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.

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

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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 Taylor

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

Paula M. Haley, Executive Director, Alaska State Commission for Human Rights *ex rel.* VILMA ANDERSON, Complainant, v. ANCHORAGE SCHOOL DISTRICT, Respondent.	)	OAH No. 09-0233-HRC ASCHR No. C-05-1231

ADMINISTRATIVE LAW JUDGE'S ORDER ON RECONSIDERATION

Both parties have filed objections seeking reconsideration of the Recommended Decision issued in this matter on March 23, 2010. The Recommended Decision found that it was reasonable for the ASD to remove Ms. Anderson from its Sub Finder system provisionally, while it reviewed whether a reasonable accommodation was possible, but that the ASD failed to follow the ADA paradigm. It thereby unlawfully discriminated against Ms. Anderson when it removed her peremptorily, so as to terminate the interactive process. This conclusion was reached because, after a *prima facie* case was established for Ms. Anderson, the ASD failed to meet its burden under 6 AAC 30.910(c) and failed to establish that Ms. Anderson's physical disability posed a direct threat to students.

The Recommended Decision concluded that Ms. Anderson should receive back pay with interest. The Decision further recommended that the Commission exercise its discretionary authority to 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 whether Ms. Anderson can be reasonably accommodated.

1. *The ASD's Objections.*

The ASD raises objections to those portions of the Recommended Decision addressing the accommodation process, the interactive process, and mitigation. The objections restate positions raised and argued by the ASD throughout the proceeding. I have considered the ASD's Objections, reviewed the case law, the Recommended Decision, and the record. The objections

merit further comment, as elaborated below, and have also resulted in revisions to the Recommended Decision, although they have not changed the outcome.[1]

In pressing its argument that the interactive process was never triggered because "Ms. Anderson admittedly made no direct request for a specific accommodation, sufficient to comply with the law" other than to bring Jerry with her,[2] the ASD fails to recognize the exceptions to the general rule as enunciated by the Commission in *In re Block*, OAH No. 07-0665 HRC, ASCHR No. C-03-165, (adopted 2009) at 9 and restated in the Decision on Summary Judgment and Law of the Case (November 25, 2009) at 5:

> There are occasional exceptions to the general rule that ADA liability for failure to accommodate only attaches when the accommodation has been requested. This can be true where the disability (such as certain kinds of mental disabilities) prevents the employee from asking for the accommodation;[3] that circumstance does not apply in this case. It can also be true where the employee's need for the accommodation is obvious.[4]

Applying this guidance I found that when, as here, only the employer was aware that it perceived the employee as unable to perform the essential functions of a position, it was appropriate to apply the exception to the rule. The Recommended Decision recognizes, as does federal interpretive guidance, that 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."[5]

It is important to note that the Recommended Decision makes no finding regarding whether a reasonable accommodation is possible. The Recommended Decision found that the ASD did not comply with the process as required by law, and therefore it was premature to determine whether Ms. Anderson could perform the essential functions of the position with or without an accommodation..

The ASD also objects to any finding that it did not comply with the interactive process. It contends that the October 26, 2005 letter was legally sufficient and at "a minimum, it

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1 The ASD's concern regarding a hearsay statement has resulted in a minor revision on page 23. The ASD's objections regarding *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47 (2d Cir. 1998) have resulted in further evaluation of its applicability to the facts presented and resulted in an explanation of why *Greenway* should not be applied in this case. This has resulted in revisions to pages 1, 2, 32 – 40, 41, and 42.

2 ASD's Notice of Objections at 2-3.

3 *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 n.7. (1st Cir. 2001) (quoting prior authority).

4 *See id.*

5 Recommended Decision at 21, quoting 29 CFR Pt. 1630, App. § 1630.9 (Interpretive Guidance).

constitutes a good faith effort to open a discussion with Ms. Anderson about other accommodations that might be needed and available."[6] For the reasons noted at pages 21 – 23 of the Recommended Decision, I found that the letter was legally insufficient. The breakdown in communication occurred when the ASD unilaterally permanently blocked Ms. Anderson from the Sub Finder system and was no longer willing to discuss the possibility of substitute teaching. I found that Ms. Anderson's failure to follow up with Dr. Boyer was not unreasonable under the circumstances.

The ASD raises a specific objection to the sentence on page 23 of the Recommended Decision that reads "Ms. Anderson's failure to follow up with Dr. Boyer after she learned there were no bilingual tutor positions available was not a failure to engage in the interactive process as argued by ASD." The ASD believes the sentence is both factually and legally incorrect. It argues the sentence is factually incorrect because Ms. Anderson's statement regarding what she was told by principals is inadmissible hearsay and is legally incorrect because the ASD disagrees with the legal conclusions reached in the Recommended Decision.

The ASD's objection that Ms. Anderson's testimony on what a principal may or may not have told her is hearsay is well taken because I may not rely on the second hand account of what the principals said for the "truth of the matter asserted," that is, for a finding that there were in fact no positions available. However, Ms. Anderson's testimony is non-hearsay for a different fact: that Ms. Anderson was told (whether truthfully or not) that no positions were available. It is the latter fact that I intended to rely on, though I expressed myself imprecisely. I have changed the sentence to read "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 ASD." In this case neither party proceeded in a text book perfect manner. However, when the facts are viewed as a whole it is apparent that the process broke down at the meeting of the 26th after the ASD presented the letter and peremptorily, permanently blocked Ms. Anderson from access to the Sub Finder system. As stated at page 23 of the Recommended Decision "[w]hile 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."

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[6] ASD's Notice of Objections at 4.

Regarding the ASD's objections regarding Ms. Anderson's efforts to mitigate her damages, the ASD advances that the appropriate standard is set forth in *Pyramid Printing Co. v. Alaska State Commission for Human Rights.*[7] The ASD's reliance on *Pyramid Printing Co* is misplaced. In *Pyramid Printing* one of the issues before the court was whether the complainant acted reasonably when she refused the offer of reinstatement to her position held at the time of constructive discharge.[8] The standards regarding mitigation pronounced in *Pyramid Printing* apply when determining whether a decision to reject an offer of reinstatement is a failure to mitigate back pay. Here, there was no offer of reinstatement; rather, the ASD offered Ms. Anderson the opportunity to apply for a bilingual tutor position. The standard in *Pyramid Printing* may have been applicable if I had found the bilingual tutor position was similar to a substitute teacher. However, for the reasons set forth in the Recommended Decision at page 22, the positions are not similar.

Finally, on the issue of failure to mitigate and the objections raised by the ASD, the Recommended Decision has been changed to answer its objections to the application of the *Greenway* exception. Upon reconsideration and consideration of the ASD's specific comparisons between the facts in *Greenway, In re Block* and the instant case, it is concluded that *Greenway* and *In re Block* were so factually dissimilar from this case when it came to the issue of the existence of alternative employment that the *Greenway* exception should not be applied in this matter. Specifically, the exception to the general rule does not lend itself to application where it is unknown if other suitable employment exists. Rather, the *Greenway* exception is appropriately applied where it is known that suitable employment *exists* but it is unknown if there are positions *available* in the market place. I have changed the Recommended Decision at pages 33 - 35 to explain why the *Greenway* exception was properly relied upon in *In re Block* but is not appropriate to apply in Ms. Anderson's case.

2. *The Executive Director's Objections.*

The Executive Director raises two objections to the way in which damages were calculated. One objection is found at page 14, footnote 4 of the objection where the Executive Director proposes a departure from prior Commission decisions which have calculated

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7 153 P.2d 994 (Alaska 2007); ASD's Notice of Objections at 5 , 6.

8 *Pyramid Printing Co.*, 153 P.2d at 998, 999.

prejudgment interest from the date of written notice of the claim. In her objection, the Executive Director asks that prejudgment interest be calculated from the date of the discriminatory act. This argument was not raised prior to the filing of the Executive Director's Objection, and should the Commission wish to depart from its past decisions, it would be advisable to remand the matter for further briefing and argument on this limited issue. In the present case, the proposed change would alter the amount owed by $170.62.[9]

The second objection raised is that the amount of back pay awarded was not supported by the record. The Executive Director's objections are based on the premise that Ms. Anderson was willing to work and that damages based on substitute teaching three days a week is reasonable and takes into account her desire to travel. She cites to several cases and past Commission decisions not previously provided that apply the principal that ambiguities in back pay calculations should be resolved against the discriminating employer.[10] Therefore, any assumptions regarding limitations on Ms. Anderson's ability to perform as a substitute teacher that are not certain should not reduce back pay below the three days per week that she offers she would have worked. I have considered the Executive Director's objection to the calculation of back pay, reviewed the case law, the Recommended Decision and the record. The objection merits further comment and have resulted in revisions to the Recommended Decision changing the outcome to increase the amount of back pay awarded.[11]

The increase is warranted because Ms. Anderson has met her burden of proving an initial entitlement to back pay which has not been persuasively rebutted. The back pay award in the Recommended Decision sought to adjust the calculation proposed by the Executive Director to reflect what might have occurred had the interactive process not been terminated. However, the cases cited by the Executive Director support the conclusion that when calculating back pay in this context that "unrealistic exactitude is not required ... that 'uncertainties' or 'doubts' are to be resolved against the discriminating party ... and [the Commission has] broad discretion to determine amounts of back pay as a matter of just and reasonable inference."[12] With this

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9 This would be the interest owing for an additional 43 days (October 26, 2005 through December 7, 2005).

10 *See* cases cited at pg 3 – 4 of Complainant's Objections to Recommended Decision.

11 The Executive Director's Objection has resulted in a revised section addressing back pay and a corresponding new interest calculation.

12 *Thomas v. Pipeliners Union 978, United Association,* No. C-75-1022-536-EE at 53 (November 1981) (citations and internal quotations omitted).

guidance I have revised the Recommended Decision in keeping with the prior Commission decisions cited by the Executive Director.

DATED this 27th day of April, 2010.

By: Rebecca L. Pauli
Rebecca L. 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: Kim DeMoss
Linda Schwass/Kim DeMoss

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

Paula M. Haley, Executive Director, Alaska State Commission for Human Rights *ex rel.* VILMA ANDERSON,	)	
Complainant,	)	
v.	)	
ANCHORAGE SCHOOL DISTRICT,	)	
Respondent.	)	OAH No. 09-0233-HRC ASCHR No. C-05-1231

RECOMMENDED DECISION

I. INTRODUCTION

This matter comes before the Alaska State Commission for Human Rights (ASCHR) on an allegation from Vilma Anderson that the respondent, Anchorage School District (ASD), violated a provision of the Alaska Human Rights Law (AHRL), AS 18.80.220, by failing to provide a reasonable accommodation for her visual impairment and blocking her from access to its Sub Finder system. This recommendation concludes that it was reasonable for the ASD to remove Ms. Anderson from its Sub Finder system provisionally, while it reviewed whether a reasonable accommodation was possible, but that the ASD erred when it removed her peremptorily, so as to terminate the interactive process. This conclusion is reached because, after a *prima facie* case was established for Ms. Anderson, the ASD did not establish by clear and convincing evidence all of the elements necessary to establish that its actions were required by business necessity or the reasonable demands of the position.[1] The district also failed to establish that Ms. Anderson's physical disability posed a direct threat to students.[2]

This recommended decision concludes that Ms. Anderson should receive "make whole" relief in the amount $44,607.42 (calculated as of December 31, 2009). Interest

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1 *See* 6 AAC 30.910(c).
2 *See* 40 U.S.C. § 12111(3).

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

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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.

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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

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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 loosing 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.

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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

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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.

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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.

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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 where 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.

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[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

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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]

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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

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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:

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[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

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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

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[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.

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[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 peremptorily 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

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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

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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

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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

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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

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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;

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[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

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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 evidence[97] 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]

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[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

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[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.

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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.

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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 where 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

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[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,

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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 complied 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

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[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

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[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.

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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

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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.

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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

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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 x 3 = 86		180/5 x 3 = 108	
13 x $100 = $1,300		20 x $100 = $2,000	
+ 73 x $120 = $8,760		+ 88 x $120 = $10,560	
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

(170-37)/2 = 66.5 days
13 x $100 = $1,300
(66.5 – 13) x $120 = $6,420
Principal = $7,720

2006 – 2007

170/2 = 85 days
20 x $100 = $2,000
65 x $120 = $7,800
Principal = $9,800

2007 – 2008

170/2 = 85 days
20 x $100 = $2,000
65 x $120 = $7,800

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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]

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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:

Damages = Principal – Mitigation + Interest

Interest = Interest Per Day x Number of Days Owed

Interest Per Day = [Principal – Mitigation x .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.

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

144 *Cf. In reFlakes*, 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 *Gotthart 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

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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 is 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 L. Pauli
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: Kim DeMoss

Linda Schwass/Kim DeMoss