**09.07** **EMPLOYER’S LIABILITY FOR SEXUAL HARASSMENT: REASONABLE CARE DEFENSE**

Even if you find all elements of the plaintiff’s claim of sexual harassment to exist, [the employer] cannot be held liable for sexual harassment if you find that it is more likely true than not true that:

(1) [the employer] exercised reasonable care to prevent and to correct promptly the sexual harassment; and

(2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that [the employer] provided.

If you find that [the employer] has proven both of these elements, then you must find for [the employer] on the plaintiff’s claims. If you find that [the employer] has failed to prove either of these elements, then you should disregard this defense when considering the plaintiff’s claims.

**Comment**

This instruction is based on the affirmative defense recognized in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The Alaska Supreme Court has not decided if this affirmative defense is available under Alaska law. VECO, Inc. v. Rosebrock, 970 P.2d 906, 914 n.18 (Alaska 1999).