scenario where the complainant knows of the need for an accommodation but fails to request one, expecting the employer to read his or her mind. “If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation.”⁷⁷ Ms. Anderson had a known disability which the ASD perceived as interfering with her ability to perform the essential functions of a substitute teacher; therefore, I find the ASD had an obligation to initiate the interactive process.

- (c) The ASD failed to engage in the interactive process when it unilaterally determined Ms. Anderson should be blocked from the Sub Finder system and terminated any further discussion of substitute teaching.

Employers “who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.”⁷⁸ ADA caselaw recognizes that “both parties bear responsibility for determining what accommodation is necessary,” a joint process that “requires a great deal of communication.”⁷⁹ If communication has been imperfect, one must “look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary.”⁸⁰

The ASD attempts to argue that the bilingual tutor position was an accommodation and that, as of October 26, 2005, Ms. Anderson was not terminated from

⁷⁷ 29 CFR Pt. 1630, App. § 1630.9 (Interpretive Guidance).

⁷⁸ *Barnett v. U.S. Air*, 228 F.3d at 1116.

⁷⁹ *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996).

⁸⁰ *Id.*

ASD employment. An accommodation includes job restructuring and reassignment to a vacant position if the position is equivalent in terms of pay, status, etc.⁸¹ The ASD considered the bilingual tutor position a promotion from a substitute teacher because it was a full time position with benefits.⁸² Ms. Anderson, however, was not looking for a full time position. She wanted a “freedom job.”⁸³ Moreover, the bilingual tutor position was not equivalent to a substitute teacher. One was full time and one was temporary. The prerequisites and responsibilities for each position are dissimilar. A substitute teaching position required a college degree; a bilingual tutor position required two years of college education. Also a substitute teacher was the individual in charge of the classroom; a bilingual tutor was not. Finally, this was not a reassignment.⁸⁴ The ASD provided Ms. Anderson with an opportunity to apply for a position.⁸⁵ Offering the chance to apply for a dissimilar position is not, however, a reasonable accommodation.

A party that fails to communicate during the interactive process, by way of initiation or response, may be acting in bad faith.⁸⁶ When it handed Ms. Anderson the October 26, 2005 letter, the ASD informed Ms. Anderson that it could not continue to use her

as a temporary employee/substitute teacher in an “all-call” fashion. ... Therefore, due to allergy/phobia, classroom management, safety, and educational concerns we have removed your name from the available sub pool.... I do believe you have qualities to offer the Anchorage School District.... A smaller, known, consistent setting, with the assurance that there will be additional adults in close proximity appears to be a much better fit. [The ASD] has identified that there are currently nine Bilingual Tutor positions open in the District. She encourages you, as do I, to apply for one of those positions. The individual site Principals ... do the actual interviewing and hiring selection. ... I wish you the best of luck in

⁸¹ 29 CFR § 1630.2(o)(2)(ii).

⁸² Boyer Testimony.

⁸³ Anderson Testimony.

⁸⁴ Dr. Boyer testified that he did not have the ability to offer her the position but he had paved the way so if Ms. Anderson had applied she would have been hired.

⁸⁵ Because the two positions were so dissimilar, Dr. Boyer’s belief that he had conveyed to Ms. Anderson that if she applied she would get the bilingual tutor position is inconsequential.

⁸⁶ *Humphrey*, 329 F.3d at 1137, citing *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

those interviews. If you have any further questions please feel free to contact me....⁸⁷

The letter made it clear that there was to be no further discussion on the issue of substitute teaching. As discussed below under “affirmative defenses,” the ASD reached its conclusion without making an effort to first determine whether an accommodation was possible; it made no factual inquiry. One option that could have been explored by the ASD was to temporarily suspend Ms. Anderson’s access to the Sub Finder system while the ASD and Ms. Anderson continued the interactive process. Ms. Anderson’s failure to follow up with Dr. Boyer after she was told there were no bilingual tutor positions available was not a failure to engage in the interactive process as argued by the ASD. Rather, the breakdown in communication occurred when the ASD unilaterally determined Ms. Anderson should be permanently blocked from the Sub Finder system and was no longer willing to discuss the possibility of Ms. Anderson substitute teaching.

While I find ASD did not act with malice, they did exactly what the ADA and the AHRL is intended to prevent: adverse employment decisions based on speculation, preconceived ideas of a disabled persons limitations, and unsubstantiated fears.

B. Affirmative Defenses

1. Direct Threat

The ASD argued that in the role of a substitute teacher Ms. Anderson posed a direct threat to herself or others as a result of her visual impairment, and that therefore the ASD was excused from any duty to engage in the interactive process. A person is a direct threat if there is a risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation.⁸⁸

Once the employer has identified the aspect of the disability that would pose a direct threat, it should conduct an “individualized assessment of the individual’s present ability to safely perform the essential functions of the job” and consider the following factors:

- (1) The duration of the risk;

⁸⁷ Ex. RES A. The exhibit at page 4 contains a typographical error which has been corrected in the quotation. The letter originally concluded “I wish you the best of look in those interviews.” At hearing it was confirmed that “look” should be replaced with “luck.”

⁸⁸ 42 USC § 12111(3) and 42 U.S.C. § 12113 provide that it may be a defense to a charge of discrimination if the individual poses a threat to the health or safety of others in the workplace.

- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.⁸⁹

The requirement of an individualized assessment based on objective evidence means that an employer must rely on facts, “not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes.”⁹⁰ The EEOC envisions a process where an employer seeks input from the individual with the disability, as well as opinions of health care providers, rehabilitation counselors, or physical therapists “who have expertise in the disability involved and/or direct knowledge of the individual with the disability.”⁹¹ An employer may not rely upon “generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency . . . to disqualify an individual with a disability.”⁹² Rather, an employer’s determination of whether a person poses a direct threat as a result of the disability must be based on individualized factual data and must consider potential reasonable accommodations.

I find that the ASD did not seek input from persons or organizations with expertise in blind teachers. It did not contact the National Federation of the Blind’s division for blind educators, which provides information for those interested in areas such as how a blind person would write on the blackboard, monitor students, take attendance, keep students safe, and use classroom management tools.⁹³ There is no evidence in the record that the ASD contacted other school districts to inquire into whether they had visually impaired substitute teachers and, if so, what accommodations were made. Nor did the ASD consult medical experts or journals regarding allergies and asthma threats that would be posed by a service dog in the school.⁹⁴ Accordingly, I find that the ASD has not presented evidence sufficient to establish that at the time it removed Ms. Anderson from access to the Sub Finder system, it did so based on an objective inquiry of

⁸⁹ 29 CFR § 1630.2(r).

⁹⁰ 29 CFR Pt. 1630, App. § 1630.2(r) (Interpretive Guidance).

⁹¹ *Id.*

⁹² *Id.*; see also *Matolete v. Bogler*, 767 F.2d 1416 (9th Cir. 1985); *Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982).

⁹³ Willows Testimony.

⁹⁴ Coburn Testimony. Ms. Anderson established that there are recognized journals with research addressing ways in which allergic reactions to animal dander can be reduced.

the type required by the ADA before an employer can claim this affirmative defense.⁹⁵ Rather, I find it did so based on subjective preconceived perceptions and stereotypes.

The findings in this decision are not intended to preclude or estop the ASD from conducting such an inquiry and, if supported by the objective evidence and facts, ultimately concluding that Ms. Anderson does pose a direct threat.

2. Business Necessity

The “business necessity” or “reasonable demands of the position,” the ASD argues, relieve it of the obligation to provide a reasonable accommodation to Ms. Anderson.⁹⁶ To prevail, a Commission regulation requires that the ASD must establish by clear and convincing evidence⁹⁷ that (1) its decision is necessary to the safe and efficient operation of the business, (2) the business purpose is sufficiently compelling to override any disproportionate impact on Ms. Anderson, (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.⁹⁸

⁹⁵ The ASD’s claim that Ms. Anderson poses a direct threat if she were to continue to substitute teach is not contradictory to its belief that she could perform the duties of a bilingual tutor. This decision focuses on the nature of a substitute teacher.

⁹⁶ As discussed above the employer’s burden with respect to its affirmative defenses merges with an employee’s claim that the employee can perform the essential functions of a position with an accommodation.

⁹⁷ Clear and convincing “evidence that is greater than a preponderance, but less than proof beyond a reasonable doubt.... ‘[C]lear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.’” *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 187 (Alaska 2009),.

⁹⁸ 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. “Business necessity” or “reasonable demands of the position” means that the distinction is necessary to the safe and efficient operation of the business; the business purpose is sufficiently compelling to override any disproportionate impact on an individual protected by AS 18.80.220(a), and the challenged business practice efficiently carries out the business purpose it is alleged to serve, and 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.

6 AAC 30.910(c). It is believed that the semicolon in the second sentence is a typographical error. If not, it could be argued that there are two distinct and alternative affirmative defenses. Because I find that the ASD has not met its burden with respect to the first and fourth elements it is not necessary to resolve whether there are one or two distinct affirmative defenses provided for in this paragraph.

- (a) The ASD has established by clear and convincing evidence that blocking Ms. Anderson from access to the Sub Finder system was sufficiently compelling to override any disproportionate impact on Ms. Anderson and that it efficiently carries out the business purpose served.

Because the consequence of failing to supervise the classroom environment and ensure student safety in an emergency situation is unacceptable, these tasks are essential functions of a substitute teacher.⁹⁹ The ASD needs substitute teachers who can accept a substitute assignment and step into the shoes of a teacher on very short notice. Because a substitute can select the position he or she wants for that day, the ASD does not know where a sub will be working unless the substitution has been prearranged or the vacancy was posted in advance.

Ms. Anderson had access to the Sub Finder posting, including short notice assignments. She did not inform the ASD of her impairment because she did not think it was necessary. She understood the law to be that no one could stop Jerry from going with her and she did not consider the impact of dog allergies or phobias because she had never met any one with either.¹⁰⁰ If it were proven that a child was allergic or phobic, Ms. Anderson offered that the child could be removed to another class for the day or she would not teach. Removing the child is not a reasonable accommodation because a substitute teacher must step into the shoes of the teacher as to all students in that class, not part of the class. If she cannot do this, she is not able to fulfill the essential function of a substitute teacher. Moreover, by placing the student in another class, the students in the new class are arguably negatively impacted because their class size has increased.

Also, an assignment, once accepted, is removed from view. For Ms. Anderson to accept an assignment and arrive only to discover she could not teach the class may mean that it is too late to get another substitute. The ASD needs substitute teachers. It cannot fill all the positions that are available. For a school to think it has a substitute only to

⁹⁹ Whether a function is essential may be identified by the consequences of failing to require the employee perform the function. “For example, although firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequence of failing to require the firefighter to be able to perform this function would be serious.” 29 CFR Pt. 1630, App § 1630.2(n) (Interpretive Guidance).

¹⁰⁰ Anderson Testimony.

discover that students had allergies and the substitute can not take the assignment strains the school's ability to perform its primary function: to teach the students.¹⁰¹

Therefore, I find by clear and convincing evidence that the need for substitute teachers who can accept short notice assignments is sufficiently compelling to override any disproportionate impact on Ms. Anderson. The challenged business practice, blocking Ms. Anderson from the Sub Finder system because of her visual impairment, does efficiently carry out the purpose of having substitute teachers available and ready to step into the shoes of the teacher on very short notice.

- (b) The ASD has not established by clear and convincing evidence that its decision to block Ms. Anderson from the Sub Finder system was necessary to the safe and efficient operation of the business, nor has it established that there is no other policy or practice that would accomplish the business purpose with less discriminatory impact.

As to the first and fourth elements, the regulation requires that “the *distinction is necessary* to the safe and efficient operation of the business; ... 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.”¹⁰² The language of the regulation conveys that there has been a consideration of alternatives and a reasoned rejection of those alternatives. For example, for a finding that there is “no available or acceptable policy or practice which would better accomplish” the business necessity, it is axiomatic that alternative policies or practices be considered. This interpretation is also supported by the interactive process envisioned by the ADA, the purpose of AHLR and the policies of the Commission.¹⁰³

The ASD blocked Ms. Anderson from the Sub Finder system because of concerns regarding allergies, her ability to supervise students, her own safety and whether she could perform in an emergency situation.

¹⁰¹ A function “may be essential because of the limited number of employees available among whom the performance of that job function can be distributed....” 29 CFR § 1630.2(n)(2)(ii).

¹⁰² 6 AAC 30.910(c) (emphasis added).

¹⁰³ See 6 AAC 30.975; AS 18.80.200.

The ASD's concern for Ms. Anderson's own health and safety should not be considered because it is based on untested stereotypes.¹⁰⁴ As Ms. Anderson observed in support of her internal EEO complaint filed in November 2005,

Safety issues apply to sighted or non-sighted subs. ... I should remind you that people who are visually impaired can probably get around better than a sighted one in the middle of a dark or no lights situation. I also have Jerry who is trained to find in case of emergency the nearest door. Other exits would have to be taught to any sub since unless the teacher subs are there all the time, he or she would have to be told about the special exits in the facility. If I work in the same one or two schools, I can easily learn all the drills and special features of safety for those two schools like everybody else.¹⁰⁵

Ms. Anderson is correct that safety issues are a concern for any teacher, sighted or visually impaired, who is unfamiliar with the physical layout of school. Her points about her own ability to look out for her own safety are worthy of investigation and assessment.

Less meritorious are Ms. Anderson's views on protecting the safety of others. She has claimed that "[m]any drills are done in the schools nowadays related to emergency evacuations, so most students know the emergency exits and the teacher is just a guide or leader so everything goes according to plan."¹⁰⁶ In an emergency situation a teacher should not expect that the students can find their own way out. To say that the teacher is simply a "guide or a leader" is incorrect. The teacher is to take charge and is responsible for the children. While Ms. Anderson may be able to get around better in a dark or no light situation than a sighted individual, she fails to address the primary concern—whether she can ensure that all of her students can get to a safe place in a dark or no light emergency situation.

If Ms. Anderson went into a school prior to accepting an assignment and learned where the exits were, she could arguably have more familiarity with the facility in an emergency situation than a sighted individual who had never been to that school. However, this does not address the ASD's concern that she cannot supervise a classroom or that she could not see all the children if they were in a line.

¹⁰⁴ See *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73, 85-86 (2002) (direct threat defense must be based on objective evidence or up-to-date medical knowledge, coupled with individualized assessment, rather than untested stereotypes).

¹⁰⁵ Ex. RES E at 3-4.

¹⁰⁶ *Id.* at 3.

The ASD cites to two specific examples of failure to supervise based on what they attributed to her lack of vision: a disturbance between two students in the back of the classroom that was handled by a TA and closing the door on two students who were lagging upon return to the classroom. Dr. Boyer was only aware of the former when he decided to block her access to the system.

Regarding the students being left in the hallway, Ms. Anderson denies the event occurred or does not recall the incident. Ms. Hodge testified that she spoke to Ms. Anderson about the hall incident with only slight variation in the details of where she was standing. The consistency in Ms. Hodge's testimony was that Ms. Anderson was leading her students into the classroom and she shut the door on two students who were lagging and goofing off. I find that the incident, at the time it occurred, was not considered significant by the principal because if it had been significant, it is reasonable to presume Ms. Hodge would have mentioned it when she spoke to Dr. Boyer about the disruption in the classroom. I find it is reasonable to conclude that the incident did occur but it did not take on significance until after the decision to terminate was made.

Ms. Willows testified that she had developed certain tools of the trade for ensuring that all of the students had returned with her to class, such as counting the students as they entered the door. How Ms. Anderson chose to perform her duties of substitute teaching may be evidence of poor judgment or the unwillingness of Ms. Anderson to recognize she must adapt how she performs her job because of her disability. Leaving two children in the hallway is, however, insufficient to demonstrate that because of her visual impairment and need for Jerry, her removal was necessary to the safe and efficient operation of the ASD.

Regarding the disruption in the back of the class, Ms. Anderson testified that she knew there was another person in the room but that she did not know if it was another teacher, a TA, or a volunteer, but Ms. Anderson presumed the person "was there for something. I didn't ask her."¹⁰⁷ Ms. Anderson explained that she was aware of the disruption but at the time she was with a group of students and thought the person in the

¹⁰⁷ Anderson Deposition at 70.

room could handle it: “She was not just there looking pretty at everybody. I mean she was there for something...”¹⁰⁸ The person in the room was a TA.

Ms. Anderson’s approach is troubling. She first testified that she knew there was another adult in the classroom but did not know who the person was or why they were there. She simply concluded, without further inquiry, that the person must have belonged there because they were in the school and adults should not be in the school without first checking in with administration. It is troubling that a substitute teacher would be aware of an adult in the classroom and fail inquire into the person’s purpose for being there.

Ms. Anderson may not have seen the disruption start, but then again a sighted teacher could have had her back turned, head down, or attention focused elsewhere and missed signs that the students were about to engage. When Ms. Anderson became aware of the situation, the TA was taking care of it. The evidence does not establish that the incident went on for an extended time. I do not find it out of the ordinary that a teacher’s attention would not be drawn to disruptive students until the disruption occurred. Ms. Anderson’s decision to not take over from the TA is a question of professional judgment and performance of her duties as the head of the classroom, but it is one unrelated to her disability.¹⁰⁹

The ASD presented testimony that it is not uncommon for substitute teachers to misunderstand how a TA is used or that a substitute teacher may not leave the classroom unattended to go to the bathroom.¹¹⁰ In those situations substitutes are counseled and their performance is expected to change. The ASD has presented no evidence, other than subjective belief, that Ms. Anderson would not be able to correct her performance deficiencies or that the principals of the schools were concerned enough to contact sub dispatch and request Ms. Anderson be blocked from accepting an assignment at their school. In fact, she returned to Baxter three times and Wonder Park twice. When asked why Ms. Anderson’s performance issues warranted termination rather than counseling,

¹⁰⁸ *Id.*

¹⁰⁹ The ASD has not alleged that Ms. Anderson was unaware that there was another person in the classroom, but that she was unaware of the disruption.

¹¹⁰ Boyer Testimony. The Executive Director entered into evidence Ex. ED 19. Ex. ED 19 is a report compiled by the ASD in response to a discovery request. It is a four page table identifying substitutes who were disciplined in recent years. It contains only brief summaries of offenses. Several of the summaries involve failure to control/supervise the classroom including a teacher who fell asleep during circle time and a teacher who remained on the phone for 30 minutes.

the ASD responded that Ms. Anderson's performance problems were a result of her visual impairment and a sighted person could correct their performance problems. As discussed above, without objective evidence, this argument is not compelling.

The hearing revealed several promising avenues for accommodation. The testimony established that, under the right circumstances, Jerry could be accommodated. The testimony also established that there are advanced as well as short notice substitute assignments posted on the Sub Finder system. The evidence at hearing raised the possibility of Ms. Anderson being informed of schools or classes where there were no allergies and of advanced substitute assignments that could be posted for those schools that would provide the district with enough time to ensure fonts in a large size. It might be possible that Ms. Anderson could familiarize herself with a school such that knowledge of exits etc. would no longer be a concern. Moreover, if Ms. Anderson familiarized herself with a school and the students, it might be that some of Ms. Zelenkov's concerns regarding preparing the students for a blind substitute would be alleviated. Because there was no interactive process, the potential for reasonable accommodations was not adequately explored.

It is conceivable that, after meeting with Ms. Anderson and exploring the options diligently, the ASD will find that business necessity supports that Ms. Anderson be blocked from certain schools. For example, business necessity may support a conclusion that Ms. Anderson be blocked from all schools that have allergy restrictions,¹¹¹ and all other schools except those where TA's are assigned to students in a class or where the teacher was still in the school, as was the case in her first assignment at Mountain View. On the other hand, as discussed above under the direct threat analysis, it may be that when the interactive process envisioned by the AHRL and the ADA is completed, the result is that Ms. Anderson cannot reasonably be accommodated at all.¹¹²

The Commission's regulation requires that all four elements be established by clear and convincing evidence. I find that the ASD has established by clear and convincing evidence the second and third elements. However, based on the evidence

¹¹¹ Designating a school "dog free" as Baxter had been because of safety concerns, not allergy issues, is not determinative of whether a service dog can be accommodated.

¹¹² This decision is not intended to preclude or estop the ASD from conducting such an inquiry, relying upon some of the same evidence and reaching the same conclusion. However, a fuller inquiry, including dialog with the employee, will be necessary.

presented I do not find that the ASD has presented evidence sufficient to establish by clear and convincing evidence the first and fourth elements. Therefore, the ASD has failed to meet its burden of proof that its decision to block Ms. Anderson from the Sub Finder system was justified by business necessity or the reasonable demands of the position.

C. Remedies

1. Damages—Back Pay

- (a) Ms. Anderson is entitled to back pay because the ASD did not present evidence sufficient to prove that other comparable employment existed in the job market.

At the time the complaint in this matter was filed, the Alaska Human Rights law provided that “if the commission finds that a person against whom a complaint was filed has engaged in the discriminatory conduct alleged in the complaint . . . the commission may order any appropriate relief, including but not limited to, the hiring, reinstatement or upgrading of an employee with or without back pay....”¹¹³ The Commission construes this statute to authorize, among other things, “any legal or equitable relief . . . which reasonably compensates the complainant”¹¹⁴

In this case, the Executive Director seeks back pay totaling in excess of \$56,000 for Ms. Anderson from the date of her termination forward. The Executive Director bases her calculation on Ms. Anderson working an average of three days per week per school year plus bonuses and interest.¹¹⁵ The general principle for back pay damages is that they should ordinarily be awarded where needed to put the claimant in the position he or she would have been but for discriminatory or retaliatory treatment.¹¹⁶ Nonetheless, victims of unlawful employment action are required to mitigate their

¹¹³ Former AS 18.80.130(a). The version of AS 18.80.130(a) that applies to this case is the version in effect prior to amendments in 2006. See § 14, ch. 63 SLA 2006.

¹¹⁴ 6 AAC 30.480(b) [prior to 2007 amendment]. The earlier version of this regulation is quoted because it is the interpretation of the pre-2006 statute that is relevant to this case. The quoted language has not changed significantly, however.

¹¹⁵ The Executive Director submitted a “Damages Sheet” illustrating her calculation. As of December 31, 2009, the Executive Director calculated total back pay in the amount of \$56,571.

¹¹⁶ 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).

damages by seeking and accepting alternative employment.¹¹⁷ Mitigation is the amount the employee did earn or could have earned by making reasonably diligent efforts to obtain similar employment. The issue of mitigation is generally viewed as an affirmative defense with the burden of proof falling on the employer; that is, the employee is assumed to have met this requirement unless the preponderance of the evidence shows otherwise. Classically this requires proof that suitable work exists, was available in the job market, and that the employee did not make adequate efforts to secure it.¹¹⁸

The ASD argues that: (1) that Ms. Anderson did not exercise reasonable diligence in finding other suitable employment and, therefore, it is not required to establish the availability of comparable employment, and (2) to the extent it is required to establish other employment, it has done so by presenting evidence of available bilingual tutor positions.

Here, there is no evidence regarding the amount of comparable work available in the market place. The ASD presented no evidence about the existence of such opportunities. As discussed above, a bilingual tutor position is not substantially similar to a substitute teaching position. Thus, the ASD has not established a failure to mitigate defense as classically formulated.

However, under the most common interpretation of the mitigation requirement, when the evidence shows that the employee “failed to pursue employment at all,” the employer does not also have to establish the availability of substantially comparable employment.¹¹⁹ This is called the *Greenway* exception, and in the recent case of *In re Block*, the Commission recognized the *Greenway*¹²⁰ exception to the general rule on failure to mitigate.¹²¹ Implicit in the *Greenway* exception is that other comparable employment exists.

¹¹⁷ See, e.g., *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53, 54 (2d Cir. 1998). In a statutory change that is too recent to be directly applicable to Ms. Anderson’s case, the Alaska Legislature has codified this longstanding principle into AS 18.80.130(a)(1) (“an order for back pay or front pay must be reduced by the amount the employee could have earned or could earn by making reasonably diligent efforts to obtain similar employment”). See §§ 6-8 and 14, ch. 63 SLA 2006.

¹¹⁸ *Greenway*, 143 F.3d at 53.

¹¹⁹ *Id.* at 54.

¹²⁰ *Id.*

¹²¹ *Ex. rel. Robin Block*, OAH No. 07-0665 HRC, ASCHR No. C-03-165 at 14, 15 (2009).

In *Greenway* the complainant was unlawfully terminated from his bartending position. Other than a few months working at a temporary agency immediately after termination, Mr. Greenway remained unemployed. He admitted he did not look for other bartending positions. The court concluded that Mr. Greenway did not actively seek comparable employment and that the employer should be relieved of the duty to establish the *availability* of comparable employment if it could prove the employee made no reasonable efforts to obtain employment.¹²² Whether bartending jobs *existed* in the job market was not an issue.

Similarly, in *In re Block*, the existence of comparable positions was not an issue. Ms. Block was unlawfully terminated from her position as a general office employee. Her duties included stuffing flyers, making some sales calls, and data entry. Ms. Block's duties were not specific to the respondent and it was reasonable to conclude, based on the duties performed, that other similar positions existed and were available in the job market. Thus, the *Greenway* exception was appropriate to apply in *In re Block* because the existence of comparable office positions in the job market was not at issue.

Here, however, the existence of positions similar to a substitute teacher in the job market has not been established. The duty to “mitigate damages is *not* met by using reasonable diligence to obtain *any* employment. Rather, the claimant must use reasonable diligence to obtain *substantially equivalent employment*.”¹²³ “Substantially equivalent employment is that employment which affords virtually identical promotional opportunities, compensation, job responsibilities, and status as the position from which the [employee] has been discriminatorily terminated.”¹²⁴

The Executive Director argued that no position similar to an ASD substitute teacher existed in the job market and that Ms. Anderson mitigated her damages when she sought out other temporary employment. The ASD offered that the existence of available bilingual tutor positions over the past four years established that suitable alternative work existed. As discussed earlier, the bilingual tutor position was not comparable to a substitute teacher because it did not have that aspect of the job which most appealed to

¹²² *Greenway*, 143 F.3d at 54.

¹²³ *Booker v. Taylor Milk Co.*, 64 F.3d 860, 865 (3rd Cir. 1995) (discussing failure to mitigate in a Title II claim) (emphasis in original).

¹²⁴ *Id.*

Ms. Anderson: it was not temporary. Other than the bilingual tutor position, the ASD makes no attempt to prevail under the general rule and instead attempts to meet its burden through *Greenway* which is inapplicable because there is no evidence that substitute teaching positions existed in the job market. Accordingly, the ASD has failed to establish the affirmative defense of failure to mitigate.

(b) Back Pay Principal - Calculation

At the hearing's conclusion the parties were asked to address what each believed to be an appropriate back pay award and calculation, should the Executive Director prevail. The parties agreed that the work pattern established by Ms. Anderson prior to her removal from the Sub Finder system should form the basis for any award of back pay. They differed over how that work pattern should be established.

The ASD offered a limited back pay analysis based on Ms. Anderson having access to 16 schools.¹²⁵ Specifically the ASD advanced that Ms. Anderson had the ability to accept substitute teaching positions as early as October 6, 2005, but did not. The ASD also claimed that prearranged assignments should be excluded from any back pay calculation because they were, by definition, unavailable to Ms. Anderson.¹²⁶ Unfortunately the ASD failed to articulate how its analysis (including unavailability of some assignments) would influence a back-pay award and it failed to provide a back pay calculation.¹²⁷ Presumably the ASD was attempting to show that over three weeks Ms. Anderson worked seven days, or slightly over two days per week. I find that Ms. Anderson was not dispatched until October 10, 2005 and she could not start to accept assignments until October 11, 2005.¹²⁸ During her first week of employment Ms. Anderson worked 3.5 days, her second week she worked 2.5 days and her third week she worked two half days until she was blocked from the Sub Finder. Therefore, out of 12 days.¹²⁹ I find Ms. Anderson worked the equivalent of 7 full days or 58% of the time.

¹²⁵ The ASD excluded Nunaka Valley because it was a fur/dog-free school.

¹²⁶ As used here "prearranged" includes "requested substitute assignments."

¹²⁷ The parties were advised that they should address what each believed to be an appropriate back pay award and calculation should the Executive Director prevail.

¹²⁸ Ex. ED 7 at 18.

¹²⁹ It is unknown whether there was a holiday or an in-service day observed during this period. If so, then Ms. Anderson may have accepted 60% of available assignments. Whether she worked 58% or 60% of the available days does not change the ultimate conclusion regarding the amount of back pay owing.

However, this is based on only 12 possible work days and does not reflect the primary reason Ms. Anderson desired a substitute position versus another teaching position – flexibility to work when she wanted so she could travel. Therefore, it provides little guidance on the number of days Ms. Anderson would have worked in the future.

The goal of the back pay award is to place Ms. Anderson in the position she would have been had she been allowed to substitute teach. Any uncertainty should be resolved in favor of the complainant.¹³⁰ What is certain is that Ms. Anderson’s reasons for wanting to substitute teach had less to do with teaching and more to do with the flexibility not to work when she desired. Ms. Anderson’s testimony regarding why substitute teaching was important to her did not focus on her love of teaching; rather, it focused on the flexibility afforded a substitute teacher because she suffered from migraines that could last for several days and because she wanted to pursue her research. If there was a genealogical convention or if she needed to go somewhere for research she could leave town for a week without asking permission.¹³¹ Her airline travel was restricted to times when school was in session or summers.¹³² Her research was conducted in one or two week blocks, not on intermittent days or over a long weekend.¹³³ Ms. Anderson provided testimony regarding her limited travel from 2005 forward, but I find it insufficient to establish what she would have worked had she been given the opportunity. Ms. Anderson repeatedly testified that she wanted to pursue other interests that would require she be unavailable for work. Therefore, the Executive Director’s calculation reducing the average days per week worked to three days to reflect Ms. Anderson’s desire to travel would, more likely than not, be an overstatement of actual days worked. This is especially so when one considers her actual days worked.

The statute gives the Commission broad discretion to fashion “any appropriate” remedy.¹³⁴ The number of days students are in school is 170 days.¹³⁵ The Executive

¹³⁰ *Hudson v. Chertoff*, 473 F. Supp.2d 1292, 1298 (2007) (discussing back pay award after a finding of retaliation under the Rehabilitation Act of 1973); *Webb v. Veco*, No. C-88-295 at 13 (ASCHR September 24, 1993).

¹³¹ Anderson Deposition at 109, 110.

¹³² Anderson Deposition at 109 (“My son work[s] for Alaska Airlines, so I can go any time I want to anywhere and of course I cannot travel when the kids travel because those are blackouts....”)

¹³³ Anderson Deposition at 59 (“I usually tell them ahead of time that I’m coming and they . . . reserve the equipment for me for the week or two that I’m going to be there.”)

¹³⁴ AS 18.80.130(a)(1) (the quoted language appears in both the pre- and post-2006 versions of the statute).

Director provided a back pay calculation based on Ms. Anderson having access to accept or decline teaching assignments at 17 schools based on a 180 day school year, and offered that because of travel she would work on average three days a week or 60% of the school year resulting in a total back pay award of \$56,751.¹³⁶ The Executive Director's calculation appropriately adjusted the first year to show a start date of October 11.¹³⁷ The principal owing based under the Executive Director's theory, is as follows for the first two school years:

2005-2006		2006-2007	
	$(180 - 37)/5 \times 3 = 86$		$180/5 \times 3 = 108$
	$13 \times \$100 = \$1,300$		$20 \times \$100 = \$2,000$
+	<u>$73 \times \\$120 = \\$8,760$</u>	+	<u>$88 \times \\$120 = \\$10,560$</u>
Principal	\$10,060	Principal	\$12,560

As discussed above, 60% is an overstatement and would result in a windfall to Ms. Anderson. While it is certain that the evidence establishes that Ms. Anderson would have worked less than 60% of the time, it is unknown how much less. I find that it is not unreasonable to conclude that Ms. Anderson would have worked on average 50% of the school year. Therefore, the principal back pay is calculated as follows:

2005 – 2006

$$\begin{aligned} (170-37)/2 &= 66.5 \text{ days} \\ 13 \times \$100 &= \$1,300 \\ (66.5 - 13) \times \$120 &= \$6,420 \\ \text{Principal} &= \$7,720 \end{aligned}$$

2006 – 2007

$$\begin{aligned} 170/2 &= 85 \text{ days} \\ 20 \times \$100 &= \$2,000 \\ 65 \times \$120 &= \$7,800 \\ \text{Principal} &= \$9,800 \end{aligned}$$

2007 – 2008

$$\begin{aligned} 170/2 &= 85 \text{ days} \\ 20 \times \$100 &= \$2,000 \\ 65 \times \$120 &= \$7,800 \end{aligned}$$

¹³⁵ Students are in the classroom an equivalent of 170 days when one accounts for the eight State-released in-service days and four half-day parent/teacher conferences. Therefore, any back pay calculation should be based on access to 170 possible substitute teaching days.

¹³⁶ Principal plus interest.

¹³⁷ The Executive Director's calculation for the first year included 13 days at \$100 per day and 73 days at \$120 per day. 13 days is correct because Ms. Anderson had already worked seven days.

Principal = \$9,800

2008 – 2009

170/2 = 85 days

20 x \$100 = \$2,000

65 x \$120 = \$7,800

Principal = \$9,800

2009 – Dec 31, 2009

81/2 = 40.5 days

20 x \$100 = \$2,000

20.5 x \$120 = \$2,460

Principal = \$4,460

(c) Interest

At the time the complaint was filed in this case, the Commission had general statutory authority to order interest on awards under the statute's authorization to order "any appropriate relief."¹³⁸ A regulation that became applicable just before the conduct at issue in this case, 6 AAC 30.480(b), provides for interest at three percentage points above the 12th Federal Reserve District discount rate as found in AS 09.30.070(a).¹³⁹

That provision states that "the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered" The discount rate in effect on January 2, 2010 was 0.5 percent, making the applicable interest rate 3.5 percent for damages awarded in this case.¹⁴⁰

The starting date for interest calculated under AS 09.30.070(a) is ordinarily the date on which the defendant or respondent "received written notification that an injury has occurred and that a claim may be brought."¹⁴¹ In this case, the ASD has offered evidence that it "received [the] external complaint from HRC" on December 7, 2005.¹⁴²

¹³⁸ AS 18.80.130(a)(1) (pre-2006 version).

¹³⁹ "A monetary award under this section may include an order that interest on the amount due be paid as provided in AS 09.30.070(a)." In a statute that was expressly made inapplicable to complaints filed before September 13, 2006, the legislature, in effect, approved the Commission's choice of the AS 09.30.070(a) method. §§ 6-8 and 14, ch. 63 SLA 2006, amending AS 18.80.130.

¹⁴⁰ See <http://www.state.ak.us/courts/forms/adm-505.pdf>.

¹⁴¹ AS 09.30.070(b). Note that the 2006 amendments to AS 18.80.130 made the whole of AS 09.30.070, including this provision, applicable to ASCHR orders. This should remove any doubt as to whether state policy is to apply interest from the date of written notice or from some earlier date.

¹⁴² RES V at 5 (ASD Complaint Case Notes).

Interest should therefore be assessed from that date. Interest assessed in accordance with AS 09.30.070 is simple, not compound, interest.¹⁴³ The Executive Director proposed calculating damages on an annual basis.¹⁴⁴ Expressed as a mathematical formula:

$$\text{Damages} = \text{Principal} - \text{Mitigation} + \text{Interest}$$

$$\text{Interest} = \text{Interest Per Day} \times \text{Number of Days Owed}$$

$$\text{Interest Per Day} = [\text{Principal} - \text{Mitigation} \times .035] / 365$$

Ms. Anderson testified that she earned \$200 for interpreting during the period in question. She was unable to identify the exact year in which the income was earned. Therefore, the \$200 will be applied to reduce the principal for the 2005/2006 school year. Applying these concepts, Ms. Anderson's back pay award is calculated as follows:

School Year	Principal	Mitigation	Back Pay Less Mitigation	Interest Per Day	Days	Interest Due	Back Pay Award
2005/2006	\$7,720.00	\$200.00	\$7,520.00	.7211	1,485	\$1,070.83	\$8,590.83
2006/2007	\$9,800.00	\$0.00	\$9,800.00	.9397	1,120	\$1,052.49	\$10,852.49
2007/2008	\$9,800.00	\$0.00	\$9,800.00	.9397	775	\$728.29	\$10,528.29
2008/2009	\$9,800.00	\$0.00	\$9,800.00	.9397	389	\$365.55	\$10,165.55
2009/2010	\$4,460.00	\$0.00	\$4,460.00	.4277	24	\$10.26	\$4,470.26
Total	\$41,580.00	\$200.00	\$41,380.00	3.9679		\$3,227.42	\$44,607.42

The principal amount of damages as of December 31, 2009 is \$ 41,580 and the prejudgment interest on those damages equals \$ 3,227.42, as shown above. Accordingly, the amount owing as of December 31, 2009 is \$44,607.42. Interest continues to accrue at \$3.9679 per day until the Commission enters its final order.

2. Damages—Front Pay

The complainant has requested front pay. Front pay is typically appropriate in a discrimination case when hostility between the parties is such that reinstatement is impractical or impossible.¹⁴⁵ I find that front pay is not appropriate in this case because it has not been determined that Ms. Anderson could be reasonably accommodated.

¹⁴³ See *Alyeska Pipeline Serv. Co. v. Anderson*, 669 P.2d 956, 956 (Alaska 1983).

¹⁴⁴ Cf. *In re Flakes*, OAH No. 07-0190 HRC, ASCHR No. C-02-337 Final Order at 6, 7 (adopting the Executive Director's proposal to calculating interest on a quarterly basis). The annual basis proposed by the Executive Director here is simpler and yields an essentially equivalent result.

¹⁴⁵ *Gothart v. National R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999) (citations omitted) (discussing front pay award in context of Title VII sex discrimination action).

Moreover, the record is insufficient to support a finding that the relationship between the parties would preclude Ms. Anderson's access to the Sub Finder system.

3. Other Relief

The Commission is required by statute to order the respondent to refrain from engaging in any discriminatory conduct it has been found to have engaged in.¹⁴⁶ Here, the respondent has been found to have terminated the employee because of her physical disability without first determining, through the interactive process, whether she could be reasonably accommodated and in so doing failed to fulfill its obligation under Alaska's human rights law. The respondent must be ordered to fully comply with the ADA and the AHRL process in the future.

The Commission has discretion to order a wide range of other relief, including imposition of conditions on the respondent's future business conduct. The Executive Director has advocated that the ASD receive training specific to disability discrimination and accommodation. Because I find that the ASD failed to fulfill its obligation under the ADA and the AHRL, it should provide training to Dr. Boyer and its EEO department in the reasonable accommodation process. The training should take place within 90 days of the date the Commission adopts this proposed order and be at least three hours in length, conducted in person by a trainer approved by the Commission staff. The ASD should be required to send a copy of an outline of the proposed program and training materials to the Commission staff for review and approval at least 15 days prior to the date of training. Within fifteen days after the date the training session takes place, the ASD should submit a report to the Commission on the training provided, including the subject matters covered and the names and job titles of the attendees, and the ASD should attach a copy of the training materials distributed to the attendees

The Executive Director has advocated that Ms. Anderson be given access to the Sub Finder system. I find that Ms. Anderson does require, at a minimum, Jerry as an accommodation, but that whether she can be reasonably accommodated is unresolved because the interactive process did not take place. It may be that after inquiry it is determined that the business necessity or the reasonable demands of the business support

¹⁴⁶ AS 18.80.130(a) (the requirement, with minor linguistic adjustments, appears in both the pre- and post-2006 versions of the statute).

blocking Ms. Anderson from the Sub Finder system. It may be that after proper inquiry, it is determined that Ms. Anderson does pose a direct threat. However, on the record presented it is premature to make any such finding. Therefore, I find that the ADA process should be allowed to follow its course and the parties should be directed to engage in the interactive process to determine whether a reasonable accommodation exists.

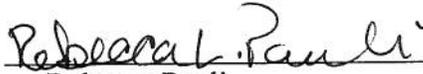
The above findings regarding business necessity, reasonable demands of the business, and direct threat are based on the limited facts developed through the failed process and are not intended to estop or preclude the ASD from raising and presenting evidence on these affirmative defenses should the need arise after the completion of the interactive process.

The ASD should submit a report to the Commission within 120 days of the date the Commission adopts this proposed decision, describing the manner in which it has carried out the undertakings herein outlined.

IV. Recommendation

Based on the reasoning and authorities set forth above, I recommend that the Alaska State Commission for Human Rights enter an order finding that the ASD discriminated against Ms. Anderson when it failed to explore whether Ms. Anderson's disability could be reasonably accommodated. I recommend that the Alaska State Commission for Human Rights award Ms. Anderson "make whole" relief in the amount owing as of December 31, 2009, \$44,607.42, with interest continuing to accrue at \$3.9679 per day from January 1, 2010 until the Commission enters its final order. I also recommend that the ASD provide training to certain employees in the laws prohibiting discrimination in employment based on disability and that the parties be directed to engage in the interactive process to determine Ms. Anderson can be reasonably accommodated, as outlined in Part III-C-3 above.

DATED this 27th day of April, 2010.

By: 
Rebecca Pauli
Administrative Law Judge

Certificate of Service: The undersigned certifies that on the 27th day of April, 2010, a true and correct copy of this document was mailed to the following: Bradley Owens, for the Respondent; and Steve Koteff, ASCHR. A copy was mailed to the Lt. Governor.

By: 
Linda Schwass/Kim DeMoss

APPELLATE
COURT
DECISION
FOLLOWS

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,)
Appellees.)

Case No. 3AN-10-10122CI

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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 [hereinafter "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.

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.

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

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 disability within the meaning of the statute; (2) is able to perform the essential functions of a substitute teacher, with or without reasonable accommodation; and (3) has suffered an adverse employment decision because

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 service dog to

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).

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 disjunctive—"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

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

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

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

³⁵ *Buckingham v. U.S.*, 998 F.2d 735, 740 (9th Cir. 1993); *see also Turner v. Hershey Chocolate U.S.*, 440 F.3d 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

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

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;
- (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;
- (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
- (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

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 options and Dr. Boyer was apparently still “open” to the possibility that Anderson could be a

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.

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. Boyer’s “giving her the run-a-round,”⁶³ it was not unreasonable to conclude that she was ill-

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.

⁶³ ALJ Decision 12

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 impossible to determine whether reasonable accommodation was possible. She explicitly

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.*

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 seeking accommodation. This is a long way from the framework of

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.

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

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).

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

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

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 its 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.”).

⁷⁷ ALJ Decision 26-7.

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

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)

⁸⁰ *Id.* at 865.

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 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” standard⁸⁵ over the “substantially equivalent” standard,⁸⁶ ASD would still not have met its burden of proving that Anderson failed to mitigate.

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.

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,

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 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

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.

⁹¹ *Greenway*, 143 F.3d at 53-54.

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 prove liability for or invalidity of the claim or its amount.”⁹⁷ It also states, however, that “[t]his

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

⁹⁷ AK. R. EVID. 408.

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 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

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.*

¹⁰⁴ *Button*, 208 P.3d at 200, quoting *Fleegel*, 61 P.3d at 1270.

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 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

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.

¹¹³ *Id.*

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 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

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.

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.

¹²¹ ALJ Decision 28.

¹²² At. Br. 38.

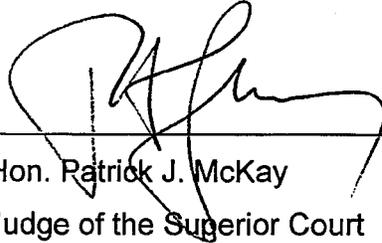
¹²³ ALJ Decision 28.

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**.

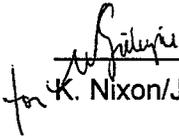
ENTERED this 12th day of October, 2011, in Anchorage, Alaska.



Hon. Patrick J. McKay
Judge of the Superior Court

I certify that on 10/13/2011,
a copy of the above was mailed to each of
the following at their addresses of record:

M. Zakatel
W. Mills
B. Owens



for K. Nixon/Judicial Assistant