IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA STATE EMPLOYEES ASSOCIATION, LOCAL 52,

Plaintiff,

vs.

STATE OF ALASKA,

Defendant.

Case No. 3AN-20-5652 CI

COMPLAINT

Plaintiff Alaska State Employees Association, Local 52, ("ASEA") asserts the following claims against defendant State of Alaska ("State" or "Defendant"), alleging as follows:

INTRODUCTION

1. This action seeks immediate judicial relief related to the Defendant's failure to protect ASEA members from the health and safety risks posed by the novel Coronavirus ("COVID-19"), an infectious disease pandemic.

2. The Defendant has failed to take adequate measures, including by failing to abide by its own policies and health mandates, to ensure that ASEA members are protected while at work. This includes the following:

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a. Failing to allow ASEA members to enter into telecommuting agreements, per State of Alaska Division of Personnel and Labor Relations Telecommuting Policy, even when there is no disruption of service or decline in the quality of services provided by the State agency and the customers served;[1]

b. Failing to follow the State of Alaska COVID-19 Facility Closure Policy, which allows State employees, including ASEA members to change or stagger shifts to ensure adequate coverage and maximize social distancing; to telecommute where possible; to reassign employees in higher staffed locations to locations in need of additional staffing or to maximize social distancing; and to train employees to ensure adequate coverage as appropriate;[2]

c. Failing, in certain instances, to treat ASEA members with respect and dignity and in a way that minimizes transmission of COVID-19,[3] including by failing to follow the State's social distancing recommendations

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[1] Exhibit A, State of Alaska Div. of Personnel and Labor Relations Telecommuting Policy.

[2] Exhibit B, COVID-19 Facility Closure Policy.

[3] *See* http://doa.alaska.gov/dop/directorsOffice/covid19/faq/.

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(videoconferencing for meetings when possible; liberal leave policies and teleworking options for staff);[4]

d. Failing to modify work spaces for ASEA members to ensure that ASEA members have adequate space and distance between other State employees ("farther than six feet from each other to prevent the spread of the virus that causes COVID-19");[5]

e. Failing to provide ASEA members who interact with the public the appropriate personal protective equipment ("PPE") so that ASEA members are not exposed to hazards that cause serious workplace injuries including COVID-19;[6] and

f. Failing to follow the CDC guidelines in order to protect ASEA members' health at work, including by allowing more than ten people to work in small areas, and by failing to allow ASEA members to work from home.[7]

3. The Defendant's failure to abide by its own polices, health mandates, and orders has damaged ASEA members, violates Alaska law, and requires immediate injunctive relief.

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4 Exhibit C, COVID-19 Health Alert, March 12, 2020.

5 Exhibit D, COVID-19 Health Mandate 9.1, March 23, 2020.

6 *See* https://www.osha.gov/Publications/OSHA3990.pdf.

7 Exhibit E, President's CORONAVIRUS Guidelines for America.

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PARTIES

1. Plaintiff ASEA is a labor organization that serves as the democratically chosen collective bargaining representative of a General Government Bargaining Unit consisting of approximately 8,000 State employees. Those members consist of 1,811 Class 1 employees, 40 Class 2 employees, and 6,084 Class 3 employees.[8] Those employees are classified per AS 23.40.200.[9]

4. Defendant State of Alaska is a public employer.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this state law dispute against the Defendant.

6. Venue is proper in this Judicial District because the claims at issue arose in the District and the Defendant may be personally served in this District.

BACKGROUND

COVID-19 AND THE STATE'S RESPONSE

7. The State first started formally communicating with employees regarding COVID-19 in early February 2020, explaining to all employees that the risk to Alaskans

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[8] Metcalfe Aff., March 24, 2020 at ¶2.

[9] *Id.*

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remained low, but that the State would update employees and the general public if the facts changed.[10]

8. Almost a month later, the State's message changed, as COVID-19 spread through a dozen states.[11] The State informed employees that it created a "FAQ document and webpage detailing important information and resources available to State employees."[12] The State also informed its employees that it "may be possible" for a person to "get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes."[13] The State encouraged employees to clean surfaces, and to request supplies to do so through the procurement process.[14]

9. On March 10, 2020, the State instructed employees to take "prevention steps" to prevent the spread of COVID-19, including enhancing "social distancing (more than 6 feet)."[15]

10. On March 11, 2020, Governor Dunleavy issued a declaration of public health disaster emergency in response to the "COVID-19 anticipated outbreak."[16]

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10 Exhibit F, Letter from Adam Crum, Kelly Tshibaka, and Dr. Anne Zink, Feb. 5, 2020.

11 Exhibit G, Email from Kelly Tshibaka to all State employees, March 4, 2020.

12 *Id.*

13 *Id.*

14 *Id.*

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11. On March 17, 2020, Governor Dunleavy again communicated to all State employees, explaining the status of COVID-19 testing in Alaska.[17] That email included a section called "Alaska Department of Administration," and made the following promises about "changes and adaptions" the State "is doing that [employees] might see in [their] workplace," including the initiation of "telework options for SOA employees on a large scale."[18] According to the email, the State intended to acquire equipment, training, implementation guidelines for departments, and that it would conduct a pilot program with select divisions and office through the state.[19] The email explained that "[a]t the direction of the Governor's Office," State workers were "compiling and reviewing telework contingency plans," and that the State intended to enhance sanitation protocols using CDC guidance, and that it would research "how to effectively implement physical barriers to protect State employees who directly interact with the public in restricted areas (for example, DMV public service windows)."[20]

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15 Exhibit H, Email from Kelly Tshibaka to all State employees, March 10, 2020.

16 Exhibit I, Governor Issues Public Health Disaster Emergency Declaration for COVID-19, March 11, 2020.

17 Exhibit J, Email from Governor Dunleavy to all State employees, March 17, 2020.

18 *Id.*

19 *Id.*

20 *Id.*

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12. On March 19, 2020, the State circulated the COVID-19 Leave Policy, which addressed the telework and workplace configuration guidance.[21] According to that policy, the State intended to "continue to explore and promote all possible options to expand telecommuting" for State employees.[22] The policy provides that telecommuting is "available to employees only in management-approved positions," and that management "retains the right to approve or deny requests based on established criteria."[23] That includes the position's suitability for telecommuting, the employee's suitability for telecommuting, and the mutual benefits to the agency and the employees. The policy identified the individuals ineligible for telecommuting: those holding positions essential to public safety, safety site visits, child welfare, and "some people within 24/7 facilities."[24] The State further promised to provide PPE and training to State employees to allow employees to "protect themselves and the public while performing necessary job functions."[25]

13. On March 21, 2020, Municipality of Anchorage Mayor Ethan Berkowitz issued an emergency order, requiring certain citizens and others to "hunker down," in

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[21] Exhibit K, Email from Kelly Tshibaka, enclosing State of Alaska COVID-19 Leave Policy, March 19, 2020.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

response to COVID-19.[26] On the following day, the State, through Department of Health and Social Services Commissioner Adam Crum, sent an email that identified an exception in Mayor Berkowitz's hunker down order, stating that "State agencies must continue to provide services to the public in this time of need."[27] Commissioner Crum stated that "[a]gencies have been working to promote the use of telework where appropriate. State offices have also been finding appropriate ways of maintaining social distancing in the workplace through configuration and schedule."[28]

14. On March 23, 2020, the State provided additional guidelines for the public, including quarantine rules for interstate and international travel,[29] and additional mandates regarding businesses and gatherings "where individuals are within six feet of each other," and precluding "no gatherings of more than 10 people" unless those people can maintain a distance of six feet apart from each other.[30] The State also issued a list it calls "Alaska Critical Workforce Infrastructure."[31] According to the State, employers have a "special responsibility" to protect individuals who provide government functions,

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[26] Exhibit L, Municipality of Anchorage Proclamation of Emergency "Hunker Down" Order EO-03, March 20, 2020.

[27] Exhibit M, Email from Adam Crum to all State employees, March 21, 2020.

[28] *Id.*

[29] Exhibit N, COVID-19 Health Mandate 10.1, March 23, 2020.

[30] Exhibit D.

[31] Exhibit N at Attachment A.

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including "all services needed to ensure the continuing operation of government agencies."[32]

ASEA AND ITS MEMBERS

15. Over the course of the last two weeks, and in response to the State's orders, policies and directives, ASEA members have sought permission to work from home or to telework based on personal safety concerns, personal risk factors, and / or because they are non-essential employees who can complete their jobs at home without disrupting essential State services.

16. The State, through its employees and supervisors, has not agreed to allow certain ASEA members' requests to telework, and has generally failed to abide by the policies outlined above, including as follows:

a. ASEA employees work in pods that are not six feet apart and that do not include barriers to prevent employee contact.[33] To protect their own safety, ASEA members have purchased and installed make-shift plastic shields to provide separation.[34] ASEA members have been informed by some State supervisors and others that the work spaces provide adequate social distancing, but ASEA employees share break rooms, elevators, stairwells,

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32 *Id.*

33 Metcalfe Aff. at ¶3.b.

34 Exhibit O, pictures.

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restrooms and other commonly used building areas that do not provide social distancing per the State's own guidelines;

b. For example, at a Division of Public Assistance office, open to the public, 19 ASEA members work in open air pods and have direct access to the general public, while supervisors work behind closed doors.[35] The State has taken no additional steps to clean the office,[36] despite promises by Governor Dunleavy;[37]

c. ASEA members receive public notices from the State to "take all CDC recommended precautions such as washing hands for 20 seconds and social distancing at 6 feet apart," but are unable to do so because of the work environment.[38] ASEA members are also required to work around and gather around more than ten people, contrary to the State's direction;[39]

d. At the Department of Motor Vehicles at 1300 Benson Boulevard in Anchorage, three ASEA members are self-quarantined, and two other ASEA members have been tested for COVID-19.[40] The ASEA members

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35 Metcalfe Aff. at ¶3.d.

36 *Id.*.

37 Exhibit J.

38 Metcalfe Aff. at ¶3.e.

39 Exhibit D.

40 Metcalfe Aff. at ¶3.g.

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are using safety gloves while interacting with the public, but the stockpile of gloves is running low.[41] Moreover, the gloves are not adequate PPE to prevent the transmission of COVID-19;

e. Contrary to the State's policies, Governor Dunleavy sent a video message to all State employees, including ASEA members, telling them that the State needed all State and municipal employees "to remain in place and to help continue government to run."[42] Governor Dunleavy told State employees that "some" would be able to "telework / work from home."[43] But for many ASEA members telework was denied with no explanation or rationale.[44] Governor Dunleavy further stated "for the most part, we need to be at work. We need to keep society going. And it is you that does that."[45] This is contrary to the State's message to ASEA members and mandate to employers throughout the State;

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41 *Id.*

42 https://vimeo.com/400021401/07f6ff5b75.

43 *Id.*

44 Metcalfe Aff. at ¶¶3.a. &

45 https://vimeo.com/400021401/07f6ff5b75

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f. The State is requesting that ASEA members provide "high risk info," without explaining why or how the information will be used, including answers to the following health questions:[46]

Hi ~

This email is intended to obtain information on those staff members that meet anyone of the following:

1. Considered High Risk to the virus (whether themselves or a someone they live with) – 65 or older or has an underlying health condition

2. Exposed to someone who has tested positive to the virus or is showing symptoms and must self-quarantine

3. Traveled within the last 14 days

4. Having Child Care issues

Please reply to me not "REPLY ALL"

Please in your response state only if you meet number 1 or 2 or both. (I do not need to know details)

g. ASEA members have requested permission to telework, but have been denied based on the discretion of a supervisor. This includes the following examples:

- An ASEA member who deals with lower level tax appeals with no due dates and who is not an essential employee, has requested permission to telework, and has been denied because the employee's supervisor believes everyone should come to work. This same State supervisor returned to work on March 9, after traveling outside of the country, without taking any precautions about social distancing.[47]

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46 Metcalfe Aff. at ¶3.h.

47 *Id.* at ¶3.i.

- In some instances, ASEA members are working in the State office while their supervisors work from home.[48]

- The State is refusing to grant telework requests, requiring ASEA members to provide information about their health conditions to determine if ASEA members satisfy certain CDC risk factors.[49] In one instance, a State employee told an ASEA member that her "Division is actively working with [Department of Health and Social Services] leadership on the authority to be as flexible as possible. A lot of questions are pending guidance."[50] The same supervisor directed the ASEA member to take personal leave if she could not work.

17. On March 23, 2020, 400 ASEA members signed a petition regarding their concerns about workplace safety and COVID-19, including specific examples of the State's failure to abide by its policies and its unwillingness to allow ASEA members to telework.[51]

LEGAL PROTECTIONS IN THE CBA AND IN STATUTE

18. The ASEA members and the State entered into a binding CBA, applicable from July 1, 2019 through June 30, 2022.[52] Article 29 states that an ASEA member is

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48 *Id.*

49 *Id.*; *see* https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html

50 Metcalfe Aff. at ¶3.i.

51 Exhibit P, ASEA Petition, March 23, 2020.

52 The "CBA" is the Collective Bargaining Agreement between the ASEA and the State covering the General Government Bargaining Unit, July 1, 2019 through June 30, 2022, and is available online at https://www.afscmelocal52.org/benefits-services/all-forms-documents/collective-bargaining-agreements/state-of-alaska-cba/soa-2019-2022/639-state-ggu-2019-2022-cba/file.

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entitled to refuse to work on an unsafe job, requires that the State provide ASEA members with safety equipment, and further requires that the State abide by the Division of Labor Standards and Safety regulations.[53] The Division of Labor Standards and Safety directs all State employees to the State's COVID-19 resources, including the COVID-19 communications and policies referenced above.[54]

19. AS 18.60.075 requires an employer, including the State, to "do everything necessary to protect the life, health and safety of employees"[55] and specifically includes complying with occupational safety,[56] adopting and prescribing "suitable protective equipment, safety devices, and safeguards as are prescribed for the work and workplace,"[57] adopting procedures that prevent an employee from being exposed to hazards,[58] and furnishing an employee a place of employment free from recognized hazards.[59]

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53 Exhibit Q, Excerpt from the CBA at Article 29.

54 Clicking the first link under "COVID-19 Coronavirus Information Links at the Alaska Department of Labor and Workforce Development webpage (http://www.labor.alaska.gov/lss/oshhome.htm) directs a person to the COVID-19 webpage for State employees (http://doa.alaska.gov/dop/directorsOffice/covid19/).

55 AS 18.60.075(a).

56 *Id.* at (a)(1).

57 *Id* at (a)(2).

58 *Id.* at (a)(3)

59 *Id.* at (a)(4).

20. By and through the facts described above, and in the attached affidavits, the State is failing to provide a safe environment for ASEA members and other employees as required by the CBA and Alaska law.

ASEA'S GRIEVANCE

21. The ASEA filed a grievance under the CBA due to the State's failure to satisfy Article 29 of the CBA.

22. An arbitrator has not yet been selected to hear the grievance. Based on past experience, ASEA predicts it will take months to a year or more to obtain an opinion from the arbitrator resolving the grievance.

IRREPARABLE HARM CAUSED BY THE DEFENDANT

23. The Defendant is already causing the ASEA to suffer irreparable harm, and ASEA will continue to suffer additional irreparable harm if the State is not enjoined from violating the CBA and Alaska law.

24. By failing to provide a safe work environment, and by failing to follow the procedures the Defendant adopted, announced and promised State employees, the Defendant is seriously harming ASEA members. The harm is varied, and includes the failure to allow telecommuting agreements, the failure to maximize social distancing, the failure to adequately train employees, the failure to treat ASEA members with dignity and respect, the failure to modify work spaces and schedules, the failure to adequately protect employees from exposed hazards, and failure to provide adequate PPE. These

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harms are occurring, and expose ASEA members to serious health risks. These harms will increase so long as the Defendant is not enjoined from its continued practice.

COUNT I
INJUNCTION IN AID OF ARBITRATION AND IN ACCORD WITH ALASKA LAW

The ASEA incorporates paragraphs 1-25 as if fully set forth herein, and alleges as follows:

25. Under established law, courts may issue a temporary restraining order or preliminary injunction to preserve the status quo and to protect the arbitration process pending the arbitration of a labor dispute under a collective bargaining agreement requiring arbitration of grievances. Such a temporary injunction to preserve the status quo pending arbitration is available under the PERA.[60]

26. The ASEA is entitled to injunctive relief to preserve the status quo because the CBA with the State of Alaska requires the State to arbitrate grievances arising out of disputes related to the agreement, including whether the State is complying with Article 29 of the CBA.

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[60] "PERA" is the Public Employment Relations Act (AS 23.40.070-.230); *Fairbanks Fire Fighters Ass'n, Local 1342 v. City of Fairbanks*, 934 P.2d 759, 760-61 (Alaska 1997).

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27. The ASEA is also entitled to an injunction requiring the State to provide a safe work environment for all employees, including ASEA members, under AS 18.60.075.

28. The traditional equitable bases for injunctive relief are met because, as alleged above, the State is not providing a safe work environment in violation of the CBA and Alaska law.

29. Injunctive relief is necessary before the resolution of the grievance because the grievance process would make arbitration of the grievance a hollow exercise.

30. Injunctive relief is also necessary in order to protect the public welfare of State employees and ASEA members.

PRAYER FOR RELIEF

WHEREFORE, the ASEA prays for judgment as follows:

1. For injunctive relief, including a temporary, preliminary, and permanent injunction, requiring the State of Alaska to provide a safe work environment for all State employees, including ASEA members, as required by the CBA and Alaska law;

2. For pre- and post-judgment interest to be awarded, along with attorney's fees, costs and expenses incurred by the ASEA in bringing this lawsuit; and

3. For such other relief as the Court deems just.

DATED this 24th day of March 2020, at Anchorage, Alaska.

DILLON & FINDLEY, P.C.
Attorneys for Plaintiff

By: _____
Molly C. Brown, ABA No. 0506057

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of March, 2020, a true and correct copy of the foregoing document was served by:

[XX] hand delivery

on the following:

Chief of Attorney General's Office
State of Alaska
1031 W. 4th Avenue, Suite 200
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and

[XX] certified mail, return receipt requested

on the following attorneys of record:

Attorney General
State of Alaska
Juneau, AK 99801

_____
Julie M. Gauthier

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