09.02 UNLAWFUL DISCRIMINATION IN HIRING OR PROMOTION: PRETEXT

The plaintiff claims that [he][she] was [subjected to an adverse employment decision] [not hired] [not promoted] [fired] because of [his][her] sex. In order for the plaintiff to prevail on this claim, you must decide that it is more likely true than not true that the plaintiff’s sex was a determinative factor in the employer’s decision; in other words, that the employer would have [hired] [promoted] [retained] the plaintiff but for the plaintiff’s sex.

 **Use Note**

This instruction should be used in those cases in which there is no direct evidence of discriminatory intent, but the plaintiff is claiming that the defendant unlawfully discriminated against him or her in hiring or promotion and that the defendant’s stated reason for the alleged discrimination was merely a pretext. For a discussion of what may constitute direct evidence, see Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 434-36 (Alaska 2004).

 **Comment**

Alaska’s test for determining whether there was unlawful discrimination in hiring or promotion is described in Era Aviation, Inc. v. Lindfors, 17 P.3d 40, 44 (Alaska 2002), and adapted from federal law. While the test as outlined in Era Aviation involves burden-shifting from the plaintiff to the defendant and then back to the plaintiff, the Court noted that “[t]he superior court need not instruct the jury on each part of this burden-shifting analysis, but only on the plaintiff’s ultimate burden of proof.” Era Aviation, 17 P.3d at 44.

Era Aviation describes a three-factor predicate to the ultimate fact issue addressed by this instruction. The three predicate factors are (1) whether the plaintiff applied for and was qualified for a position or promotion for which the employer was seeking applicants; (2) whether the plaintiff was denied the position or promotion despite his or her qualifications; and (3) whether the employer then hired, promoted, or continued to seek other applicants whose qualifications were similar to or lower than those of the plaintiff. The instruction presumes that these three factors have been resolved in the plaintiff’s favor before trial and that only the ultimate issue remains for the jury. In some cases, however, there may be fact issues as to whether the plaintiff actually was qualified for, or actually applied for, a position. In those cases, the jury should be instructed that it cannot reach the ultimate issue – whether the plaintiff’s sex was a determinative factor in the adverse employment decision – until it has first resolved the predicate factual issues in favor of the plaintiff.