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**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

BRYAN BELGROVE,
Plaintiff,
vs.
NORTH SLOPE BOROUGH POWER,
LIGHT, AND PUBLIC WORKS
Defendant.

3:12-CV-00178 JWS
ORDER AND OPINION
[Re: Motions at docket 46, 61]

I. MOTIONS PRESENTED

At docket 46, Plaintiff Bryan Belgrove (“Belgrove”) filed a motion for partial summary judgment as to his state law claim for wrongful discharge in breach of the covenant of good faith and fair dealing. Defendant North Slope Borough Power, Light, and Public Works (“the Borough” or “Public Works”) responded at docket 60 and crossed moved for summary judgment as to all of Belgrove’s claims at docket 61. Its memorandum and evidence in support is at docket 62. Belgrove’s reply is at docket 88, and his response in opposition to the Borough’s cross-motion is at docket 89. The Borough’s reply is at docket 90. Belgrove filed an additional reply at docket 91. Oral argument was heard on October 2, 2013.

1 **II. BACKGROUND**

2 Belgrove was hired as an apprentice lineman for Public Works in January 2011.
3 He had probationary status during the first six months of his employment.¹ As an
4 apprentice lineman, Belgrove worked under the supervision of a journeyman lineman.²
5 A critical aspect of his position as an apprentice lineman was to take direction from
6 more senior linemen.³ During the initial months on the job, Belgrove's supervisor, Clark
7 Williams, developed concerns about Belgrove's job performance, including his ability to
8 get along with others and listen to directions.⁴ During his probationary period, Belgrove
9 had a verbal altercation with another lineman, Perry Welch, while working in Point Hope
10 Alaska, causing a disturbance in the community.⁵ Belgrove reported to his supervisors
11 and Public Works management that Welch had threatened him.⁶ On April 19, 2011, the
12 Borough released both Belgrove and Welch from their probationary employment based
13 on inadequate performance and poor attitude.⁷

14 Shortly after Belgrove's release, the Borough learned that an administrative
15 mistake had been made so that Belgrove and another apprentice lineman hired in
16 January of 2011 had not been properly registered as apprentices with the state. In light
17 of the mistakes, the Borough decided to reinstate Belgrove to his former position
18 starting in the beginning of May with back pay for all days missed.⁸ Shortly after
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20 ¹Ex. C.

21 ²Belgrove depo. at pp. 33-34; Ex. E.

22 ³Ahgeak aff. at ¶ 5; Bagienski dec. at ¶ 2.

23 ⁴Williams aff. at ¶¶ 2-3; Exs. G, H.

24 ⁵Grinage aff. at ¶ 3.

25 ⁶Grinage aff. at ¶ 3.

26 ⁷Grinage aff.; Ex. J.

27 ⁸Grinage aff. at ¶ 4.

1 Belgrove's return to the job, Jason Bagienski became lead lineman and Belgrove's
2 immediate supervisor.⁹

3 Belgrove continued to have problems with his performance. His coworkers
4 expressed concerns about working with him. They complained that he talked on the
5 phone too much.¹⁰ They complained that he was argumentative and could not follow
6 the proper chain of command or instructions.¹¹ For example, an electrician for Public
7 Works, Doug Aldred, stated that Belgrove refused to work through lunch during an
8 emergency power outage in dereliction of his duties.¹² Aldred had such a difficult time
9 working with Belgrove, he informed Bagienski that he would no longer work with him.¹³
10 Belgrove's coworkers said that Belgrove made threats against them and was overly
11 argumentative.¹⁴ For example, one coworker, Kris Kolodziej reported that he witnessed
12 Belgrove becoming upset with the other apprentice lineman over dishes at mealtime,
13 and later that night Belgrove told Kolodziej that he knew people who could beat up the
14 other apprentice when they went to California for apprentice training.¹⁵ In light of these
15 complaints, on July 20, 2011, Bagienski went to the Borough's human resources
16 department to discuss how to address Belgrove's performance problems.¹⁶ He drafted
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20 ⁹Bagiensi dec. at ¶ 2.

21 ¹⁰Bagiensi dec. at ¶ 3 ; Kolodziej aff. at ¶ 5; Aldred aff. at ¶ 2; Exs. L M, Q.

22 ¹¹Bagiensi dec. at ¶¶ 6-7; Williams aff. at ¶¶ 7-8; Kolodziej aff. at ¶¶ 2, 4; Aldred aff. at
23 ¶ 2.; Exs. L, M, N.

24 ¹²Aldred aff. at ¶ 3; Ex. E.

25 ¹³Aldred aff. at ¶ 4.

26 ¹⁴Williams aff. at ¶ 8; Kolodziej aff. at ¶¶ 3, 7.

27 ¹⁵Kolodziej aff. at ¶ 2.

28 ¹⁶Bagiensi aff. at ¶ 9.

1 an evaluation of Belgrove, documenting the complaints and concerns Belgrove's
2 coworkers had about working with him.¹⁷

3 During the training course in California, Belgrove had performance problems.
4 Belgrove did not pass two of his academic courses and failed to turn in homework.¹⁸
5 His instructor determined that he needed to improve his practical skills and also said
6 that he seemed to have his mind somewhere else and did not adequately study.¹⁹ The
7 instructor's behavioral assessment concluded that Belgrove's attitude did not meet
8 expectations.²⁰

9 Shortly after Belgrove's return from training, on August 10, 2011, Belgrove
10 brought a gun to work to sell to a coworker. This upset some of the linemen given the
11 past concerns they had about Belgrove being argumentative and making threats.²¹ On
12 that day Bagienski had a meeting with the Public Works management at that time:
13 Assistant Deputy Director Chris Dunbar, Deputy Director Harold Snowball, and Director
14 Ken Grinage.²² The management team decided to place Belgrove on investigative
15 leave from August 12 to August 26.²³ The Borough then issued Belgrove a notice of
16 contemplated discharge, setting forth its basis for termination.²⁴ Belgrove and
17 Bagienski met to discuss the contemplated discharge and to allow Belgrove to respond

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20 ¹⁷Ex. N.

21 ¹⁸Ex. P at p. 2.

22 ¹⁹Ex. P at pp. 2-3.

23 ²⁰Ex. P. at p. 5.

24 ²¹Bagiensi dec. at ¶ 12.

25 ²²Bagiensi dec. at ¶ 12; Dunbar aff. at ¶ 4; Ex. R.

26 ²³Dunbar aff. at ¶ 4; Grinage aff. at ¶ 5.; Exs. R, T.

27 ²⁴Ex. V.

1 to the allegations against him.²⁵ After the meeting, Bagienski recommended that
2 management discharge Belgrove based on personality conflicts and job performance.²⁶
3 Belgrove was informed that a pre-disciplinary hearing with the then-director of Public
4 Works, Grinage, was scheduled for August 26 where Belgrove would be able to present
5 evidence in his defense.²⁷ Grinage conducted the meeting and Dunbar, the assistant
6 deputy director at that time, was also present.²⁸ At the meeting, Belgrove generally
7 denied all the of the allegations against him, but he did not provide an explanation
8 regarding any of the specific allegations or provide evidence in his defense.²⁹ He
9 alleged that his coworkers were aligning to get him fired, but he did not mention any
10 incidents of discrimination.³⁰ Grinage determined that termination was appropriate, and
11 discharged Belgrove from service on August 29.³¹ Belgrove was informed he could
12 appeal. Belgrove did not, but instead filed complaints with both the Alaska State
13 Commission for Human Rights (“the Human Rights Commission”) and the Equal
14 Employment Opportunity Commission (“the EEOC”). He later discharged his Human
15 Rights Commission complaint.³² As for his EEOC complaint, the EEOC determined that
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20 ²⁵Ex. W; Bagienski dec. at ¶ 12.

21 ²⁶Ex. W; Bagienski dec. at ¶¶ 12, 13.

22 ²⁷Ex. X; Grinage aff. at ¶ 6.

23 ²⁸Grinage aff. at ¶ 6; Dunbar aff. at ¶ 5.

24 ²⁹Grinage aff. at ¶¶ 6, 7; Ex. Y.

25 ³⁰Belgrove depo. at pp. 105-09, 117-18.

26 ³¹Grinage aff. at ¶ 7; Dunbar aff. at ¶ 5; Ex. Z.

27 ³²Belgrove depo. at pp. 110-13.

1 there were insufficient facts to establish a civil rights violation.³³ As of July 2013, the
2 Borough had not hired another apprentice lineman to replace Belgrove.³⁴

3 Belgrove filed his complaint in state court for “the irregular and wrongful
4 termination of a permanent employee based on cultural discrimination and racial
5 profiling.” His complaint raises three claims: 1) a discriminatory termination claim under
6 Title VII of the Civil Rights Act of 1964 and the Alaska Human Rights Act alleging race,
7 religion, and national origin discrimination; 2) a hostile work environment claim under
8 Title VII; and 3) a breach of the covenant of good faith and fair dealing under state law.
9 The Borough removed the action to federal court based upon the Title VII claims. The
10 court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367. Belgrove moved for
11 summary judgment as to his state law claim. The Borough moved for summary
12 judgment as to all three claims.

13 **III. STANDARD OF REVIEW**

14 Summary judgment is appropriate where “there is no genuine dispute as to any
15 material fact and the movant is entitled to judgment as a matter of law.”³⁵ The
16 materiality requirement ensures that “only disputes over facts that might affect the
17 outcome of the suit under the governing law will properly preclude the entry of summary
18 judgment.”³⁶ Ultimately, “summary judgment will not lie if the . . . evidence is such that
19 a reasonable jury could return a verdict for the nonmoving party.”³⁷ In resolving a
20 motion for summary judgment, a court must view the evidence in the light most
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23 ³³Belgrove depo. at pp. 111-12.

24 ³⁴Bagiensi dec. at ¶ 15; Belgrove depo. at p. 115.

25 ³⁵Fed. R. Civ. P. 56(a).

26 ³⁶*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

27 ³⁷*Id.*

1 favorable to the non-moving party.³⁸ The reviewing court may not weigh evidence or
2 assess the credibility of witnesses.³⁹

3 The moving party has the burden of showing that there is no genuine dispute as
4 to any material fact.⁴⁰ The moving party need not present evidence; it need only point
5 out the lack of any genuine dispute as to material fact.⁴¹ Once the moving party has
6 met this burden, the non-moving party must set forth evidence of specific facts showing
7 the existence of a genuine issue for trial.⁴² All evidence presented by the non-movant
8 must be believed for purposes of summary judgment and all justifiable inferences must
9 be drawn in favor of the non-movant.⁴³ However, the non-moving party may not rest
10 upon mere allegations or denials, but must show that there is sufficient evidence
11 supporting the claimed factual dispute to require a fact-finder to resolve the parties'
12 differing versions of the truth at trial.⁴⁴

13 **IV. DISCUSSION**

14 **A. Discriminatory Discharge**

15 One of Belgrove's claims for relief is that the Borough terminated him because of
16 his race and national origin in violation of Title VII and the Alaska Human Rights Act.
17 The borough moved for summary judgment on this claim, arguing there is no evidence
18 to establish that Belgrove's termination was based on anything but inadequate
19 performance as a lineman. To defeat a motion for summary judgment on both his state
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21 ³⁸*Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000).

22 ³⁹*Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1036 (9th Cir. 2005).

23 ⁴⁰*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

24 ⁴¹*Id.* at 323-25.

25 ⁴²*Anderson*, 477 U.S. at 248-49.

26 ⁴³*Id.* at 255.

27 ⁴⁴*Id.* at 248-49.

1 and federal employment discrimination claims,⁴⁵ “a plaintiff may produce direct or
2 circumstantial evidence demonstrating that a discriminatory reason more likely than not
3 motivated the defendant’s [adverse employment] decision.”⁴⁶ Alternatively a plaintiff
4 may proceed under the *McDonnell Douglas*⁴⁷ burden-shifting framework.⁴⁸

5 Under the *McDonnell Douglas* framework, the plaintiff bears the burden of
6 establishing a prima facie case of discrimination.⁴⁹ If he succeeds in doing so, the
7 burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for
8 the termination.⁵⁰ If the employer is successful, “the burden then shifts back to the
9 plaintiff to raise a triable issue of fact that the defendant’s proffered reason was a
10 pretext for unlawful discrimination.”⁵¹

11 Belgrove did not present any evidence or point to any evidence in the record to
12 show that discrimination was more likely than not the reason for his termination. While
13 Belgrove’s briefing and complaint are rife with allegations of discrimination based on his
14 race and national origin, under the summary judgment standards, Belgrove must show
15 that there is sufficient evidence supporting the claimed factual dispute and cannot rest
16 upon mere allegations.⁵²

19 ⁴⁵The Alaska Supreme Court looks to federal law in interpreting Alaska’s anti-
20 discrimination laws and endorses the federal approach when analyzing such claims. *Era*
Aviation, Inc. v. Lindfors, 17 P.3d 40, 43-44 (Alaska 2000).

21 ⁴⁶*Dominguez-Curry*, 424 F.3d at 1037.

22 ⁴⁷*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

23 ⁴⁸*Dominguez-Curry*, 424 F.3d at 1037.

24 ⁴⁹*Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 640 (9th Cir. 2004).

25 ⁵⁰*Id.*

26 ⁵¹*Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168 (9th Cir. 2007).

27 ⁵²*Anderson*, 477 U.S. at 248-49.

1 The Borough, however, submitted Belgrove’s deposition in support of its motion
2 for summary judgment, which provides some relevant evidence to consider. During his
3 deposition Belgrove described a few specific instances where his coworkers made
4 racist and derogatory comments. He stated that both Williams and Welch called him a
5 “stupid nigger” sometime before April 19, 2011, and that Williams told him to “speak
6 English.”⁵³ These discriminatory comments, while racist and derogatory, are not direct
7 evidence that the Borough more likely than not terminated Belgrove for discriminatory
8 reasons, because neither Williams nor Welch were involved in the decision to terminate
9 Belgrove in August of 2011 and there is no evidence linking these discriminatory
10 remarks to that decision. While these comments are circumstantial evidence that
11 Belgrove experienced discrimination in the workplace, they do not amount to substantial
12 evidence of discriminatory motive on the part of the Public Works director who actually
13 fired Belgrove.⁵⁴

14 Unlike discriminatory animus exhibited by coworkers who were uninvolved in the
15 decision to terminate an employee, evidence that a supervisor who exhibited
16 discriminatory animus and who influenced or participated in the termination process is
17 sufficient to show a triable issue of fact for the jury regarding discriminatory motive for
18 termination.⁵⁵ Here, Belgrove stated in his deposition that Bagienski, his supervisor
19 who influenced the decision to terminate him, asked about Belgrove’s dreadlocks with
20 an offensive expression and asked him why he did not cut off his dreadlocks.⁵⁶ He also
21 said that Bagienski would joke about his accent in an “offhanded” way and twice told
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24 ⁵³Belgrove depo. at pp. 35-37, 57-59, 71-72.

25 ⁵⁴*Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005) (“[W]hen the
26 plaintiff relies on circumstantial evidence, that evidence must be specific and substantial to
defeat the employer’s motion for summary judgment.” (internal quotations omitted)).

27 ⁵⁵*Dominguez-Curry*, 424 F.3d at 1039-40.

28 ⁵⁶Belgrove depo. at pp. 79-81.

1 him to speak English.⁵⁷ Bagienski's comments are not direct evidence of Bagienski's
2 discriminatory animus towards Belgrove. Direct evidence is "evidence which, if
3 believed, proves the fact [of discriminatory animus] without inference of presumption."⁵⁸
4 Bagienski's comment about Belgrove's dreadlocks is not unambiguously discriminatory.
5 His comments about Belgrove's accent and speaking English, while certainly offensive,
6 are better characterized as stray comments.⁵⁹ Indeed, Belgrove alleges in his
7 deposition that these comments were made in an "offhanded" and joking way.
8 Bagienski's comments were not alleged to have been made in context of Belgrove's job
9 performance or his termination and there is no other evidence linking such comments to
10 Belgrove's termination.⁶⁰ While the comments are circumstantial evidence that
11 Bagienski could have harbored discriminatory animus toward Belgrove, taken together
12 they do not amount to substantial evidence of such animus or that Bagienski more likely
13 than not initiated disciplinary proceedings against Belgrove for discriminatory reasons.
14 This conclusion is substantially bolstered by the long history of problems with
15 Belgrove's performance.

16 Belgrove does not fare better under the *McDonnell Douglas* burden shifting
17 framework because he failed to present evidence to meet his prima facie burden. To
18 establish a prima facie case of discrimination, a plaintiff must show: 1) he belongs to a
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20 ⁵⁷*Id.* at pp. 83-85.

21 ⁵⁸*Goodwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (internal
22 quotations omitted).

23 ⁵⁹*Merrick v. Farmers Ins. Grp.*, 892 F.2d 1434, 1438 (9th Cir. 1990) ("[S]tray remarks are
24 insufficient to establish discrimination.").

25 ⁶⁰*See Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993) (holding that a
26 supervisor's comment that the company does not like grey hair was not direct evidence of age
27 discrimination but rather was merely a stray comment because it was uttered in an ambivalent
28 manner and was not tied to the plaintiff's termination); *Marques v. Bank of Am.*, 59 F. Supp. 2d
1005, 1019 (N.D. Cal. 1999) (noting that a relevant consideration when determining whether a
comment was a stray remark is whether it was "related in time and subject matter to the
decisional process").

1 protected class; 2) he was performing according to the Borough's legitimate
2 expectations; 3) he suffered an adverse employment action; and 4) that other
3 employees with qualifications similar to his own outside of his protected class were
4 treated more favorably or that his position was filled by someone outside of the
5 protected class.⁶¹ Belgrove did not provide affidavits or depositions from coworkers,
6 performance evaluations, or any other evidence to show he was performing according
7 to the Borough's expectations. Instead, the only evidence on record regarding
8 Belgrove's job performance was submitted by the Borough and that evidence confirms
9 that Belgrove was not meeting expectations. Belgrove also did not meet his burden to
10 establish a prima facie case because he failed to present evidence that other
11 employees with qualifications similar to his own outside of his protected class were
12 treated more favorably or that his position was filled by someone outside of the
13 protected class. Indeed, the undisputed evidence submitted by the Borough shows that
14 Belgrove's position was not filled after his termination.⁶²

15 Even if Belgrove were to establish a prima facie case of discrimination, the
16 Borough met its burden of demonstrating a legitimate, nondiscriminatory reason for
17 terminating Belgrove. His supervisors consistently rated Belgrove's performance as
18 poor and said that he had an argumentative attitude, inappropriately used his cell
19 phone, required constant supervision, and posed a safety risk.⁶³ His coworkers echoed
20 these concerns.⁶⁴ Belgrove did not adequately perform at lineman training camp in
21 California in July of 2011.⁶⁵ The burden shifts to Belgrove to show that the Borough's
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23 ⁶¹*Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002); *Cornwell v.*
24 *Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006).

25 ⁶²Bagienski dec. at ¶ 15.

26 ⁶³See, e.g., Bagienski dec. at ¶¶ 2,3,7; Williams aff. at ¶¶ 2,5.

27 ⁶⁴See, e.g., Aldred aff. ¶¶ 2,3 ; Kolodziej aff. ¶¶ 3,4.

28 ⁶⁵Ex. P.

1 stated reason is merely pretext for intentional discrimination. To the extent Belgrove
2 generally alleges in his briefing that he was subjected to constant discrimination, such
3 allegations are not enough to defeat a motion for summary judgment. Belgrove does
4 not present any evidence to suggest a discriminatory motive behind his firing. The only
5 specific evidence that raises an issue of discrimination is in Belgrove's deposition,
6 submitted by the Borough, where Belgrove identified a few discriminatory comments
7 that were made against him. As explained above, those comments are not direct
8 evidence of discriminatory termination and do not amount to substantial circumstantial
9 evidence of discriminatory termination.

10 **B. Hostile Work Environment**

11 Belgrove also claims that he was subjected to a hostile work environment under
12 Title VII. To prevail on a hostile work environment claim, Belgrove must raise a triable
13 issue of fact as to whether: (1) "he was subjected to verbal or physical conduct of a
14 racial or sexual nature"; (2) "the conduct was unwelcome"; and (3) "the conduct was
15 sufficiently severe or pervasive to alter the conditions of [his] employment and create an
16 abusive work environment."⁶⁶ He must show that the work environment was both
17 subjectively hostile and objectively hostile.⁶⁷ The borough moved for summary
18 judgment on this claim, arguing that Belgrove cannot show severe or pervasive
19 harassment.

20 To determine whether the conduct complained of was sufficiently severe or
21 pervasive, the court looks to "all the circumstances, including the frequency of the
22 discriminatory conduct; its severity; whether it is physically threatening or humiliating, or
23 a mere offensive utterance; and whether it unreasonably interferes with an employee's
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27 ⁶⁶*Vasquez*, 349 F.3d at 642.

28 ⁶⁷*Dominguez-Curry*, 424 F.3d at 1034.

1 work performance.”⁶⁸ Title VII, “is not a ‘general civility code.’”⁶⁹ Consequently, “teasing,
2 offhand comments, and isolated incidents (unless extremely serious) will not amount to
3 discriminatory changes in the terms and conditions of employment.”⁷⁰

4 Belgrove said in his deposition that he was subjected to “constant humiliation”
5 and racist attitudes, but he only described a few specific incidents of harassment in any
6 detail.⁷¹ As noted above, he described an incident where his coworker Welch called
7 him a “stupid nigger.”⁷² He said that Williams also directed this racist term at him one
8 time.⁷³ He said that on one occasion Williams yelled at him and told him to speak
9 English while on the job.⁷⁴ He said that Bagienski once asked about his dreadlocks with
10 an expression Belgrove described as offensive and asked why he did not cut them.⁷⁵
11 He also said that Bagienski would joke about his accent and twice asked him to speak
12 English.⁷⁶ He did not describe any further insults or incidents of humiliation.

13 While Belgrove asserted in his deposition that he believed he was subjected to
14 racist attitudes in the workplace, there is not enough evidence on the record to
15 demonstrate that Belgrove’s work environment was objectively hostile. That is, there is
16 not enough evidence to show that the discriminatory insults directed toward him were
17 sufficiently severe, frequent, or pervasive to alter the conditions of Belgrove’s

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19 ⁶⁸*Vasquez*, 349 F.3d at 642.

20 ⁶⁹*Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal quotations
21 omitted).

22 ⁷⁰*Manatt v. Bank of Am.*, 339 F.3d 792, 798 (9th Cir. 2003) (internal quotations omitted).

23 ⁷¹Belgrove depo. at pp. 85-86.

24 ⁷²*Id.* at pp. 58-59.

25 ⁷³*Id.* at pp. 35-37.

26 ⁷⁴*Id.* at pp. 71-72.

27 ⁷⁵*Id.* at pp. 79-81.

28 ⁷⁶*Id.* at pp. 83-84.

1 employment. In *McGinest v. GTE Serv. Corp.*,⁷⁷ the plaintiff was also called a “stupid
2 nigger.” However, in that case there was additional evidence of discriminatory and
3 hostile conduct. White workers received overtime pay, but the plaintiff did not; the
4 plaintiff was subjected to comments such as “I’ll retire before I work for a black man;”
5 the plaintiff was told that only drug dealers could afford gold chains like the one the
6 plaintiff wore; African American employees were referred to as “mammy” and “Aunt
7 Jemima” in front of plaintiff; and racist graffiti was written on the walls.⁷⁸ Here, the
8 conduct Belgrove complains about does not approach the severity, frequency, or
9 pervasiveness of the conduct asserted in *McGinest*.

10 In *Mannett v. Bank of America*, the Ninth Circuit held that there was no hostile
11 work environment where the plaintiff, an employee of Chinese descent, on several
12 occasions overheard coworkers tell jokes using the phrase “China man” and refer to
13 Chinese people as “communists from Beijing,” and where the plaintiff’s coworkers on
14 one occasion mocked her accent in front of her and called her “China woman” and on
15 another occasion pulled their eyes back with their fingers in an attempt to mock
16 plaintiff’s Asian appearance.⁷⁹ In *Vasquez v. County of Los Angeles*, the Ninth Circuit
17 found that there was no hostile work environment where the employee was told that he
18 had a “typical Hispanic Macho attitude” and that he should start working in the field
19 because “Hispanics do good in the field.”⁸⁰ The allegations in these cases are at least
20 as severe and frequent as in this case but were nonetheless insufficiently severe or
21 pervasive to create a hostile work environment. While “[t]here is no doubt that the term
22 ”nigger” is an invidious, demeaning, and unacceptable racial slur[,] . . . [i]t is recognized
23 that isolated and sporadic instances in which offensive language is used, including

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25 ⁷⁷360 F.3d 1103 (9th Cir. 2004).

26 ⁷⁸*Id.* at 1107-11.

27 ⁷⁹339 F.3d at 795.

28 ⁸⁰349 F.3d at 643.

1 racial epithets, are themselves insufficient to constitute a racially hostile work
2 environment.”⁸¹ Thus, Belgrove’s claim cannot survive summary judgment.

3 **C. Breach of the Covenant of Good Faith and Fair Dealing**

4 Belgrove’s third claim against the Borough is a state law claim for the breach of
5 the covenant of good faith and fair dealing. Both Belgrove and the Borough move for
6 summary judgment on this claim.

7 Employment contracts in Alaska include an implied covenant of good faith and
8 fair dealing.⁸² “The covenant has both a subjective and an objective component.”⁸³ An
9 employer violates the subjective component and is in breach of the covenant when it
10 acts with an improper motive, such as when it “discharges an employee for the
11 purpose of depriving him or her of one of the benefits of the contract.”⁸⁴ The employee
12 cannot rely on his personal feelings about the employer’s motive but rather he must
13 present evidence that the employer’s decision to terminate was in bad faith.⁸⁵

14 Belgrove failed to present evidence raising a genuine issue of material fact about
15 the Borough’s subjective motive for terminating him. The evidence, even viewed in the
16 light most favorable to Belgrove, shows that the Borough terminated Belgrove for poor
17 performance, including his inability to work with other lineman, and not for improper
18 subjective motives such as depriving him of an employee benefit.

19 An employer violates the objective component if it treats an employee in a
20 manner that a reasonable person would deem unfair.⁸⁶ It is objectively unfair, and a

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22 ⁸¹*Cooper v. Cate*, No. 1:10-cv-899, 2012 WL 1669353, at *6 (E.D. Cal. May 11, 2012).

23 ⁸²*Smith v. Dept of Transp.*, 253 P.3d 1233, 1238 (Alaska 2011).

24 ⁸³*Smith v. Anchorage Sch. Dist.*, 240 P.3d 834, 844 (Alaska 2010) (quoting *Mitchell v.*
25 *Teck Cominco Alaska, Inc.*, 193 P.3d 751, 760 (Alaska 2008)).

26 ⁸⁴*Smith*, 240 P.3d at 844.

27 ⁸⁵*Id.*

28 ⁸⁶*Id.*

1 breach of the covenant of good faith and fair dealing, to treat similarly situated
2 employees differently or to terminate an employee for unconstitutional reasons or for
3 reasons that violate public policy.⁸⁷ It is also objectively unfair to terminate an employee
4 without proper or fair procedures.⁸⁸

5 Belgrove failed to present evidence raising a genuine issue of material fact as to
6 the objective fairness of his termination. “Although the question of what a reasonable
7 person would find to be unfair is usually a question for the trier of fact, this does not
8 relieve [Belgrove] of the burden of presenting admissible evidence to successfully
9 oppose a motion for summary judgment.”⁸⁹ As discussed above, Belgrove did not
10 provide any evidence to show that the Borough terminated him for discriminatory
11 reasons or for other objectively unfair and unlawful reasons. There is no evidence that
12 the Borough treated Belgrove differently from other employees similarly situated.

13 Belgrove argues that the Borough terminated him unfairly because it based his
14 termination upon incidents that occurred during his probationary period of employment
15 and for which the Borough did not have proper documentation to support. He argues
16 that once his six-month probationary period expired, the Borough could only terminate
17 him for incidents that occurred during his time as a permanent employee. Belgrove
18 does not provide any support for his assertion that any problematic behavior or job
19 performance must be disregarded once the probationary period expires and the
20 Borough’s policies do not support such an assertion. The difference between a
21 probational and permanent employee is that a permanent employee can only be
22 terminated for cause.⁹⁰ Moreover, the record shows that Belgrove had performance
23 problems and conflicts with coworkers after his probationary period ended.

24
25 ⁸⁷*Id.*

26 ⁸⁸*Holland v. Union Oil Co. of Cal., Inc.*, 993 P.2d 1026, 1032 (Alaska 1999).

27 ⁸⁹*Smith*, 240 P.3d at 845.

28 ⁹⁰Ex. D. at p. 16.

1 Belgrove also asserts that the Borough failed to follow proper procedures before
2 terminating him. The court disagrees. As for Belgrove's assertion that the Borough
3 failed to implement progressive discipline as required by its own policies, the Borough's
4 written policies clearly indicate that while employees are subjected to progressive
5 discipline, "the imposition of one level of discipline shall not be construed to be a
6 prerequisite for the imposition of any other level of discipline."⁹¹ Discharge by the
7 director Public Works is an appropriate level of discipline for "serious infractions" of
8 rules governing job performance or "continued unwillingness or inability on the part of
9 the employee to correct unacceptable actions or job performance."⁹² Here, the Borough
10 put Belgrove on investigative leave in compliance with written policies.⁹³ The Borough
11 followed its written procedures for termination, providing Belgrove written notices of
12 discharge and disciplinary hearings.⁹⁴ He had the opportunity to respond to the notices
13 and present evidence in his defense but did not avail himself of that opportunity.
14 Nothing about Belgrove's termination process was unfair.

15 Belgrove suggests in his complaint that he was terminated in bad faith because
16 the Borough fired him in retaliation for him contacting the Department of Labor in April
17 2011 about the Borough's apprenticeship program. Assuming Belgrove was the reason
18 the registration error was brought to light, Belgrove must then show a causal connection
19 between his act of reporting and his termination.⁹⁵ The record shows that the Borough
20 voluntarily reinstated Belgrove.⁹⁶ Belgrove does not present any evidence to dispute

21
22 ⁹¹Ex. D at pp. 46-47 (§ 4.01.2).

23 ⁹²Ex. D. at p. 48 (§ 4.01.4(G)).

24 ⁹³Ex. D. at p. 47 (§ 4.01.3).

25 ⁹⁴Ex. D. at pp. 52-53 (§ 4.01.9).

26 ⁹⁵*Derendinger v. Kiewit Constr. Co.*, 272 F. Supp. 2d 850, 854-60 (D. Alaska 2003)
27 (granting employer's motion for summary judgment on a retaliatory discharge claim).

28 ⁹⁶Grinage aff. at ¶ 4.

