No. 87448-9

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

In the Matter of

ROBERT SOELBERG

ROBERT SOELBERG,

Plaintiff - Appellant,

v.

ALASKA AIRLINES,

Defendant - Defendant.

PETITION FOR REVIEW

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A. Identity of Petitioner

COMES NOW the Petitioner, Robert Soelberg, by and through his attorney of record, Rodney R. Moody, and hereby requests this Court accept review of the Court of Appeals, Div. One decision affirming Summary Judgment on July 14, 2025, and denying Reconsideration on August 28, 2025.

B. Court of Appeals Decision

The Petitioner seeks review of the Court of Appeals ruling upholding the Trial Court's granting of summary judgment.

C. **Issues Presented for Review**

1. Does Division One disregard the authority established in *Swanson v. Liquid Air Corp.,* 118 Wn.2d 512, 826 P.2d 664 (1992), when the decision supporting summary judgment permits an employer to create an eternal escape hatch with impunity under the claim of employment at will while making promises intended to influence the decision of a potential employee to accept employment.

D. Statement of the Case

Throughout his professional career Robert Soelberg has safely piloted the Boeing 747 more than 10,000 hours. CP 80. He also spent more than 25 years as an instructor training pilots to fly the 747. CP 80.

In September 2021 Soelberg applied for employment with Alaska Airlines as a Boeing 737 Flight Simulator Instructor. CP 80. During the hiring process Soelberg spoke telephonically with the General Manager for Training of Alaska, Scott Nielson. CP 81. Nielson stated to Soelberg that his training would be in conformance with Advanced Qualification

Program (AQP) principles which were adopted by Alaska. CP 81; 206-08. Nielson promised Soelberg that his training would be a "train to proficiency" position. CP 81. With over 25 years of instruction experience Soelberg understood the meaning of this term and recognized its necessity to him given the differences between the Boeing 747 which with which he was fully familiar, and the more electronic control systems of the Boeing 737 which he had never flown. CP 81.

Soelberg himself has instructed pilots using the concept of train to proficiency throughout his career of more than 40 years including 25+ as an instructor. CP 81. Nielson was clear that even though Soelberg had never actually flown a 737, his employment was desired because of his extensive exzperience training pilots on flight operation of large jets. CP 81.

Soelberg testified he recognized the position offered was an "at will" position and that he could be terminated at any time by Alaska. CP 81. He also recognized Alaska's policy to permit no less than two opportunities to test as testified to by Nielson's replacement, Chelsea Ozolin. CP 196. Recognizing this policy Soelberg accepted this position only because of the additional contractual commitment made by Nielson that the position was train to proficiency. CP 81. Without this assurance Soelberg would not have accepted this employment. CP 82.

Soelberg began his training with Alaska in the 737 simulator successfully completing in their entirety the first two of three training modules with additional simulator sessions as needed in conformance with the train to proficiency promise as committed to by Nielson. CP 83. Soelberg was permitted to test only once for the final Line Observation Evaluation (LOE) gate but was not rated as proficient. He needed brief additional training sessions in the simulator to complete the LOE gate which would have permitted him to begin his employment as a trainer. CP 83.

Soelberg's employment was terminated after being permitted only one attempt at the LOE gate without the opportunity for additional training contrary to train to proficiency principles as well as the established practice of Alaska of allowing trainees at least two attempts as testified to by Ozolin who had replaced Nielson. CP 206-08.

E. Argument

RAP 13.4 (b)(1) provides the basis for this Court's acceptance of this Petition for review.

As held in *DePhillips v. Zolt Construction Co.,* 136 Wn.2d 26, 959 P.2d 1104 (1998), modification of an at-will employment agreement can occur in any of three ways. First, an express agreement may specify other terms and conditions of employment. Second, an

agreement specifying other terms of employment may arise from the conduct of the parties, an implied contract, and Third, irrespective of the existence of an implied contract, as previously held in *Thompson v. St. Regis Paper Co.,* 102 Wn.2d 219, 685 P.2d 1081 (1984), an equitable claim may exist where the employee makes promises of specific treatment in specific situations, thus precluding the enforcement of the at-will aspect of the employment agreement. Id. at 34-37.

In *Swanson v. Liquid Air Corp.,* 118 Wn.2d 512, 826 P.2d 664 (1992), the Court when addressing a disclaimer made by an employee that included an at-will provision stated, "We reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make." Id. at 530-31. "An employer's inconsistent representations can negate the effect of a disclaimer[.]" Id. at 53. This language was also discussed with approval in *Kuest v. Regent Living*, 111 Wn.App. 36, 53, 43 P.3d 23 (2002).

Alaska as well as Division One completely disregards this authority, for obvious reasons. Alaska argues exactly what this Court *specifically rejected* in *Swanson* and *Kuest*; the premise that including

at-will language in an offer letter effectively serves as an eternal escape hatch allowing Alaska to make whatever promises of working conditions it is to its benefit to make while remaining immune from any ramification. *Swanson*, supra at 530-31.

Alaska attempts to distinguish this case from *Kuest, Thompson,* and *Swanson* with the simplistic argument that "Oral assurances by a single supervisor have been consistently treated as entirely separate and distinct from implied contract claims rooted in formal personal policies, and this Court should similarly reject any attempt to import principles from those cases into this inapposite positive context." Rp. Br. at 19. Alaska also attempts to distinguish this case based on the authority in *Winspear v. Boeing Co.,* 75 Wn.App. 870 (1994), by arguing that oral promises by a supervisor are "distinctly different" from "documented and disseminated employment policies." Id. at 880.

Nielson when he interviewed Robert Soelberg for the instructor position was not his supervisor. Nielson was the *hiring manager* for this position who was negotiating a contract with Soelberg regarding the terms of his potential employment. Nielson knew that Soelberg had never actually flown a Boeing 737; he desired Soelberg's employment because of his extensive instruction experience, and he

made a commitment to train to proficiency deliberately to entice Soelberg to accept employment with Alaska. CP 80.

Soelberg, for his part recognized that the position being offered to him was at-will. CP 81. He also knew what train to proficiency meant in this industry and how the term would be applied within the policy and practice of Alaska to permit no less than two opportunities at each task. Soelberg testified he accepted this position *only* because of the additional contractual commitment made by Nielson that the position was train to proficiency. CP 81. Without this additional contract term Soelberg would have rejected the offer.

Soelberg and Nielson reached an implied contract, the terms of which were understood by each of them based upon their extensive experience in the airline industry. Alaska acted in conformity with this agreement; at least until the point when it made the decision to terminate Soelberg's employment with literally only the final LOE gate remaining in his training progress.

Alaska continues to argue that Soelberg failed the final two check gates stating, "Most significantly, it is undisputed that Soelberg failed two separate test, or "gate" events, during his training." CP 211-213. This is false, purposely misleading, and a disputed issue of material fact.

During her deposition Chelsea Ozolin testified regarding the alleged failure of Soelberg to demonstrate proficiency on the MV "gate." She testified:

Q. Didn't you just tell me he did meet proficiency standard for the MV gate?

A. He failed the first time, and then we remediated to get him to pass the MV.

Q. Did he pass the second time?

A. Yes.

Q. Okay. Thank you. That's my confusion. So yes, ultimately, after two tries he did pass the MV?

A. Yes.

Q. Which allows him to go to the LOE type ride.

A. Yes.

Q. You're suggesting to me that he failed the type ride the first time he attempted that gate?

A. Yes.

Q. So we are clear, this gate, this is the final gate, if he passes -- if he gets the proficiency on this gate, then he gets to go to the next phase of training. Is that -- is my understanding correct?

A. This is true.

The deposition continued:

Q. All right. When you say he failed two gates, so we are clear, he failed the MV gate the first time he attempted it, received

additional training, and then was able to demonstrate proficiency at that gate?

A. Yes, but it's still considered a failure.

Q. Ultimately he passed that gate. So when he got to the final gate, which is the test ride. And you're suggesting he failed that gate one time and then the decision was made to terminate. Do I understand that chronology correct?

A. That is correct.

CP 194-95.

Soelberg contrary to the assertion of Alaska *did not* fail the second to last "gate", the MV gate. He demonstrated proficiency on the MV gate and was scheduled to take the final gate test, the LOE test ride. This was the final ride gate of the entire training process. This is a clear issue of material fact that is in dispute. As such grating summary judgment is legal error. *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

Soelberg was only permitted one opportunity to take the final LOE test ride which is contrary to the standard practice of Alaska which permits an applicant at least two opportunities to pass a final gate, as testified to by Ozolin. CP 196.

Alaska breached the implied contract Nielson specifically offered to entice Soelberg to accept employment. By terminating his employment before he was able to train to proficiency on the final LOE

test ride Alaska violated its agreed upon contract. The granting of summary judgment on the breach of contract claim was legal error and should be reversed.

CONCLUSION

Alaska's included at-will language in an offer letter and then through its representative with authority to do so made the commitment to "train to proficiency" which conflicts with the at-will concept. "An employer's inconsistent representations can negate the effect of a disclaimer[.]" *Swanson*, supra at 532. Despite the clear language of both *Swanson* and *Kuest* rejecting this conduct both Alaska and Division One disregard this Court's authority. RAP 13.4(b)(1) has been violated and for the reasons outlined above the granting of summary judgment as to both the breach of contract and negligent misrepresentation claims was legal error. It is respectfully requested this Court reverse the granting of summary judgment and return this matter to the King County Superior Court.

RESPECTFULLY SUBMITTED this 29th day of September 2025.

/s/ Rodney R. Moody
WSBA #17416
Attorney for Appellant

I hereby certify that this Opening Brief
contains 2,135 words and complies with RPC 18.17.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Appellant's Opening Brief upon the people listed by the methods indicated:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Lynnwood, Washington this 29th day of September, 2025.

/s/ Rodney R. Moody

Exhibit A

Honorable Sean O'Donnell

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ROBERT SOELBERG,

Plaintiff,

v.

ALASKA AIRLINES, a foreign for profit corporation,

Defendant.

Case No. 23-2-16819-4

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendant Alaska Airlines's Motion for Summary Judgment. The Court has considered:

1. Defendant's Motion for Summary Judgment, the declarations of Nicholas Gillard-Byers and Chelsea Ozolin, and all attachments there to;
2. Plaintiff's Opposition to the Motion for Summary Judgment, if any, and all papers filed therewith, if any;
3. Defendant's Reply in Support of Its Motion For Summary Judgment, if any, and all papers filed therewith, if any; and
4. All other pleadings and the case file.

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Following the review and for good cause, it is ordered that Defendant's Motion for Summary Judgment be GRANTED. Plaintiff's Complaint is DISMISSED with prejudice. The Clerk is ordered to take all necessary steps to execute this order.

DATED: October _____, 2024

Judge Sean P. O'Donnell

Presented by:

SEYFARTH SHAW LLP

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CERTIFICATE OF SERVICE

I hereby declare that on this 6th day of September, 2024, I caused a copy of ***Defendant's [Proposed] Order*** to be electronically filed with the Court using ECF-Filing system which will send notification of such filing to the following:

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King County Superior Court
Judicial Electronic Signature Page

Case Number:	23-2-16819-4
Case Title:	SOELBERG VS ALASKA AIRLINES
Document Title:	ORDER RE SUMMARY JUDGMENT
Signed By:	Sean O'Donnell
Date:	October 11, 2024

Judge: Sean O'Donnell

This document is signed in accordance with the provisions in GR 30.

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Exhibit B

FILED
7/14/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ROBERT SOELBERG, Appellant, v. ALASKA AIRLINES, a foreign for profit corporation, Respondent.	No. 87448-9-I UNPUBLISHED OPINION

BOWMAN, A.C.J. — Robert Solberg appeals the trial court's summary judgment dismissal of his breach of contract and negligent misrepresentation claims against Alaska Airlines (Alaska). We affirm.

FACTS

Soelberg is a retired airline pilot with over 40 years of flying experience, including experience with the Boeing 747 and 727 aircrafts. He also has over 25 years of experience as a flight simulator instructor. In 2021, Soelberg applied to become a Boeing 737 flight simulator instructor for Alaska. Scott Nielsen, Alaska's general manager of training, interviewed Soelberg for the position. During the interview, Nielsen explained that Alaska uses a training system known as the "Advanced Qualification Program" (AQP). Nielsen also told Soelberg that he would be able to " 'train to proficiency' " within the AQP system. Soelberg understood this to mean he "would be able to repeat modules within the training program as necessary until [he] became proficient."

Alaska offered Soelberg the position. It sent him an offer letter that included a paragraph titled "At-will employment," which explained, in relevant part:

> This offer letter does not alter the at-will nature of your employment. The employment relationship may be ended at any time by you or Alaska Airlines for any reason, with or without notice or cause.

Soelberg accepted the position and began his training with Alaska in January 2022.

Alaska's AQP training system is approved by the Federal Aviation Administration (FAA). It allows for flexible techniques and performance-based training. And it includes a concept called "train-to-proficiency." "Train-to-proficiency" means "an instructor-in-training will not be 'checked off' for a task until the trainee is proficient, regardless of how many hours are spent on that task." There are three modules that a potential instructor must complete during training. In these modules, there are "qualifying" training events that provide trainees with opportunities to practice skills. And then there are "gate" events, which are cumulative tests of the skills already learned in the qualifying events. To advance through the training process, a potential instructor must complete each step of the program sequentially. The flight instructor training typically takes about three months to complete.

Soelberg successfully completed the first two modules of the training. While completing the third module, which has three subcomponents, he failed two gate events. After additional training, he completed one of these gate events

but still failed the other. As of October 2022, 10 months after he began the training program, Soelberg still had not completed all three modules.

In October 2022, Chelsea Ozolin replaced Nielsen as Alaska's general manager of training. Ozolin reviewed Soelberg's performance record and decided to terminate his employment. On November 9, 2022, Alaska terminated Soelberg " 'due to [his] inability to successfully complete the required training and meet the qualifications for [his] role.' "

On September 5, 2023, Soelberg sued Alaska for breach of contract and negligent misrepresentation. On September 6, Alaska moved for summary judgment dismissal of Soelberg's claims. The court granted its motion and dismissed Soelberg's complaint with prejudice.

Soelberg appeals.

ANALYSIS

Soelberg argues the trial court erred by dismissing his complaint at summary judgment. We disagree.

We review a trial court's grant of summary judgment de novo. *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 64, 316 P.3d 469 (2013). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c).

A defendant moving for summary judgment can challenge whether the plaintiff produced competent evidence to support the essential elements of their claim. *See Boyer v. Morimoto*, 10 Wn. App. 2d 506, 519, 449 P.3d 285 (2019).

The plaintiff must then provide sufficient evidence to support those elements. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The plaintiff may not rely on the allegations in their pleadings. *Id.* Instead, the plaintiff must respond with evidence setting forth specific facts to show that there is a genuine issue for trial. *Id.* at 225-26. We consider all facts submitted and draw all reasonable inferences therefrom in a light most favorable to the nonmoving party. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). If the plaintiff fails to meet their burden, summary judgment for the defendant is proper. *See Knight v. Dep't of Lab. & Indus.*, 181 Wn. App. 788, 795-96, 321 P.3d 1275 (2014).

Soelberg argues the court erred by dismissing his breach of contract claim. He acknowledges his employment with Alaska was terminable "at-will" but argues Alaska's promise to train him to proficiency modified the at-will nature of his employment agreement.

Employment relationships in Washington are generally terminable at-will by either party. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081 (1984). But the at-will nature of an employment agreement can be modified in three ways. *Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 48, 43 P.3d 23 (2002) (citing *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 34-37, 959 P.2d 1104 (1998)). First, the parties may expressly agree to modify its terms. *Id.* Second, the parties' conduct may create an implied modification of the terms. *Id.* And third, an equitable claim may exist where an employer makes

promises of specific treatment for conduct that precludes enforcement of the at-will aspect of the employment agreement. *Id.*

When determining whether an implied agreement modified the at-will nature of employment,

> courts will look at the alleged "understanding", the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstance of the case to ascertain the terms of the claimed agreement.

Roberts v. Atl. Richfield Co., 88 Wn.2d 887, 894, 568 P.2d 764 (1977). An employee's subjective understanding or expectation as to a term of their employment is not enough to establish an implied agreement to modify the nature of their employment. *Id.*

Soelberg argues that Nielsen's promise to train him to proficiency changed the at-will nature of his employment such that he could not be terminated for poor performance. But the evidence shows that the term "train-to-proficiency" is customarily used in the industry to describe an FAA-approved AQP training metric. Ozolin explained in her declaration that

> [t]rain-to-proficiency simply means that an instructor-in-training will not be "checked off" for a task until the trainee is proficient, regardless of how many hours are spent on that task. It is not a guarantee of employment—it is a threshold requirement for serving as an instructor. AQP programs still include review boards and other checks to ensure that trainees who are not advancing can be identified and separated if need be.

Soelberg offers no evidence to the contrary. Indeed, Soelberg agrees that the term "train-to-proficiency" did not amount to a promise not to terminate him for poor performance. Soelberg explained in his declaration that he believed that

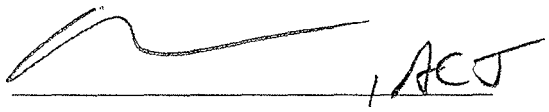
Nielsen's statement meant that

> Alaska committed that [his] employment would be conducted under the AQP concept, and [he] would be able to repeat certain modules as necessary in order to become proficient.

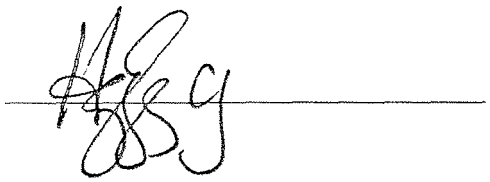
And in his deposition, Soelberg stated that he understood this did not mean that he "could train indefinitely" and that Alaska "could not fire [him]." He agreed that his position with Alaska was "at-will employment" and that Alaska could terminate his employment "at any point." He also agreed that Alaska "gave [him] all the time [he] requested [to train] up to that point" when he failed the final gate event.

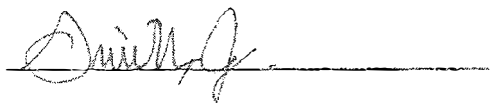
Because Soelberg fails to show that the parties expressly or impliedly agreed to modify his at-will employment, the trial court did not err by dismissing his breach of contract claim.[1]

We affirm summary judgment for Alaska.



WE CONCUR:





[1] Soelberg also argues the court erred by dismissing his negligent misrepresentation claim. He contends that Nielsen "promised" to train him to proficiency and that Alaska "recognized [he] would rely upon this promise when accepting employment," which Alaska "then failed to honor." Because we determine the term "train-to-proficiency" did not guarantee Soelberg employment, he cannot show that Alaska engaged in misrepresentation. The court did not err by dismissing that claim.

Exhibit C

FILED
8/28/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ROBERT SOELBERG, Appellant, v. ALASKA AIRLINES, a foreign for profit corporation, Respondent.	No. 87448-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Robert Solberg filed a motion for reconsideration of the opinion filed on July 14, 2025. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

LAW OFFICE OF RODNEY R. MOODY

September 29, 2025 - 1:55 PM

Transmittal Information

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