## 09.05 EMPLOYER’S LIABILITY FOR SEXUAL HARASSMENT: HOSTILE WORK ENVIRONMENT

The plaintiff claims that [he][she] was subjected to harassment based on [his][her] sex, and that this harassment created a hostile work environment. To prevail on this claim, the plaintiff must prove that it is more likely true than not true that:

(1) [he][she] was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;

(2) the conduct was unwelcome;

(3) the conduct was so severe or pervasive that it created a working environment that a reasonable [man][woman] in the plaintiff’s position would have viewed as offensive or abusive;

(4) the plaintiff viewed the work environment as offensive or abusive;

(5) the sexual harassment was the legal cause of damages to the plaintiff; and

(6) the plaintiff’s supervisor engaged in the conduct, or encouraged, caused, or approved the conduct; or the plaintiff’s supervisor knew or reasonably should have known about the conduct and failed to take remedial action. Remedial action is action that is taken immediately and that is reasonably calculated to end the conduct without adversely affecting the terms or conditions of the complaining person’s employment.

[A supervisor is a person who has the authority to affect the terms and conditions of an employee’s employment: for example, the authority to hire, fire, promote, demote, or otherwise discipline the employee. An employee can have more than one supervisor.]

# USE NOTE

This instruction is intended for use when the plaintiff is suing his/her employer for sexual harassment based on a hostile work environment.

In a case that only involves harassment by the plaintiff’s supervisor, the second clause of the first sentence of element six and the second sentence of element six can be deleted. In a case that only involves the failure of the plaintiff’s supervisor to address harassment by other employees, the first clause of the first sentence of element six can be deleted.

If the identity of plaintiff’s supervisor is undisputed or has been determined by summary judgment or directed verdict, the last paragraph can be deleted. If the jury must decide whether someone was the plaintiff’s supervisor, the last paragraph should be included in the instruction.

This instruction may be modified in cases that involve hostile work environments related to other characteristics protected against discrimination by AS 18.80.220, including religion, color, national origin, age, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood.

 **Comment**

This instruction follows the instruction given in Norcon, Inc. v. Kotowski, 971 P.2d 158, 171 (Alaska 1999). The elements of the claim are also discussed in VECO, Inc. v. Rosebrock, 970 P.2d 906, 910 (Alaska 1999). The Alaska Supreme Court has not yet decided what standard should be used in evaluating the severity of the conduct. Id. at 915 n.21. This instruction is patterned after Judicial Council of California Civil Jury Instruction 2521, which uses both a subjective and objective test.

An employer’s liability for sexual harassment by its employees is discussed in VECO, 970 P.2d at 910-15. Element six of this instruction is adapted from the instruction that was approved in part in VECO. Id. at 912 (but see id. at 912, n.13, indicating that the third paragraph of the instruction was not challenged on appeal). The definition of a supervisory employee is also based on the instruction given in VECO. Id. at 912, 916.